



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 2, 2010

Mr. James G. Nolan
Assistant General Counsel
Texas Comptroller of Public Accounts
P.O. Box 13528
Austin, Texas 78711-3528

OR2010-09833

Dear Mr. Nolan:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 385474 (CPA ID# 6293812549).

The Texas Comptroller of Public Accounts (the "comptroller") received a request for all documents related to a specified request for proposal relating to travel agency services. You state you are providing the requestor with some of the requested information. You state you will redact social security numbers pursuant to section 552.147 of the Government Code.¹ You claim the submitted information is excepted from disclosure under sections 552.107, 552.111, and 552.139 of the Government Code. You also state release of the submitted information may implicate the proprietary interests of Shorts Travel Management ("Shorts"). Thus, pursuant to section 552.305 of the Government Code, you state you notified Shorts of the request and of its right to submit arguments to this office as to why its information should not be released. Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure in certain circumstances). We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

¹Section 552.147(b) authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act. *See* Gov't Code § 552.147(b).

²We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Initially, we note a portion of the submitted information, which we have marked, is not responsive to the instant request for information because it was created after the date the comptroller received the request. This ruling does not address the public availability of any information that is not responsive to the request, and the comptroller is not required to release that information in response to the request.

Next, we note some of the requested information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2010-05706 (2010). We have no indication the law, facts, and circumstances on which the prior ruling was based have changed. Accordingly, with regard to the requested information that was previously requested and ruled on by this office, the comptroller must continue to rely on Open Records Letter No. 2010-05706 as a previous determination and withhold or release the identical information in accordance with that ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). With respect to the submitted information, which was not previously ruled upon in Open Records Letter No. 2010-05706, we will address your arguments against disclosure of this information.

Next, we note an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) of the Government Code to submit its reasons, if any, as to why the requested information relating to it should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have not received any comments from Shorts. Thus, we have no basis for concluding that any portion of the submitted information constitutes the proprietary information of this third party. *See id.* § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3. Accordingly, the comptroller may not withhold any of the submitted information based on the proprietary interests of Shorts.

You claim section 552.107 of the Government Code for portions of the submitted information. Section 552.107(1) protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is

involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a confidential communication, *id.* 503(b)(1), meaning it was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5).

Whether a communication meets this definition depends on the intent of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no pet.). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You state the information you have marked consists of communications between attorneys for the comptroller and comptroller representatives that were made in furtherance of the rendition of legal services to the comptroller. You further state these communications were intended to be confidential and the confidentiality of this information has been maintained. Based on your representations and our review, we conclude the comptroller may withhold the responsive information you have marked under section 552.107 of the Government Code.

Section 552.111 of the Government Code excepts from disclosure “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” Gov’t Code § 552.111. This exception encompasses the deliberative process privilege. *See Open Records Decision No. 615 at 2 (1993)*. The purpose of section 552.111 is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, no writ); *Open Records Decision No. 538 at 1-2 (1990)*. In ORD 615, this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined that section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See ORD 615 at 5*. A governmental body’s policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues

among agency personnel. *Id.*; see also *City of Garland v. The Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body's policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body's policy mission. See Open Records Decision No. 631 at 3 (1995). Moreover, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. See ORD 615 at 5. But if factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, the factual information also may be withheld under section 552.111. See Open Records Decision No. 313 at 3 (1982).

This office also has concluded that a preliminary draft of a document that is intended for public release in its final form necessarily represents the drafter's advice, opinion, and recommendations with regard to the form and content of the final document, so as to be excepted from disclosure under section 552.111. See Open Records Decision No. 559 at 2 (1990) (applying statutory predecessor). Section 552.111 protects factual information in the draft that also will be included in the final version of the document. See *id.* at 2-3. Thus, section 552.111 encompasses the entire contents, including comments, underlining, deletions, and proofreading marks, of a preliminary draft of a policymaking document that will be released to the public in its final form. See *id.* at 2.

Further, section 552.111 can encompass communications between a governmental body and a third party consultant. See Open Records Decision Nos. 631 at 2 (section 552.111 encompasses information created for governmental body by outside consultant acting at governmental body's request and performing task that is within governmental body's authority), 563 at 5-6 (1990) (private entity engaged in joint project with governmental body may be regarded as its consultant), 561 at 9 (1990) (section 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process), 462 at 14 (1987) (section 552.111 applies to memoranda prepared by governmental body's consultants). Section 552.111 is not applicable to a communication between the governmental body and a third party unless the governmental body establishes it has a privity of interest or common deliberative process with the third party. See ORD 561 at 9.

You state portions of the remaining information, which you have marked, consist of draft documents and advice, opinions, and recommendations pertaining to Texas state agency travel. Based on your representations and our review, we find you have established the deliberative process privilege is applicable to portions of the information at issue. Therefore, provided the submitted draft documents will be released to the public in their final form, the comptroller may withhold the information we have marked under section 552.111 of the Government Code. However, we find the remaining information at issue consists of either general administrative information that does not relate to policymaking or information that is purely factual in nature. Thus, you have failed to demonstrate, and the information does

not reflect on its face, that this information is excepted under section 552.111. Accordingly, we find none of the remaining information may be withheld under section 552.111 of the Government Code.

Section 552.139 of the Government Code provides:

(a) Information is excepted from [required public disclosure] if it is information that relates to computer network security, to restricted information under Section 2059.055 [of the Government Code], or to the design, operation, or defense of a computer network.

(b) The following information is confidential:

(1) a computer network vulnerability report; and

(2) any other assessment of the extent to which data processing operations, a computer, or a computer program, network, system, or software of a governmental body or of a contractor of a governmental body is vulnerable to unauthorized access or harm, including an assessment of the extent to which the governmental body's or contractor's electronically stored information is vulnerable to alteration, damage, or erasure.

Gov't Code § 552.139. You state release of the information at issue may impair the security of the reservation system and leave the system vulnerable to access by unauthorized persons. We note the information at issue consists of general control characteristics of the system. Upon review, we find you have failed to demonstrate the information at issue relates to computer network security, restricted information under section 2059.055, or to the design, operation, or defense of a computer network as contemplated in section 552.139(a). *See id.* § 2059.055 (defining confidential network information for purposes of section 2059.055). Further, we find you have failed to demonstrate this information consists of a computer network vulnerability report or assessment as contemplated by section 552.139(b). Consequently, none of the remaining information may be withheld under section 552.139 of the Government Code.

In summary, with regard to the requested information that was previously requested and ruled on by this office, the comptroller must continue to rely on Open Records Letter No. 2010-05706 as a previous determination and withhold or release the identical information in accordance with that ruling. The comptroller may withhold the information you have marked under section 552.107 of the Government Code. Provided the submitted draft documents will be released to the public in their final form, the comptroller may withhold the information we have marked under section 552.111 of the Government Code. The remaining information must be released.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Sarah Casterline
Assistant Attorney General
Open Records Division

SEC/eeg

Ref: ID# 385474

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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(w/o enclosures)