



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 16, 2010

Ms. Ruth H. Soucy
Deputy General Counsel for Open Records
Texas Comptroller of Public Accounts
P.O. Box 13528
Austin, Texas 78711-3528

OR2010-18978

Dear Ms. Soucy:

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# 403076 (Comptroller ID#s 6661384812, 6684587760, 6684592192, and 6684596881).

The Texas Comptroller of Public Accounts (the "comptroller") received four requests from the same requestor for sixteen categories of information related to specified audits of Amazon.com, Inc.; Amazon.com.kydc L.L.C.; Amazon.com L.L.C.; and Amazon Corporate L.L.C. (collectively "Amazon"). You state some of the requested information does not exist.¹ You claim that the submitted information is excepted from disclosure under sections 552.103, 552.107, 552.111, and 552.116 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.² We have also received and considered comments from the requestor. *See*

¹The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990), 452 at 3 (1986), 362 at 2 (1983).

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.

Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we address the requestor's assertion that the comptroller did not comply with the procedural obligations outlined in section 552.301 of the Government Code. Section 552.301 of the Government Code prescribes the procedures a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Pursuant to section 552.301(b) of the Government Code, the governmental body must request a ruling from this office and state the exceptions to disclosure that apply within ten business days after receiving the request. *See id.* § 552.301(b). Further, pursuant to section 552.301(e), a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *Id.* § 552.301(e)(1)(A)-(D). The requestor states, and provides documentation demonstrating, he requested the audit plan and working papers in certified letter # 7160 3901 9849 9306 7510. We note the United States Postal Service website confirms the comptroller received this letter on September 10, 2010. The requestor again requested this information and the remaining information in letters received by the comptroller on September 27, 2010 and October 6, 2010. Thus, the comptroller's ten and fifteen-day deadlines for the first request were September 24, 2010 and October 1, 2010, respectively. The comptroller did not submit the request for ruling for this information until October 11, 2010. Accordingly, we conclude the comptroller failed to comply with the requirements of section 552.301 with respect to the audit plan and working papers requested on September 10, 2010.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the requirements of section 552.301 results in the legal presumption the information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ); *see also* Open Records Decision No. 630 (1994). Normally, a compelling reason to withhold information exists where some other source of law makes the information confidential or where third-party interests are at stake. *See* ORD 630. Although you raise sections 552.111 and 552.116 of the Government Code as exceptions to disclosure of the information at issue, these exceptions are discretionary in nature. *See* Open Records Decision Nos. 677 at 10 (attorney-work product privilege under section 552.111 or rule 192.5 is not compelling reason to withhold information under section 552.302 if it does not implicate third-party rights), 665 at 2 n.5

(2000) (discretionary exceptions in general), 663 at 5 (1999) (waiver of discretionary exceptions), 470 at 7 (1987) (deliberative process privilege under statutory predecessor to section 552.111 subject to waiver). These exceptions serve only to protect a governmental body's interests and may be waived; as such, they do not constitute compelling reasons to withhold information for purposes of section 552.302. Accordingly, the comptroller may not withhold the audit plans and working papers requested on September 10, 2010 under sections 552.111 and 552.116 of the Government Code. As you raise no further exceptions against disclosure of this information, it must be released. However, we will consider your remaining arguments for the information that was submitted timely.

Section 552.107(1) of the Government Code protects information that comes 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. *See* 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. *See* 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. *See 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 capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. *See* TEX. R. EVID. 503(b)(1)(A)-(E). 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. *See 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 remaining submitted information consists of communications between comptroller staff and attorneys representing the comptroller. You assert the communications were made for the purpose of facilitating the rendition of professional legal services. You have identified the parties to the communications. You state the communications were intended to be confidential, and you indicate that the communications have maintained their confidentiality. Based on your representations and our review of the information at issue, we find that the comptroller has established that the remaining information consists of attorney-client privileged communications. Therefore, the comptroller may withhold the remaining information under section 552.107 of the Government Code.³

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,



Andrea L. Caldwell
Assistant Attorney General
Open Records Division

ALC/ëeg

Ref: ID# 403076

Enc. Submitted documents

c: Requestor
(w/o enclosures)

³As our ruling for this information is dispositive, we need not address your remaining argument against its disclosure.