



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 8, 2011

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

OR2011-04868

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# 414034 (Comptroller ID# 6933277857).

The Texas Comptroller of Public Accounts (the "comptroller") received a request for multiple categories of information related to Formula One Racing. You state you will release some of the requested information to the requestor. You also state some of the requested information does not exist.¹ You claim some of the remaining requested information is subject to section 552.027 of the Government Code. You claim that the remaining requested information is excepted from disclosure under sections 552.106, 552.107, and 552.111 of the Government Code. We have considered your arguments and reviewed the submitted representative sample of information.²

¹In responding to a request for information under the Act, a governmental body is not required to disclose information that did not exist at the time 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).

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 understand you to contend that a portion of the submitted information is subject to section 552.027 of the Government Code. This section provides that the Act does not require a governmental body to allow the inspection of information in a commercial publication purchased or acquired by the governmental body for research purposes if the publication is commercially available to the public. *See* Gov't Code § 552.027(a). You have submitted, as Exhibit 2, portions of the 2008/2009 edition of "Formula Money."³ You state, and provide documentation showing, this publication is commercially available. Accordingly, we conclude this publication is commercially available information that falls within the scope of section 552.027 and need not be released to the requestor.

Next, you state the comptroller will rely on Open Records Letter No. 2010-12298 (2010) to withhold portions of the responsive information. As we have no indication that the law, facts, or circumstances on which the prior rulings were based have changed, we agree the comptroller may continue to rely on this ruling as a previous determination and withhold or release any previously ruled upon information in accordance with this prior 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).

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 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

³We understand that the submitted portions of the publication are representative of the publication as a whole.

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 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 claim the information you have marked is protected by section 552.107(1) of the Government Code. You state the information at issue consists of attorney-client communications that were made between counsel for the comptroller and comptroller employees for the purpose of rendering professional legal services to the comptroller. You state these communications were intended to be and remain confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue. Accordingly, the comptroller may generally withhold the information you have marked under section 552.107(1) of the Government Code. We note, however, one of the submitted communications includes as an attachment a letter from a representative of Texans for Public Justice that is separately responsive to the instant request. You have not explained how this representative from Texans for Public Justice is a privileged party. Consequently, to the extent this letter, which we have marked, exists separate and apart from the communication in which it was enclosed, the comptroller may not withhold it under section 552.107(1) of the Government Code. If this letter does not exist separate and apart from the communication in which it was enclosed, the comptroller may withhold it along with the remaining communications you seek to withhold as privileged attorney-client communications under section 552.107(1) of the Government Code.

You seek to withhold portions of the remaining information under section 552.111 of the Government Code, which 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); *see also Open Records Decision No. 538 at 1-2* (1990).

In Open Records Decision No. 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 only those internal communications that consist of advice, opinions, recommendations 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. *See 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). Further, 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 recommendation 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.

You contend that the remaining information consists of communications and draft documents related to an event under the Major Events Trust Fund that contain advice, opinion, and recommendations relating to policy matters. You state the comptroller will release the submitted draft documents in their final form. Upon review of your arguments and the information at issue, we find you have established the deliberative process privilege is applicable to the submitted draft documents, as well as 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. Accordingly, the comptroller may not withhold the remaining information at issue under section 552.111 of the Government Code.

You also contend that the remaining information is excepted from disclosure under section 552.106 of the Government Code, which excepts from disclosure "[a] draft or

working paper involved in the preparation of proposed legislation[.]” Gov’t Code § 552.106(a). Section 552.106 resembles section 552.111 in that both exceptions protect advice, opinion, and recommendation on policy matters, in order to encourage frank discussion during the policymaking process. *See* Open Records Decision No. 460 at 2 (1987). However, section 552.106 applies specifically to the legislative process and is narrower than section 552.111. *Id.* Therefore, section 552.106 is applicable only to the policy judgments, recommendations, and proposals of persons who are involved in the preparation of proposed legislation and who have an official responsibility to provide such information to members of the legislative body. *Id.* Section 552.106 does not protect purely factual information from public disclosure. *See id.* at 2; *see also* Open Records Decision No. 344 at 3-4 (1982) (for purposes of statutory predecessor, factual information prepared by State Property Tax Board did not reflect policy judgments, recommendations, or proposals concerning drafting of legislation). However, a comparison or analysis of factual information prepared to support proposed legislation is within the scope of section 552.106. *See* ORD 460 at 2.

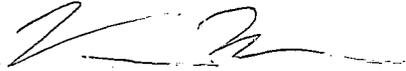
You generally assert the remaining information, which is related to an event under the Major Events Trust Fund, contains advice, opinion, and recommendations relating to policy matters between employees of the comptroller and members of the legislative body. In this instance, however, you have not established that the comptroller has an official responsibility to the involved legislative body to provide policy judgments, recommendations, and proposals to its members. Therefore, the comptroller may not withhold any of the remaining information under section 552.106 of the Government Code.

In summary, the submitted publication constitutes commercially available information that falls within the scope of section 552.027 of the Government Code and need not be released to the requestor. The comptroller may continue to rely on Open Records Letter No. 2010-12298 as a previous determination and withhold or release the previously ruled upon information in accordance with this ruling. To the extent the letter we have marked exists separate and apart from the communication in which it was enclosed, the comptroller may not withhold it under section 552.107 of the Government Code. If this letter does not exist separate and apart from the communication in which it was enclosed, the comptroller may withhold it along with the remaining communications you seek to withhold as privileged attorney-client communications under section 552.107(1) of the Government Code. The comptroller may withhold the submitted draft documents, as well as 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,



Vanessa Burgess
Assistant Attorney General
Open Records Division

VB/dls

Ref: ID# 414034

Enc. Submitted documents

c: Requestor
(w/o enclosures)