



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

May 26, 2011

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

OR2011-07454

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# 417364 (Comptroller ID# 7024829303).

The Texas Comptroller of Public Accounts (the "comptroller") received a request for all information pertaining to the investigation of overpayment/underpayment of sales tax by a specified company. You state you have released some of the requested information. You claim the submitted information is excepted from disclosure under sections 552.101, 552.107, 552.108, 552.111, and 552.116 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>1</sup>

Initially, you assert the submitted audit file documentation is excepted from disclosure pursuant to previous determinations issued by this office to the comptroller in Open Records Letter Nos. 2004-3926 (2004) and 2007-10491 (2007). These rulings serve as previous determinations under section 552.301(a) of the Government Code and allow the comptroller to withhold the following under section 552.116 of the Government Code without requesting a decision from this office: 1) comments entered into the comptroller's internal Agency Work Manager system prepared or maintained in conducting audits and 2) audit working

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<sup>1</sup>We assume 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.

papers created during the course of an audit conducted under the authority of section 111.004 of the Tax Code. Because the comptroller states portions of the submitted information are subject to these previous determinations, we need not address them. *See* Open Records Decision No. 673 (2001) (governmental body may rely on previous determination when elements of law, fact, and circumstances have not changed, decision concludes specific, clearly delineated category of information is exempted, and governmental body is explicitly informed it need not seek a decision from this office to withhold information in response to future requests).

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. Section 111.006(a)(2) of the Tax Code provides that information “secured, derived, or obtained by the comptroller or the attorney general during the course of an examination of the taxpayer’s books, records, papers, officers, or employees, including an examination of the business affairs, operations, source of income, profits, losses, or expenditures of the taxpayer” is confidential. Tax Code § 111.006(a)(2).

The supreme court considered the applicability of section 111.006 to several categories of information in *A & T Consultants, Inc. v. Sharp*, 904 S.W.2d 668 (Tex. 1995). In doing so, the court not only considered if the information was derived from the taxpayer’s records, but also whether the information reveals anything about the taxpayer’s business affairs, operations, financial condition, profits, or losses. *Id.* at 676, 680. The court concluded that the starting and ending dates of an audit are not confidential under section 111.006 because although they may indicate the seriousness of an audit, they “reveal[] nothing about a taxpayer’s business affairs, operations, or profits or losses.” *Id.* at 676. Similarly, the court concluded that while the amounts of deficiencies or refunds are derived from the taxpayer’s records, the fact of a deficiency or refund “reveals nothing about taxpayers except that they miscalculated their tax.” *Id.* at 680; *see id.* at 680 n. 6. Thus, the fact of a deficiency or refund is not confidential under section 111.006.

You explain some of the administrative hearing documents at issue were filed by the taxpayer and some were filed by the comptroller. You contend while you would generally release de-identified versions of comptroller- filed documents, because in this instance the requestor knows the identity of the taxpayer, de-identification would not protect the taxpayer’s identity. However, in *A&T Consultants*, the comptroller at that time conceded taxpayer names are public, and the court determined taxpayer identities are not confidential under section 111.006 and order them released. *Id.* at 676. Therefore, the information at issue may not be withheld in its entirety on this basis.<sup>2</sup> Based on our review of the information at issue and *A & T Consultants*, we conclude some of the submitted information is confidential under section 111.006 as it was obtained or derived from a taxpayer’s records and reveals the taxpayer’s business affairs, operations, financial condition, profits, or losses.

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<sup>2</sup>Although this office refuted the comptroller’s de-identification argument and articulated the standard for section 111.006 as interpreted by *A & T Consultants* in Open Records Letter No. 2004-7085 (2004), the comptroller continues to rely on and cite to decisions issued prior to 2004.

Accordingly, the comptroller must withhold the information we have marked pursuant to section 552.101 of the Government Code in conjunction with section 111.006 of the Tax Code.<sup>3</sup> However, you have failed to demonstrate how the remaining information constitutes information obtained from or derived from a taxpayer's records and reveals the taxpayer's business affairs, operations, financial condition, profits, or losses for section 111.006 purposes. Accordingly, none of the remaining information may be withheld under section 552.101 of the Government Code on this basis.

You seek to withhold some of the remaining information under section 552.101 of the Government Code in conjunction with section 151.027 of the Tax Code. Section 151.027 of the Tax Code provides in relevant part:

(a) Information in or derived from a record, report, or other instrument required to be furnished under this chapter is confidential and not open to public inspection, except for information set forth in a lien filed under this title or a permit issued under this chapter to a seller and except as provided by Subsection (c) of this section.

(b) Information secured, derived, or obtained during the course of an examination of a taxpayer's books, records, papers, officers, or employees, including the business affairs, operations, profits, losses, and expenditures of the taxpayer, is confidential and not open to public inspection except as provided by Subsection (c) of this section.

Tax Code § 151.027(a)–(b). Upon review, you have provided no arguments explaining how the information at issue is information in or derived from a record, report, or other instrument required to be furnished under chapter 151 for purposes of section 151.027(a).

Further, information made confidential under section 151.027(b) is co-extensive with information deemed confidential under section 111.006(a)(2). Because we have already disposed of the comptroller's claims under section 111.006, none of the remaining information at issue may be withheld under section 151.027(b). Therefore, none of the remaining information may be withheld under section 552.101 of the Government Code on this basis.

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

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<sup>3</sup>As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

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). 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.*, 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 some of the remaining 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 withhold the information you have marked under section 552.107(1) of the Government Code.<sup>4</sup>

Section 552.108(b)(2) of the Government Code excepts from public disclosure “[a]n internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution ... if ... the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication[.]” Gov’t Code § 552.108(b)(2). Section 552.108 applies only to records created by an agency, or a portion of an agency, whose primary function is the investigation of crimes and enforcement of criminal laws. *See Open Records Decision Nos. 493 (1988), 287 (1981)*. Section 552.108 is generally not applicable to records created by an agency whose chief function is essentially regulatory in nature. *See*

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<sup>4</sup>As our ruling is dispositive, we need not address your remaining argument against its disclosure.

Open Records Decision No. 199 (1978). The comptroller is a law enforcement agency for purposes of administering the Tax Code. *A&T Consultants, Inc.*, 904 S.W.2d at 678-79. You represent a portion of the information at issue pertains to a criminal investigation regarding tax compliance. You also represent the investigation is closed and that it did not result in either a conviction or a deferred adjudication. Therefore, we agree you may withhold the information you have marked under section 552.108(b)(2) of the Government Code.

Section 552.137 of the Government Code excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body," unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c).<sup>5</sup> See Gov't Code § 552.137(a)-(c). The e-mail address we marked in the remaining information is not specifically excluded by section 552.137(c). As such, this e-mail address must be withheld under section 552.137, unless its owner affirmatively consents to its release. See *id.* § 552.137(b).<sup>6</sup>

In summary, because the comptroller states portions of the submitted information are subject to Open Records Letter Nos. 2004-3926 and 2007-10491, which allow the comptroller to withhold certain information under section 552.116 of the Government Code, we need not address said portions. The comptroller must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 111.006(a)(2) of the Tax Code. The comptroller may withhold the information you have marked under sections 552.107 and 552.108(b)(2) of the Government Code. The comptroller must withhold the e-mail address we have marked under section 552.137, unless its owner affirmatively consents to its release. 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](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

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<sup>5</sup>The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

<sup>6</sup>Open Records Decision No. 684 (2009) is a previous determination to all governmental bodies authorizing them to withhold ten categories of information, private e-mail addresses under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

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,

A handwritten signature in cursive script that reads "Paigelay".

Paige Lay  
Assistant Attorney General  
Open Records Division

PL/eb

Ref: ID# 417364

Enc. Submitted documents

cc: Requestor  
(w/o enclosures)