



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

June 16, 2011

Mr. David D. Menchaca  
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Texas Comptroller of Public Accounts  
P.O. Box 13528  
Austin, Texas 78711-3528

OR2011-08541

Dear Mr. Menchaca:

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# 420867 (Comptroller ID# 7106006807).

The Texas Comptroller of Public Accounts (the "comptroller") received a request for records relating to matters in which a taxpayer was represented before the comptroller by a named entity during a specified period of time. You state you have released some information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>1</sup>

Section 552.103 of the Government Code provides in relevant part as follows:

- (a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or

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<sup>1</sup>We assume the "representative sample" of information 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 those records contain substantially different types of information than those submitted to this office.

employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The comptroller has the burden of providing relevant facts and documents to show the section 552.103 exception is applicable in a particular situation. The test for meeting this burden is a showing (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The comptroller must meet both prongs of this test for information to be excepted under section 552.103. We note contested cases conducted under the Texas Administrative Procedure Act (the "APA"), chapter 2001 of the Government Code, are considered litigation for purposes of section 552.103. See Open Records Decision No. 588 at 7 (1991).

You state, and provide documentation showing, on the date the comptroller received the present request for information, the comptroller was a party to contested administrative proceedings conducted under the APA involving the named entity. We therefore agree litigation to which the comptroller is a party was pending on the date the comptroller received the request. We further find the information at issue relates to the pending litigation. Accordingly, based on your representations and our review, we conclude the information you have marked may be withheld under section 552.103 of the Government Code.<sup>2</sup>

We note, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. See Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing parties in the pending litigation is not excepted from disclosure under section 552.103(a), and must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has concluded. See Attorney General Opinion MW-575 (1982); see also Open Records Decision No. 350 (1982).

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<sup>2</sup>As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

Section 552.107 protects information coming within the attorney-client privilege. Gov't Code § 552.107(1). 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 Texas 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). 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. 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. *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).

Most of the e-mails you have marked reflect they are communications between and among individuals you have identified as comptroller attorneys and employees. You represent these e-mails were made for the purpose of facilitating the rendition of legal services, and were intended to be, and have remained, confidential. Thus, based on your representations and our review, we conclude most of the e-mails you have marked are protected by the attorney-client privilege and may be withheld under section 552.107(1) of the Government Code. However, the remaining e-mail reflects it was sent from a non-privileged party or individual who is not identified. Accordingly, you failed to show how this remaining e-mail, which we have marked as non-privileged, falls within the attorney-client privilege. However, this non-privileged e-mail is submitted in an otherwise privileged e-mail string. If this e-mail does not exist separate and apart from the privileged string in which it was submitted, it may be withheld along with the attached e-mail string as a privileged attorney-client

communication. If this non-privileged e-mail exists separate and apart from the e-mail string in which it was submitted, it may not be withheld under section 552.107.

Section 552.111 excepts from public disclosure “[a]n 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. Section 552.111 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 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 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. Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). 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 has also concluded 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 indicate some of remaining information pertains to policy issues concerning the procedures and process regarding the treatment of refund claims for sales tax that were allegedly remitted in error. Further, you state this information consists of draft documents of taxability rulings that have been publicly released. Based on your representations and our review, we agree the comptroller may withhold the information we have marked under section 552.111 of the Government Code.

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 remaining information at issue was filed by the comptroller and some was filed by the taxpayer. While you contend you would generally release de-identified versions of comptroller-filed documents, we note that, 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 ordered them released. *Id.* at 676. Therefore, the remaining information at issue filed by the comptroller may not be de-identified on this basis.<sup>3</sup> Based on our review of the information at issue and *A & T Consultants*, we conclude some of the remaining information at issue 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. 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. 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.

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<sup>3</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 Open Records Letter No. 2004-7085.

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:

(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(b). We note 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 552.137 of the Government Code provides that "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act]," unless the owner of the e-mail address has affirmatively consented to its release or the e-mail address is specifically excluded by subsection (c).<sup>4</sup> Gov't Code § 552.137(a)-(c). We have marked e-mail addresses in remaining information at issue that are not of the types specifically excluded by section 552.137(c) of the Government Code. Accordingly, the comptroller must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners consent to disclosure.<sup>5</sup>

In summary, the comptroller may withhold the information you have marked under section 552.103 of the Government Code. The comptroller may withhold most of the e-mails you have marked under section 552.107 of the Government Code. If the e-mail we have marked as non-privileged does not exist separate and apart from the privileged string in which it was submitted, it may be withheld along with the attached e-mail string as a privileged attorney-client communication. If this non-privileged e-mail exists separate and apart from the e-mail string in which it was submitted, it may not be withheld under section 552.107. The comptroller may withhold the information we have marked under section 552.111 of the Government Code. The comptroller must withhold the information we have marked in the remaining information at issue pursuant to section 552.101 of the

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<sup>4</sup>The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body. See Open Records Decision Nos. 481 at 2 (1987), 480 at 5 (1987).

<sup>5</sup>In Open Records Decision No. 684 (2009), this office issued a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including e-mail addresses of members of the public under section 552.137, without the necessity of requesting an attorney general decision.

Government Code in conjunction with section 111.006 of the Tax. Code. The comptroller must withhold the e-mail addresses we have marked in the remaining information at issue under section 552.137 of the Government Code, unless the owners consents to disclosure. The remaining information must be released to the requestor.

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 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,



Sean Nottingham  
Assistant Attorney General  
Open Records Division

SN/bs

Ref: ID# 420867

Enc. Submitted documents

c: Requestor  
(w/o enclosures)