



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 24, 2011

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

OR2011-12206

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# 427896 (Comptroller ID# 7292935075).

The Texas Comptroller of Public Accounts (the "comptroller") received a request for twenty two categories of information pertaining to two named employees. You state you have released some of the requested information, subject to redactions pursuant to sections 552.024(c) and 552.147 of the Government Code.¹ You also state the comptroller will redact e-mail addresses pursuant to the previous determination issued under section 552.137 of the Government Code in Open Records Decision No. 684 (2009).² You claim the submitted information is excepted from disclosure under

¹Section 552.024 of the Government Code authorizes a governmental body to redact, without the necessity of requesting a decision from this office, the home address, home telephone number, emergency contact information, social security number, and family member information of a current or former employee who properly elected to keep his or her information confidential. *See* Act of May 24, 2011, 82nd Leg., R.S., S.B. 1638, § 1 (to be codified as an amendment to Gov't Code § 552.024(a)). We also that section 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.

²This office issued Open Records Decision No. 684, a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including the e-mail address of a member of the public under section 552.137, without the necessity of requesting an attorney general decision.

sections 552.101, 552.107, and 552.111 of the Government Code.³ We have considered the exceptions you claim and reviewed the submitted representative sample of information.⁴

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. This section encompasses information protected by other statutes, such as section 111.006(a)(2) of the Tax Code, which 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 argue that the information you have marked is confidential in its entirety under section 111.006 of the Tax Code. 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. 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. Accordingly, the comptroller must withhold the information we have

³Although the comptroller also raises sections 552.103 and 552.116 of the Government Code, you have provided no arguments regarding the applicability of these exceptions. Since you have not submitted arguments concerning sections 552.103 and 552.116, we assume you no longer urge them. *See* Gov’t Code §§ 552.301(b), (e), .302.

⁴We 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.

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 at issue 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 at issue 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 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.* 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 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.⁵

In summary, 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. The comptroller may withhold the information you have marked under section 552.107(1) 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,



Tamara Wilcox
Assistant Attorney General
Open Records Division

TW/dls

Ref: ID# 427896

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁵As our ruling is dispositive, we need not address your remaining argument against its disclosure.