



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 16, 2011

Mr. David D. Menchaca
Assistant General Counsel for Open Records
Texas Comptroller of Public Accounts
P.O. Box 13528
Austin, Texas 78711-3528

OR2011-18558

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# 439318 (Comptroller ID# 7621818325).

The Comptroller of Public Accounts (the "comptroller") received a request for information related to the sales, excise, and use tax audits pertaining to the determination of a tax debt of a named company.¹ You also state the comptroller is withholding audit working papers and Audit Work Manager comments subject to section 552.116 of the Government Code pursuant to the previous determinations issued to the comptroller in Open Records Letter Nos. 2007-10491 (2007) and 2004-3926 (2004), respectively. *See Gov't Code* § 552.301(a); Open Records Decision No. 673 at 7-8 (2001). You claim portions of the submitted

¹You state, and provide documentation showing, the comptroller sought and received clarification of the request. *See Gov't Code* § 522.222(b) (stating if information requested is unclear or large amount has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used); *see also City of Dallas v. Abbott*, 304 S.W.3d 380 (Tex. 2010) (holding when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or overbroad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

information are excepted from disclosure under sections 552.101, 552.107, and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the representative sample of information you have submitted.²

Initially, we note, and you acknowledge, the comptroller did not fully comply with section 552.301 of the Government Code. Subsection (b) of section 552.301 requires a governmental body requesting an open records ruling from this office to state the exceptions that apply not later than the tenth business day after the date of receiving the written request. Gov't Code § 552.301(b). Pursuant to subsection 552.301(e), within fifteen business days of receiving the request the governmental body must submit to this office (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. *See id.* § 552.301(e). The comptroller did not raise section 552.101 within the ten-business-day deadline nor did the comptroller submit a representative sample of the information subject to section 552.101 until after the fifteen-business-day deadline had passed. Generally, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *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). The presumption that information is public under section 552.302 can generally be overcome by demonstrating the information is confidential by law or third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3, 325 at 2 (1982). Section 552.101 of the Government Code provides a compelling reason to overcome the presumption of openness; therefore, we will consider section 552.101 for the information submitted untimely.

Section 552.107(1) of the Government Code protects information that lies 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. 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.

²This letter ruling assumes the submitted representative sample of information is truly representative of the requested information as a whole. This ruling does not reach, and therefore does not authorize, the withholding of any other requested information to the extent that the other information is substantially different than that submitted to this office. *See* Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

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)(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. *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 assert the information you have noted constitutes communications between comptroller employees and attorneys. You state the communications at issue were made in the furtherance of legal services for the comptroller. You also state the confidentiality of these communications has been maintained. Accordingly, the comptroller may withhold the information you have noted under section 552.107(1) of the Government Code.

You claim some of the remaining information is excepted under section 552.108(a)(1) of the Government Code, which excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if: (1) release of the information would interfere with the detection, investigation, or prosecution of crime.” Gov’t Code § 552.108(a)(1). Generally, a governmental body claiming section 552.108 must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex Parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). We note 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* Open Records Decision No. 199 (1978). The comptroller is a law enforcement agency for purposes of administering the Tax Code. *See A&T Consultants, Inc. v. Sharp*, 904 S.W.2d 668, 678-79 (Tex. 1995). You inform us that the information you have noted pertains to an ongoing enforcement action by the comptroller and its release would interfere with the comptroller's law enforcement duties. Therefore, we agree the comptroller may withhold the information you noted under section 552.108(a)(1) of the Government Code.³

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 552.101 encompasses information made confidential by other statutes, including section 6103(a) of title 26 of the United States Code. Section 6103(a) renders tax return information confidential. Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision No. 600 (1992) (W-4 forms). Section 6103(b) defines the term "return information" as "a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments or tax payments, . . . or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary [of the Internal Revenue Service] with respect to a return or with respect to the determination of the existence, or possible existence, of liability . . . for any tax, penalty, . . . , or offense[.]" *See* 26 U.S.C. § 6103(b)(2)(A). Federal courts have construed the term "return information" expansively to include any information gathered by the Internal Revenue Service regarding a taxpayer's liability under title 26 of the United States Code. *See Mallas v. Kolak*, 721 F. Supp. 748, 754 (M.D.N.C. 1989), *aff'd in part*, 993 F.2d 1111 (4th Cir. 1993). Consequently, the comptroller must withhold the information you have marked pursuant to section 552.101 in conjunction with section 6103(a).

Section 552.101 also encompasses 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.* *See* 904 S.W.2d at 668. 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. *A&T Consultants, Inc.*, 904 S.W.2d at 680. The court concluded the starting and ending dates of an audit are not confidential under section 111.006

³As our ruling for this information is dispositive, we need to address your remaining arguments against its disclosure.

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.

You explain some of the remaining information at issue was provided directly by the taxpayer and other information was derived from the taxpayer information. 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 during the course of an examination 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 during the course of an examination 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 552.101 also encompasses information protected by section 560.003 of the Government Code. Section 560.003 provides “[a] biometric identifier in the possession of a governmental body is exempt from disclosure under [the Act].” Gov’t Code § 560.003; *see also id.* §§ 560.001(1) (defining “biometric identifier” to include fingerprints), .002(1)(A) (governmental body may not sell, lease, or otherwise disclose individual’s biometric identifier to another person unless individual consents to disclosure). Therefore, the comptroller must withhold the fingerprint we have marked under section 552.101 in conjunction with section 560.003 of the Government Code.

Section 552.101 also encompasses the doctrine of common-law privacy, which protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *Id.* at 681-82. The type of information considered highly intimate or embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. This office has also found some kinds of medical information or information indicating disabilities or specific illnesses is excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). Upon review, we find portions of the remaining information are highly intimate or embarrassing and not of legitimate public interest. Therefore, the comptroller must withhold the information we have marked under section 552.101 in conjunction with common-law privacy.

In summary, the comptroller may withhold the information it has noted under sections 552.107 and 552.108(a)(1) of the Government Code. The comptroller must withhold the information it has noted under section 552.101 in conjunction with section 6103(a) of title 26 of the United States Code. The comptroller must withhold the information we have marked under section 552.101 in conjunction with (1) section 111.006 of the Tax Code, (2) section 560.003 of the Government Code, and (3) common-law privacy. 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,

A handwritten signature in black ink, appearing to read 'Melanie J. Villars', with a stylized flourish at the end.

Melanie J. Villars
Assistant Attorney General
Open Records Division

MJV/ag

Ref: ID# 439318

Enc. Submitted documents

c: Requestor
(w/o enclosures)