



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

April 19, 2012

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

OR2012-05625

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# 451167 (Comptroller ID#: 7978276512).

The Texas Comptroller of Public Accounts (the "comptroller's office") received a request for the requestor's personnel file and any records pertaining to the requestor's termination. You state the comptroller's office will release some information to the requestor. You claim some of the submitted information is excepted from disclosure under sections 552.101 and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>1</sup>

You seek to withhold some of the submitted 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:

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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.

(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). You state a sales tax permit holder must file sales tax reports each reporting period. You state comptroller's office personnel refer to these reports in a manner which reveals the amount of the permit holder's sales tax liability. You further state some of the submitted information references specific sales tax accounts and reveals the sales tax amounts due for certain reporting periods. Based on your representations and our review, we find the comptroller's office must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 151.027(a) of the Tax Code. However, we find you have failed to demonstrate how any of the remaining information you seek to withhold is 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, we find you have failed to demonstrate how any of the remaining information you seek to withhold was secured, derived, or obtained during the course of an examination of a taxpayer's books, records, papers, officers, or employees for purposes of section 151.027(b). Therefore, none of the remaining information you seek to withhold may be withheld under section 552.101 of the Government Code on these bases.

Section 552.101 of the Government Code also encompasses section 171.206 of the Tax Code which provides that the following information is excepted from disclosure:

- (1) information that is obtained from a record or other instrument that is required by this chapter to be filed with the comptroller; or
- (2) information, including information about the business affairs, operations, profits, losses, cost of goods sold, compensation, or expenditures of a taxable entity, obtained by an examination of the books and records, officers, partners, trustees, agents, or employees of a taxable entity on which a tax is imposed by this chapter.

Tax Code § 171.206. Upon review, you have provided no arguments explaining how the information you seek to withhold was obtained from a record or other instrument that is required to be furnished under chapter 171 for purposes of section 171.206(a). Further, we

find you have failed to demonstrate how any of the remaining information you seek to withhold was obtained by an examination of the books and records, officers, partners, trustees, agents, or employees of a taxable entity for purposes of section 171.206(b). Therefore, none of the information you seek to withhold may be withheld under section 552.101 of the Government Code on these bases.

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.*, 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, orig. proceeding). 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 a portion of the remaining information at issue, which you have marked, is protected by section 552.107(1) of the Government Code. You state these e-mails consist of attorney-client communications that were made between attorneys and staff of the comptroller’s office for the purpose of rendering professional legal services to the comptroller’s office. 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. As you acknowledge, the submitted e-mail strings contain communications with the requestor. You indicate, to the extent these non-privileged communications exist separate and apart from the submitted e-mail strings, the comptroller's office will release these non-privileged communications to the requestor. Therefore, we agree the comptroller's office may withhold the information at issue under section 552.107 of the Government Code.

In summary, the comptroller's office must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 151.027(a) of the Tax Code. The comptroller's office may withhold the information you have marked under section 552.107 of the Government Code. The comptroller's office must release the remaining information.

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/akg

Ref: ID# 451167

Enc. Submitted documents

c: Requestor  
(w/o enclosures)