



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 18, 2012

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

OR2012-07499

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# 454185 (Comptroller ID# 8071072080).

The Office of the Texas Comptroller of Public Accounts (the "comptroller's office") received a request for all information pertaining to events supported by the Major Events Trust Fund, the Events Trust Fund, the Motor Sports Racing Trust Fund, the Special Events Trust Fund, or any other trust fund governed by article 5190.14 of the Texas Civil Statutes. You state some information will be released to the requestor. You claim the remaining requested information is excepted from disclosure under sections 552.107, 552.111, and 552.136 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

¹Although you also raise section 552.101 as an exception to disclosure, you have provided no arguments in support of this exception; therefore, we assume you have withdrawn it. *See* Gov't Code §§ 552.301, .302.

²We assume that 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.

Initially, you state the comptroller's office will rely on Open Records Letter No. 2010-13143 (2010) to withhold portions of the responsive information. In that decision, we ruled marked portions of the submitted information must be withheld under sections 552.110 and 552.137 of the Government Code. Further, we note a portion of the responsive information was the subject of a previous request for a ruling by the comptroller's office, in response to which this office issued Open Records Letter No. 2012-06733(2012). In Open Records Letter No. 2012-06733, we ruled the comptroller's office may withhold a portion of the submitted information under section 552.107(1) of the Government Code, except to the extent a non-privileged attachment exists separate and apart from the otherwise privileged e-mail. We further ruled the comptroller's office may withhold a portion of the submitted information under section 552.111 of the Government Code. As we have no indication the law, facts, or circumstances on which the prior rulings were based have changed, the comptroller's office may rely on these rulings as previous determinations and withhold or release any previously ruled upon information in accordance with these prior rulings. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). To the extent the remaining requested information is not encompassed by Open Records Letter Nos. 2010-13143 and 2012-06733, we will address your arguments against disclosure.

Section 552.107(1) of the Government Code protects information coming 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 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). Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (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 state the information you have marked under section 552.107 consists of communications between comptroller's office attorneys and staff to facilitate the rendition of professional legal services to comptroller's office decision-makers. You identify the parties to the communications and state the communications were intended to be confidential. Further, you state the communications have remained confidential. Based on these representations and our review, we find you have established the applicability of the attorney-client privilege to most of the information you have marked. Accordingly, the comptroller's office may generally withhold the information you have marked under section 552.107 of the Government Code. However, we note several attachments to and e-mails within otherwise privileged e-mail strings include communications with non-privileged parties. If these communications, which we have marked, exist separate and apart from the privileged e-mail strings in which they appear, the comptroller's office may not withhold them under section 552.107(1) of the Government Code.

Next, we consider your section 552.111 assertion for some of the information. Section 552.111 of the Government Code excepts from disclosure "an 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. This exception 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 recommendations 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); *see also 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 only those internal communications that consist of advice, opinions, recommendations 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. *See id.*; *see also City of Garland v. The Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body's policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body's policy mission. *See Open Records Decision No. 631 at 3 (1995)*. Further, 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 intended for public release in its final form necessarily represents the drafter's advice, opinion, and recommendations 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 state the information you have marked under section 552.111 consists of drafts created by comptroller's office personnel. You state the drafts relate to the policymaking functions of the comptroller's office. Finally, you state the submitted draft documents will be publicly released in their final form. Based on your representations and our review, we find you have established the drafts you have marked are encompassed by the deliberative process privilege. Accordingly, the comptroller's office may withhold the information you have marked under section 552.111 of the Government Code.

Section 552.136 provides "[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." Gov't Code § 552.136(b). An access device number is one that may be used to 1) obtain money, goods, services, or another thing of value, or 2) initiate a transfer of funds other than a transfer originated solely by paper instrument, and includes an account number. *See id.* § 552.136(a) (defining "access device"). You have marked information the comptroller's office seeks to withhold under section 552.136 and state the information at issue includes bank account, routing, and wire transfer numbers. This office has determined bank account, routing, and wire transfer numbers are access device numbers for purposes of section 552.136 of the Government Code. Accordingly, the comptroller's office must withhold the marked bank account and routing numbers under section 552.136 of the Government Code. Furthermore, based on the representation by the comptroller's office that the remaining information it marked consists of wire transfer numbers, it must withhold the remaining information under section 552.136 of the Government Code.

The non-privileged communications contain the e-mail addresses of members of the public and government employees. Section 552.137 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 owner of the e-mail address consents to its release or the

e-mail address falls within the scope of section 552.137(c).³ *See id.* § 552.137(a)-(c). Section 552.137 is not applicable to a government employee's work e-mail address because such an address is not that of the employee as a "member of the public" but rather the address of the individual as a government employee. Accordingly, the comptroller's office may not withhold the government employees' e-mail addresses under section 552.137. The remaining e-mail addresses, which we have marked, do not appear to be a type specifically excluded by section 552.137(c). To the extent the non-privileged communications we have marked may not be withheld under section 552.107(1) of the Government Code, the comptroller's office must withhold the e-mail addresses we have marked under section 552.137 of the Government Code unless the owners of the e-mail addresses consent to their release.

You state a portion of the remaining requested information, which you will make available to the requestor, is protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; *see* Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

In summary, the comptroller's office may rely on Open Records Letter Nos. 2010-13143 (2010) and 2012-06733 (2012) as previous determinations and withhold or release any previously ruled upon information that is also responsive to this request in accordance with these prior rulings. The comptroller's office may withhold the information you have marked under section 552.107(1) of the Government Code. However, to the extent the non-privileged communications we have marked exist separate and apart from the otherwise privileged e-mail strings to which they are attached, they may not be withheld under section 552.107(1) of the Government Code. The comptroller's office may withhold the information you have marked under section 552.111 of the Government Code. The comptroller's office must withhold the information you have marked under section 552.136 of the Government Code. To the extent the non-privileged communications may not be withheld under section 552.107(1) of the Government Code, the comptroller's office must withhold the e-mail addresses we have marked under section 552.137 of the Government Code. The remaining information must be released; however, any information protected by copyright may only be released in accordance with copyright law.

³The 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).

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 cursive script that reads "Jessica Marsh".

Jessica Marsh
Assistant Attorney General
Open Records Division

JM/em

Ref: ID# 454185

Enc. Submitted documents

c: Requestor
(w/o enclosures)