



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

February 22, 2013

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

OR2013-03019

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# 479461 (Comptroller ID# 8794884020).

The Texas Comptroller of Public Accounts (the "comptroller's office") received a request for any information pertaining to BG's Enterprise, Inc. You inform us the comptroller's office will release some of the requested information. You state the comptroller's office is withholding responsive audit working papers pursuant to the previous determination issued to the comptroller's office in Open Records Letter No. 2007-10491 (2007). *See Gov't Code § 552.301(a); Open Records Decision No. 673 at 7-8 (2001)* (so long as law, facts, and circumstances upon which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely the same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). You claim the submitted information is 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 submitted representative samples of information.<sup>1</sup>

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<sup>1</sup>We assume that the "representative samples" of records submitted to this office are 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, we note some of the submitted information was the subject of two previous requests for information, as a result of which this office issued Open Records Letter Nos. 2013-02907 (2013) and 2013-02933 (2013). In Open Records Letter No. 2013-02907, we held the comptroller's office may withhold the information at issue under section 552.108(b)(1) of the Government Code. In Open Records Letter No. 2013-02933, we held the comptroller's office must withhold certain information under section 552.101 of the Government Code in conjunction with section 111.006 of the Tax Code and must release the remaining information. As we have no indication the law, facts, or circumstances on which the prior rulings were based have changed, we conclude the comptroller's office may continue to rely on Open Records Letter No. 2013-02907, and must continue to rely on Open Records Letter No. 2013-02933, as previous determinations and withhold or release the submitted information we have marked in accordance with those rulings.<sup>2</sup> See ORD 673 7-8. However, we will address your arguments under sections 552.101, 552.107, and 552.108 of the Government Code for the remaining information.

You claim portions of Exhibit F are confidential under section 111.006(a)(2) of the Tax Code in conjunction with section 552.101 of the Government Code. Section 552.101 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 made confidential by other statutes. Section 111.006(a)(2) 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 of the Tax Code in *A&T Consultants, Inc. v. Sharp*, 904 S.W.2d 668 (Tex. 1995), stating:

The Tax Code prevents the disclosure of data "obtained" or "derived" from a taxpayer . . . . Confidentiality under the Tax Code thus turns on the identity of the source of the information. It makes confidential the information obtained or derived from *taxpayers*.

*Id.* at 676 (citations omitted) (emphasis in original). You state the information you have marked in Exhibit F was obtained by the comptroller's office from a taxpayer other than the requestor in the course of a Texas sales tax audit. Based on our review of the information in Exhibit F and *A & T Consultants*, we conclude the information you have marked in Exhibit F is confidential under section 111.006 of the Tax Code and must be withheld in conjunction with section 552.101 of the Government Code.<sup>3</sup>

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

<sup>3</sup>As our ruling for this information is dispositive, we need not address your remaining arguments against its disclosure.

Section 552.107(1) of the Government Code 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 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 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 to only 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 to only 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, orig. proceeding). 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 inform us Exhibits G and H consist of e-mails and a draft document communicated between a comptroller's office attorney and comptroller's office employees for the purpose of facilitating the rendition of legal services to the comptroller's office. You also inform us these communications were intended to be confidential and have remained confidential. Based on your representations and our review, we find Exhibits G and H consist of privileged attorney-client communications that the comptroller's office may withhold under section 552.107(1) of the Government Code.

Section 552.108 of the Government Code provides, in pertinent part:

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from [required public disclosure] if:

(1) release of the internal record or notation would interfere with law enforcement or prosecution[.]

Gov't Code § 552.108(b)(1). Section 552.108(b)(1) is intended to protect "information which, if released, would permit private citizens to anticipate weaknesses in a police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate the laws of this State." *City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 327 (Tex. App.—Austin 2002, no pet.). To prevail on its claim that section 552.108(b)(1) excepts information from disclosure, a governmental body must do more than merely make a conclusory assertion that releasing the information would interfere with law enforcement. Instead, the governmental body must meet its burden of explaining how and why release of the requested information would interfere with law enforcement and crime prevention. *See* Open Records Decision No. 562 at 10 (1990) (construing statutory predecessor). This office has concluded that section 552.108(b) excepts from public disclosure information relating to the security or operation of a law enforcement agency. *See, e.g.*, Open Records Decision Nos. 531 (1989) (release of detailed use of force guidelines would unduly interfere with law enforcement), 252 (1980) (section 552.108 of the Government Code is designed to protect investigative techniques and procedures used in law enforcement), 143 (1976) (disclosure of specific operations or specialized equipment directly related to investigation or detection of crime may be excepted). Section 552.108(b)(1) is not applicable, however, to generally known policies and procedures. *See, e.g.*, ORDs 531 at 2-3 (Penal Code provisions, common law rules, and constitutional limitations on use of force not protected), 252 at 3 (governmental body failed to indicate why investigative procedures and techniques requested were any different from those commonly known). 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's office is a law enforcement agency for purposes of administering the Tax Code. *A&T Consultants, Inc. v. Sharp*, 904 S.W.2d 668, 678-79 (Tex. 1995).

You assert Exhibit J and the remaining information in Exhibit I is excepted from disclosure under section 552.108(b)(1). You inform us this information consists of internal records used by the comptroller's office's enforcement division for enforcement of state tax laws. You also inform us disclosure of the information at issue would interfere with law enforcement investigative abilities by revealing the comptroller's office's investigation and tax collection methods. Based on your representations and our review, we agree the release of this information would interfere with law enforcement. Thus, the comptroller's

office may withhold Exhibit J and the remaining information in Exhibit I under section 552.108(b)(1) of the Government Code.<sup>4</sup>

In summary, the comptroller's office may continue to rely on Open Records Letter No. 2013-02907, and must continue to rely on Open Records Letter No. 2013-02933, as previous determinations and withhold or release the information we have marked in accordance with those rulings. The information you have marked in Exhibit F must be withheld under section 552.101 of the Government Code and section 111.006 of the Tax Code. The comptroller's office may withhold Exhibits G and H under section 552.107(a) of the Government Code. Exhibit J and the remaining information in Exhibit I may be withheld under section 552.108(b)(1) 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,



Kenneth Leland Conyer  
Assistant Attorney General  
Open Records Division

KLC/bhf

Ref: ID# 479461

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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<sup>4</sup>As our ruling for this information is dispositive, we need not address your remaining argument against its disclosure.