



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

June 20, 2013

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

OR2013-10431

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# 490923 (Comptroller ID# 9058250172).

The Texas Comptroller of Public Accounts (the "comptroller's office") received a request for information pertaining to communications relating to the reporting for tiered partnership arrangement provisions of section 171.1015 of the Tax Code and the limitations on tiered partnership reporting requirements imposed by a specified rule of the comptroller's office, to exclude attorney-client communications, attorney work product, and the identities of taxpayers and third parties.<sup>1</sup> 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) and franchise tax returns under section 552.101 of the Government Code in conjunction with section 151.027 of the Tax Code pursuant to the previous determination issued to the comptroller's office in Open Records Letter No. 2003-7642 (2003). *See* Gov't Code § 552.301(a); Open Records Decision No. 673 at 7-8 (2001). You also state the comptroller's office released some

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<sup>1</sup>You state the comptroller's office sought and received clarification of the information requested. *See* Gov't Code § 552.222(b) (stating if information requested is unclear to governmental body or if large amount of information 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).

information to the requestor. You claim the remaining responsive information is excepted from disclosure under section 552.111 of the Government Code. We have considered the exception you claim and reviewed the submitted representative sample of information.<sup>2</sup>

Section 552.111 of the Government Code excepts from disclosure “[a]n interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency[.]” 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 recommendation 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); 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 from disclosure only those internal communications that consist of advice, recommendations, opinions, 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. *Id.*; *see also City of Garland v. 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 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 that is intended for public release in its final form necessarily represents the drafter’s advice, opinion, and recommendation 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

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<sup>2</sup>We 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 those records contain substantially different types of information than those submitted to this office.

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 Exhibits C, D, and E consist of internal communications between employees of the Tax Policy Division, Tax Administration Division, General Counsel, and Executive Administration Office of the comptroller's office that contain advice, opinions, and recommendations of tax policy matters. You explain Exhibit D contains a draft document that has been released in its final form. You further explain Exhibit E consists of a draft document that will be released to the public in its final form as soon as it is finalized. Based on your representations and our review, we find that you have established the deliberative process privilege is applicable to Exhibits D and E, as well as the information we have marked in Exhibit C. Accordingly, the comptroller's office may withhold Exhibits D and E and the information we have marked in Exhibit C under section 552.111 of the Government Code. However, we conclude you have not established the remaining information at issue consists of advice, opinion, or recommendations, or we find it is purely factual in nature. Accordingly, comptroller's office may not withhold any of the remaining information in Exhibit C under section 552.111 of the Government Code.

We note the remaining information contains information that may be subject to section 552.117 of the Government Code.<sup>3</sup> Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former officials employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a)(1). Section 552.117 is also applicable to cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. *See Open Records Decision No. 506 at 5-6 (1988)* (statutory predecessor to section 552.117 of the Government Code not applicable to cellular telephone numbers provided and paid for by governmental body and intended for official use). Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See Open Records Decision No. 530 at 5 (1989)*. Therefore, a governmental body must withhold information under section 552.117 on behalf of a current or former employee only if the individual made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. Accordingly, if the individual whose cellular telephone number is at issue timely requested confidentiality pursuant to section 552.024, the cellular telephone number we have marked must be withheld under section 552.117(a)(1) if the cellular

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<sup>3</sup>The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987)*.

telephone service is not paid for by a governmental body. The comptroller's office may not withhold the marked cellular telephone number under section 552.117(a)(1) if the individual did not make a timely election to keep the number confidential or if the cellular telephone service is paid for by a governmental body.

In summary, the comptroller's office may withhold Exhibits D and E and the information we have marked in Exhibit C under section 552.111 of the Government Code. The comptroller's office must withhold the marked cellular telephone number under section 552.117(a)(1) of the Government Code if the individual whose cellular telephone number is at issue timely requested confidentiality for this information and the cellular telephone number is not paid for with government funds. The remaining information in Exhibit C 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.texasattorneygeneral.gov/open/orl\\_ruling\\_info.shtml](http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml), 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Ana Carolina Vieira  
Assistant Attorney General  
Open Records Division

ACV/ag

Ref: ID# 490923

Enc. Submitted documents

c: Requestor  
(w/o enclosures)