



**ATTORNEY GENERAL OF TEXAS**  
**GREG ABBOTT**

October 14, 2004

Ms. Ruth Soucy  
Manager and Legal Counsel  
Open Records Division  
Comptroller of Public Accounts  
P.O. Box 13528  
Austin, Texas 78711-3528

OR2004-8740

Dear Ms. Soucy:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 211071.

The Comptroller of Public Accounts (the "comptroller") received a request for all information maintained by the comptroller pertaining to Woodside Trails Therapeutic Camp and School ("Woodside"). The request, made by a representative of Woodside, specifies four categories of information to be included in the scope of the request.<sup>1</sup> You advise that the comptroller will release some responsive information to the requestor. You also indicate that release of a videotape provided to the comptroller by Ms. Tanji Patton, a reporter from

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<sup>1</sup> First, the requestor asks for information concerning a visit to Woodside by comptroller staff accompanied by representatives of WOAI-TV ("WOAI"), to include: any information relating to WOAI and an arrangement between the comptroller and WOAI relating to a report concerning Woodside aired by WOAI on May 25, 2004; information delivered to representatives of WOAI; information made available to WOAI for review, reading, or copying; and "the statement made by a former employee of Woodside, a copy of which appeared in the WOAI televised report." Second, the requestor asks for information regarding former employees of Woodside interviewed or contacted by the comptroller, to include interview questions or interview notes, statements prepared or obtained from such former employees, and any other records regarding former employees. Third, the requestor asks for information concerning an alleged sexual assault of a child in the care of Woodside. Fourth, the requestor asks for information concerning the Bastrop County Department of Health and Sanitation.

WOAI, may implicate the proprietary interests of WOAI. Thus you state, and provide documentation showing, that you notified WOAI of the request and of its right to submit arguments to this office as to why the information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under Public Information Act in certain circumstances). While you take no position on whether the submitted videotape is excepted from disclosure, you claim that portions of the submitted records are excepted under sections 552.101, 552.107, 552.111, and 552.130 of the Government Code. We have considered your claimed exceptions and reviewed the submitted information.<sup>2</sup>

As a preliminary matter, we understand you to represent that some of the information that is responsive to the present request is the subject of two prior rulings of this office, issued as Open Records Letter No. 2004-5599 (2004) on July 8, 2004, and Open Records Letter No. 2004-6884 (2004) on August 13, 2004. *See* Open Records Decision No. 673 (2001) (governmental body may rely on prior ruling as previous determination when 1) the records or information at issue are precisely the same records or information that were previously submitted to this office pursuant to section 552.301(e)(1)(D); 2) the governmental body which received the request for the records or information is the same governmental body that previously requested and received a ruling from the attorney general; 3) the prior ruling concluded that the precise records or information are or are not excepted from disclosure under the Act; and 4) the law, facts, and circumstances on which the prior ruling was based have not changed since the issuance of the ruling). You do not indicate that the pertinent facts and circumstances have changed since the issuance of these prior rulings. Thus, to the extent the present request encompasses records that are identical to the records at issue in Open Records Letter Nos. 2004-5599 and 2004-6884, we determine that those prior rulings constitute previous determinations with respect to such records.

You state that the comptroller "will provide the requestor with the information ruled public by your office [in Open Records Letter Nos. 2004-5599 and 2004-6884] along with the additional information we believe is public." We note you have not submitted for review some of the information specified in the present request. In particular, you did not submit the requested statement made by a former Woodside employee that appeared in a WOAI televised report; interview questions, notes, and other records regarding former Woodside employees contacted by the comptroller; information concerning the alleged sexual assault referenced in the request; or information concerning the Bastrop County Department of

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<sup>2</sup> You indicate that the portions of the submitted information you seek to withhold under sections 552.107 and 552.111 are representative samples of responsive information that you contend is subject to these exceptions. We assume that these "representative sample" records are truly representative of the responsive information. *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.

Health and Sanitation. Furthermore, you have not identified any of the submitted information as “information delivered to WOAI” or “made available to WOAI for review, reading, or copying” as specified in the request. We understand you to represent that portions of this information are subject to the previous determinations of this office issued in Open Records Letter Nos. 2004-5599 and 2004-6884, and we agree that the comptroller must continue to follow Open Records Letter No. 2004-5599 and Open Records Letter No. 2004-6884 with respect to any information responsive to the present request that is identical to the information at issue in those rulings. In addition, to the extent that the comptroller maintains information responsive to the present request that is not subject to these previous determinations, we assume that the comptroller has released such information to the requestor. If not, you must release it immediately. *See* Gov’t Code §§ 552.006, .301, .302; Open Records Decision No. 664 (2000) (concluding that section 552.221(a) requires that information not excepted from disclosure must be released as soon as possible under the circumstances).

We now turn to the submitted information. As noted, you indicate that release of a videotape WOAI provided to the comptroller may implicate the interests of WOAI. WOAI has submitted comments arguing that certain information pertaining to Woodside in the comptroller’s possession should be withheld from public disclosure. In considering WOAI’s comments, we emphasize that responsive information in the comptroller’s possession is “public information” under the Act, and therefore may not be withheld from required public disclosure unless it is subject to one of the Act’s exceptions. *See* Gov’t Code § 552.002 (information collected, assembled, or maintained in connection with transaction of official business of a governmental body is “public information” subject to Act). WOAI asserts that information in the comptroller’s possession relating to WOAI’s reporting on Woodside is excepted from disclosure under section 552.101 of the Government Code in conjunction with state and federal constitutional law concerning news gathering and reporting.

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 requires express confidentiality. *See* Open Records Decision Nos. 658 (1998) (statute must make information explicitly confidential for information to be excepted under section 552.101 pursuant to statute), 478 (1987) (statutory confidentiality requires express language making information confidential). We note state and federal courts have determined that a privilege for news reporters is not found in the Texas Constitution, statutes, or Texas Supreme Court rules. *See, e.g., De La Paz v. Henry’s Diner, Inc.*, 946 F.Supp. 484, 485 (N.D. Tex 1996), *In re Union Pacific R. Co.*, 6 S.W.3d 310 (Tex. App.–Houston [14<sup>th</sup> Dist.] 1999, no writ), *Dolcefino v. Ray*, 902 S.W.2d 163 (Tex. App.–Houston [1<sup>st</sup> Dist.] 1995), *cert. denied*, 517 U.S. 1121 (1996); *see also Branzburg v. Hayes*, 408 U.S. 665 (1972) (considering privilege for news reporter under First Amendment against disclosure of information in criminal proceedings). However, to the extent WOAI holds a privilege against discovery for information related to news gathering, this office has found that discovery privileges generally do not make information expressly confidential for

purposes of section 552.101. *See* Attorney General Opinion JM-1048 (1989) (statutory predecessor to section 552.101 does not protect agency from civil discovery requests); Open Records Decision Nos. 647 (1996) (information protected by privilege in civil discovery context is not excepted from disclosure under Act pursuant to section 552.101), 575 (1990) (statutory predecessor to section 552.101 does not encompass discovery privileges). The submitted videotape was voluntarily provided to the comptroller by WOAI. We find that in providing the videotape to the comptroller, WOAI has waived any privilege WOAI may have had with respect to this information. We therefore determine that the submitted videotape is not excepted from disclosure under section 552.101 of the Government Code on the basis of a discovery privilege held by WOAI.

WOAI also asserts that portions of the submitted videotape are excepted under section 552.101 in conjunction with common-law privacy. Common-law privacy protects information if (1) the information contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The type of information considered intimate and 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. 540 S.W.2d at 683. Upon review, however, we determine that the videotape does not contain highly intimate or embarrassing information and is subject to a legitimate public interest. We therefore determine that the videotape is not excepted from disclosure under section 552.101 in conjunction with common-law privacy.

Next, WOAI states “to the extent the materials held by the Comptroller that are responsive to [Woodside’s] request for WOAI materials include information about individual cases of individuals, the information is likely protected by Chapter 261 of the Family Code, confidential medical records, confidential mental health records, and/or information protected under the Health Insurance Portability and Accountability Act of 1996 [HIPAA].” The comptroller does not argue that any of these provisions apply to the submitted information. Furthermore, upon review, we determine that these provisions are not applicable to the submitted information. We therefore find that none of the submitted information may be withheld under section 552.101 in conjunction with any of these provisions.

We next address WOAI’s arguments with respect to section 552.110 of the Government Code. Section 552.110 of the Government Code protects: (1) trade secrets, and (2) commercial or financial information the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. *See* Gov’t Code § 552.110(a), (b). Section 552.110(a) protects the property interests of private parties by excepting from disclosure trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *See* Gov’t Code § 552.110(a). *See*

RESTATEMENT OF TORTS § 757 cmt. b (1939) (defining “trade secret”); *see also* Open Records Decision No. 232 (1979). Section 552.110(b) protects “[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained[.]” Gov’t Code § 552.110(b). WOAI states, “[t]o the extent the materials held by the Comptroller . . . include information about competitive therapeutic camps, the information is excepted from disclosure under [section 552.110].” Thus, WOAI appears to assert that release of the videotape could implicate the proprietary interests of third parties other than WOAI. Because WOAI has not argued that it has a protected proprietary interest in any of the submitted information, we determine the videotape is not excepted from disclosure under section 552.110 of the Government Code. *See* Gov’t Code § 552.110(b) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material that substantial competitive injury would likely result from disclosure); Open Records Decision Nos. 639 at 4 (1996), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). As we have received no other arguments concerning the submitted videotape, we determine the comptroller must release the videotape to the requestor.

We now consider the exceptions raised by the comptroller for the remainder of the submitted information. While you indicate that the name and address of a former employee of Woodside are excepted from disclosure under section 552.101 of the Government Code, you have not raised any confidentiality provisions for this information or otherwise explained how the information is within the scope of section 552.101. *See* Gov’t Code § 552.301(e)(1)(A) (governmental body must explain why stated exceptions apply that would allow information to be withheld). We therefore determine the former employee’s name and address are not excepted under section 552.101 and may not be withheld on that basis.

You also contend that the representative sample attorney-client communications you have submitted are excepted from disclosure under section 552.107 of the Government Code. Section 552.107(1) of the Government Code excepts from disclosure information protected by 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.<sup>3</sup> TEX. R. EVID. 503(b)(1). Third, the privilege applies only to

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<sup>3</sup> The privilege does not apply when an attorney or representative is acting in a 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). Because government attorneys often act

communications between or among clients, client representatives, lawyers, and lawyer representatives.<sup>4</sup> TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body seeking to establish that a communication is protected by the attorney-client privilege must inform this office of the identity and capacity of each individual involved in the communication. Finally, the attorney-client privilege applies only to a communication that is confidential. *Id.* 503(b)(1). A confidential communication is a communication that 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 the definition of a confidential communication 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 writ). 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) of the Government Code 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 advise that the information you seek to withhold under section 552.107 consists of confidential communications between comptroller staff and attorneys made for the purpose of providing legal services to the comptroller, and you indicate that the confidentiality of the communications has been maintained. Based on your representations and our review, we agree that the comptroller may withhold this information pursuant to section 552.107 of the Government Code as information protected by the attorney-client privilege.

Next, you have submitted a representative sample of information you contend is excepted from disclosure under section 552.111 of the Government Code. Section 552.111 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.” In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of

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in capacities other than that of professional legal counsel, including as administrators, investigators, or managers, the mere fact that a communication involves an attorney for the government does not demonstrate this element.

<sup>4</sup> Specifically, the privilege applies only to confidential communications between the client or a representative of the client and the client’s lawyer or a representative of the lawyer; between the lawyer and the lawyer’s representative; by the client or a representative of the client, or the client’s lawyer or a representative of the lawyer, to a lawyer or representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein; between representatives of the client or between the client and a representative of the client; or among lawyers and their representatives representing the same client. *See* TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E); *see also id.* 503(a)(2), (a)(4) (defining “representative of the client,” “representative of the lawyer”).

the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the deliberative or policymaking processes of the governmental body. Open Records Decision No. 615 at 5-6 (1993). The preliminary draft of a policymaking document that has been released or is intended for release in final form is excepted from disclosure in its entirety under section 552.111 because such a draft necessarily represents the advice, recommendations, or opinions of the drafter as to the form and content of the final document. Open Records Decision No. 559 at 2 (1990). An agency's policymaking functions, however, do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. Open Records Decision No. 615 at 5-6 (1993). Additionally, section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. See *Arlington Indep. Sch. Dist. v. Texas Atty. Gen.*, 37 S.W.3d 152, 160 (Tex. App.--Austin 2001, no writ); Open Records Decision No. 615 at 4-5.

In this case, you have not identified any authority that places this matter properly within the scope of the comptroller's policymaking functions. See generally Gov't Code chapter 403 (setting forth generally the role of the Comptroller of Public Accounts); see *id.* § 403.011 (listing comptroller's "general powers"); see *cf.* Act of Sept. 22, 2003, 78<sup>th</sup> Leg., 3<sup>rd</sup> C.S., ch. 3, § 6.18, 2003 Tex. Sess. Law Serv. 86 (effective Jan. 11, 2004) (repealing section 403.022 of the Government Code, which had authorized the comptroller to review the performance of state agencies). Consequently, we find you have failed to establish that the information you seek to withhold under section 552.111 relates to the authorized policymaking functions of the comptroller. See *City of Garland v. Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (internal communication that does not bear upon governmental body's policymaking deliberations not excepted under section 552.111), Open Records Decision Nos. 631 (1995) (section 552.111 only excepts information that relates to policymaking functions of governmental body), 615 (1993) (to come within scope of statutory predecessor to section 552.111, information must be related to policymaking functions of governmental body). We therefore determine the comptroller may not withhold this information under section 552.111 of the Government Code. As you raise no other exceptions to disclosure for this information, we find it must be released to the requestor.

Finally, you have submitted photographs taken during a visit to Woodside that include Texas automobile license plate numbers. Section 552.130 of the Government Code provides in pertinent part:

- (a) Information is excepted from the requirements of Section 552.021 if the information relates to:

(1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or]

(2) a motor vehicle title or registration issued by an agency of this state[.]

Gov't Code § 552.130. We find the comptroller must withhold the Texas license plate numbers from the submitted photographs pursuant to section 552.130 of the Government Code.

In summary, to the extent the present request encompasses records that are identical to the records at issue in Open Records Letter Nos. 2004-5599 and 2004-6884, the comptroller must continue to follow those prior rulings as previous determinations with respect to such records. We have marked the portion of the submitted information that may be withheld under section 552.107 of the Government Code. The comptroller must withhold the Texas license plate numbers of motor vehicles appearing in the submitted photographs. The remainder of the submitted information must be released to the requestor.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within thirty calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within ten calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within ten calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within ten calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free,

at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within ten calendar days of the date of this ruling.

Sincerely,



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Open Records Division

DRS/seg

Ref: ID# 211071

Enc: Submitted documents

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