



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 23, 2008

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

OR2008-01066

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# 300258.

The Texas Comptroller of Public Accounts (the "comptroller") received a request for copies of any and all electronic messages received or sent by any employee of the comptroller relating to the TexNet payment processing server for the period of October 16 through October 23, 2007. You state that the comptroller will release some of the requested information, but claim that a portion of the submitted information is not subject to the Act. You also claim that portions of the submitted information are excepted from disclosure under sections 552.101, 552.111, 552.136, 552.137, and 552.139 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.¹

You claim that a portion of the submitted information is not subject to the Act. In Open Records Decision No. 581 (1990), this office determined that certain computer information that has no significance other than its use as a tool for the maintenance, manipulation, or

¹We 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.

protection of public property, such as source codes, documentation information, and other computer programming, is not the kind of information made public under section 552.021 of the Government Code. Based on the reasoning in this decision and our review of the information at issue, we agree that some of the submitted information does not constitute public information under section 552.002 of the Government Code as it has no significance other than its use as a tool for the maintenance, manipulation or protection of public property. Accordingly, this information, which we have marked, is not subject to the Act and need not be released to the requestor. However, we determine that the remaining submitted information is subject to the Act; therefore, we will address your arguments under sections 552.101, 552.111, 552.136, 552.137, and 552.139 of the Government Code for this information.

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. This section encompasses information made confidential by other statutes, including section 151.027 of the Tax Code, which provides in part:

(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.

.....

(c) This section does not prohibit:

(1) the examination of information, if authorized by the comptroller, by another state officer or law enforcement officer, by a tax official of another state, by a tax official of the United Mexican States, or by an official of the United States if a reciprocal agreement exists;

(2) the delivery to a taxpayer, or a taxpayer’s authorized representative, of a copy of a report or other paper filed by the taxpayer under this chapter;

(3) the publication of statistics classified to prevent the identification of a particular report or items in a particular report;

(4) the use of records, reports, or information secured, derived, or obtained by the attorney general or the comptroller in an action under this chapter against the same taxpayer who furnished the information;

(5) the delivery to a successor, receiver, executor, administrator, assignee, or guarantor of a taxpayer of information about items included in the measure and amounts of any unpaid tax or amounts of tax, penalties, and interest required to be collected;

(6) the delivery of information to an eligible municipality in accordance with Section 321.3022; or

(7) the release of information in or derived from a record, report, or other instrument required to be furnished under this chapter by a governmental body, as that term is defined in Section 552.003, Government Code.

Tax Code § 151.027(a), (c). Having considered your representations and reviewed the information at issue, we find a portion of the submitted information is information obtained during the course of an examination of the taxpayer's records for purposes of section 151.027 of the Tax Code. We further find that release of the information in this instance is not authorized by section 151.027(c). Therefore, the comptroller must withhold the submitted information that we have marked pursuant to section 552.101 of the Government Code in conjunction with section 151.027 of the Tax Code. *See* Attorney General Opinion H-223 (1974).

Additionally, you claim that a portion of the submitted information is excepted from public 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." 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 recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630S.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 (1993), 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 that section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, and opinions that reflect the policymaking processes of the governmental body. *See* Open Records Decision No. 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. 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). Moreover, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *See* Open Records Decision No. 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).

You argue that a portion of the submitted information consists of advice, opinions or recommendations concerning a policymaking issue. Upon review, we find that the comptroller has failed to demonstrate that any of the submitted information constitutes internal communications that consist of advice, recommendations, or opinions that reflect the policymaking processes of the comptroller. Therefore, we find that the comptroller has failed to establish the applicability of section 552.111 to the submitted information. *See* Gov't Code § 552.301(e)(1) (requiring governmental body to explain the applicability of the raised exception). Accordingly, none of the submitted information may be withheld under section 552.111 of the Government Code.

Next, you assert that a portion of the submitted information is protected under section 552.137 of the Government Code. Section 552.137 of the Government Code states that "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act]," unless the owner of the e-mail address has affirmatively consented to its public disclosure. *Id.* § 552.137(a)-(b). You do not inform us that the owner of the e-mail address has affirmatively consented its to release. Therefore, the comptroller must withhold the e-mail address that you have marked under section 552.137 of the Government Code.

Finally, you claim that a portion of the remaining submitted information is excepted under section 552.139 of the Government Code, which provides:

(a) Information is excepted from the requirements of Section 552.021 if it is information that relates to computer network security or to the design, operation, or defense of a computer network.

(b) The following information is confidential:

(1) a computer network vulnerability report; and

(2) any other assessment of the extent to which data processing operations, a computer, or a computer program, network, system, or software of a governmental body or of a contractor of a governmental body is vulnerable to unauthorized access or harm, including an

assessment of the extent to which the governmental body's or contractor's electronically stored information is vulnerable to alteration, damage, or erasure.

Gov't Code § 552.139. You indicate that a portion of the submitted information discussing where electronic tax payments are stored relates to computer network security or to the design, operation, or defense of a computer network. Upon review, we find that the comptroller may withhold the information we have marked under section 552.139 of the Government Code.

In summary, the comptroller need not release the information we have marked that is not subject to the Act. The comptroller must withhold the marked information under section 552.101 in conjunction with section 151.027 of the Tax Code. The comptroller must also withhold the information you have marked under section 552.137 and the information we have marked under section 552.139 of the Government Code. The remaining submitted information must be released.²

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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, the governmental body must file suit within 10 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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline,

²As our ruling is dispositive, we do not address your remaining arguments.

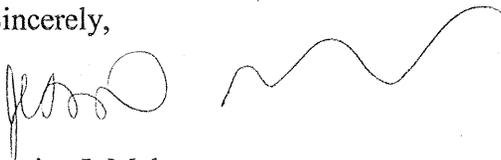
toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can challenge that decision by suing the governmental body. *Id.* § 552.321(a); *Texas 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 Office of the Attorney General 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. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read 'Jessica J. Maloney', with a long, wavy flourish extending to the right.

Jessica J. Maloney
Assistant Attorney General
Open Records Division

JJM/jh

Ref: ID# 300258

Enc. Submitted documents

c: Mr. Trey McAtee
8127 Mesa, Suite B-206
Austin, Texas 78759
(w/o enclosures)