



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 18, 2010

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

OR2010-02479

Dear Ms. Soucy:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), Government Code, chapter 552. Your request was originally received by the Open Records Division of this office and assigned ID# 370698. Preparation of the ruling has been assigned to the Opinion Committee of this office.

I. Public Information Act Request

The Comptroller of Public Accounts (the "Comptroller") received a letter dated November 20, 2009, from Ryan McNeill of the *Dallas Morning News*, seeking the following information under the Act:

Any communications, written or otherwise,
concerning the dates of birth of government employees.

Any documents, written or otherwise, concerning the
dates of birth of government employees.

Mr. McNeill asked that the above-referenced communications and documents be provided for the time frame between June 1, 2009, and the date of his request, November 20, 2009.

The Comptroller responded to Mr. McNeill's request by letter of December 9, 2009, by noting that "some of the requested records are protected from disclosure by Sections 552.101 through 552.151 of the Texas Government Code. Therefore, we are seeking a decision from the attorney general concerning this information." Also on December 9, 2009, the Comptroller requested from this office a ruling under the Act and stated that "[the Comptroller's] written comments explaining the applicability of the stated exceptions to the requested records and also a representative sample of the records at issue will be provided

to [the Office of the Attorney General] within fifteen (15) business days after receipt of the request.” Subsequently, and in a timely manner, the Comptroller delivered to this office a letter containing representative samples of the documents and arguing that certain samples should be excepted from disclosure under sections 552.103 (litigation), 552.107 (attorney-client privilege), and 552.111 (deliberative process privilege). You have provided eleven separate documents as representative samples and marked each of them with the numbered exceptions you believe to be applicable. We will first consider the scope of these exceptions.¹

II. Exceptions Claimed to be Applicable

A. Section 552.103 (litigation)

Section 552.103(a) of the Government Code excepts from required public disclosure “information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person’s office or employment, is or may be a party.” In order to prevail upon a claim under this exception, the governmental body must demonstrate not only that relevant litigation is pending, but also that “the information . . . relates to the litigation.” See *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.). The governmental body must explain how the requested information relates to the issues in litigation. See Tex. Att’y Gen. ORD-551 (1990) at 5.

We note that the litigation at issue here is currently pending before the Supreme Court of Texas as cause number 08-0172. It represents an appeal from the decision of the Third Court of Appeals in *Texas Comptroller of Public Accounts v. Attorney General of Texas*, 244 S.W.3d 629 (Tex. App.—Austin 2008, pet. granted). We note that the primary issue before the court is whether “state employees’ dates of birth must be disclosed pursuant to a request for information under the Texas Public Information Act.” *Id.* at 632.

B. Section 552.107 (attorney-client privilege)

Section 552.107 of the Government Code excepts from required public disclosure, *inter alia*, “information that the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Texas Rules of Evidence or the Texas Disciplinary Rules of Professional Conduct.” The governmental body claiming this exception must demonstrate (1) that the information constitutes or documents a communication; (2) that the communication has been made “for the purpose of facilitating

¹We 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 that those records contain substantially different types of information than that submitted to this office.

the rendition of professional legal services to the client governmental body”; (3) that the communication was between or among clients, client representatives, lawyers, and lawyer representatives; (4) that the communication 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”; and (5) that the communication has remained confidential. Tex. Att’y Gen. ORD-676 (2002) at 5, 7–8, 10. If a governmental body demonstrates that any portion of a communication is protected under the attorney-client privilege, then the entire communication will be excepted from disclosure under section 552.107. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996).

C. Section 552.111 (deliberative process privilege)

The deliberative process privilege under section 552.111 of the Government Code protects from disclosure intra-agency and interagency communications consisting of advice, opinion, or recommendations on policymaking matters of the governmental body at issue. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 361, 364 (Tex. 2000). “An agency’s policymaking functions do not encompass routine internal administrative and personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues.” Tex. Att’y Gen. ORD-615 (1993) at 5. Even when an internal memorandum does relate to a governmental body’s policy functions, the deliberative process privilege excepts from disclosure only the advice, recommendations, and opinions found in that memorandum. The privilege does not except from disclosure purely factual information that is severable from the opinion portions of the memorandum. *Id.* at 4–5.

III. Representative Sample Documents

As we have noted, you have marked various documents that you contend are representative samples of the information requested. We have numbered those documents (together with their attachments) as numbers one through eleven. We will proceed to determine the applicability of the exceptions you claim.

Document Number	Claimed Exception(s)	Determination
1	552.103	denied: no showing of relatedness
2	552.103	denied: no showing of relatedness
3	552.103	denied: no showing of relatedness
4	552.103	denied: no showing of relatedness

5	552.103, 552.107	accepted: attorney-client communication
6	552.103, 552.107	accepted: attorney-client communication
7	552.103, 552.107	accepted: attorney-client communication
8	552.103, 552.107	accepted: attorney-client communication
9	552.103, 552.107	accepted: attorney-client communication
10	552.103, 552.107, 552.111	accepted: relates to litigation
11	552.103, 552.107, 552.111	accepted: relates to litigation

With this letter, we are returning the documents marked as “representative samples.” Please note that the documents marked “denied” have not been demonstrated to be within one of the claimed exceptions to disclosure and that those documents should be made available to the requestor. If a governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office.

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,



Susan Garrison
Assistant Attorney General
Opinion Committee

SLG/pdr

Ref: ID# 370698

Enc. Submitted documents

c. Requestor
(w/o enclosures)