



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

February 22, 2010

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

OR2010-02611

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# 371094 (Comptroller ID# 6041627613).

The Texas Comptroller of Public Accounts (the "comptroller") received a request for information relating to a specified Request for Offers, to include (1) the proposal, best and final offer materials, and certain presentation materials submitted by Deloitte; (2) communications between the evaluation committee or procurement officials and Deloitte concerning the request for offers; (3) minutes of meetings or transcripts of the evaluation committee; (4) evaluation committee scoring sheets and associated materials used during the procurement process; (5) all available internal communications between the comptroller and the participating agencies and committee members; (6) all documented procedures followed by the procurement officials and evaluation committee members; and (7) instructions provided throughout the evaluation, selection, and award process. You inform us the comptroller will release some of the responsive information. You also inform us that Deloitte will be notified that its proprietary rights may be implicated by this request and of its right to submit arguments as to why its submitted information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). You claim the submitted information is excepted from disclosure under sections 552.101, 552.107,

and 552.111 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted representative samples of information.²

Initially, we note that an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why requested information relating to it should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have not received correspondence from Deloitte explaining why its submitted information should not be released. Thus, we have no basis for concluding that any portion of the submitted information pertaining to Deloitte constitutes proprietary information, and the comptroller may not withhold its information on that basis. *See* Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990).

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 section 171.206 of the Tax Code which provides that the following information is excepted from disclosure:

- (1) information that is obtained from a record or other instrument that is required by this chapter to be filed with the comptroller; or
- (2) information, including information about the business affairs, operations, profits, losses, cost of goods sold, compensation, or expenditures of a taxable entity, obtained by an examination of the books and records, officers, partners, trustees, agents, or employees of a taxable entity on which a tax is imposed by this chapter.

Tax Code § 171.206. You state the information you have highlighted consists of taxpayer information that is confidential under section 171.206. Upon review, we agree that the information you have highlighted is within the scope of this provision. Accordingly, the comptroller must withhold the highlighted information under section 552.101 of the Government Code in conjunction with section 171.206 of the Tax Code.

¹We note you have not submitted arguments in support of the remaining exceptions you assert; thus we assume you have withdrawn them. *See* Gov't Code §§ 552.301, .302.

²We 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.

Section 552.107(1) of the Government Code protects information coming within 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. 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 Texas 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 only to communications between or among clients, client representatives, lawyers, and lawyer representatives.³ TEX. R. EVID. 503(b)(1)(A)-(E). 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 only to a *confidential* communication, *id.* 503(b)(1), 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, no pet.). 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 indicate that the information you have marked consists of confidential communications between the comptroller and state agencies who share a privity of interest concerning certain

³Specifically, 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)-(E); *see also id.* 503(a)(2), (a)(4) (defining “representative of the client,” “representative of the lawyer”).

legal matters affecting the state.⁴ See Gov't Code §§ 2101.031(a) (providing that the uniform statewide accounting project is in the comptroller's office), .031(c) (directing the comptroller to ensure that the statewide accounting project includes enterprise resource planning); see also Gov't Code §§ 2101.031-.040 (describing the comptroller's duties with the respect to the uniform statewide accounting system). You state that these communications were made for the purpose of facilitating the rendition of professional legal services, that the communications were intended to be confidential, and that confidentiality has been maintained. You have identified the parties to the communications. Based on your representations and our review of the submitted documents, we find that the information at issue consists of privileged attorney-client communications that the comptroller may withhold under section 552.107(1) of the Government Code. See TEX. R. EVID. 503(b)(1)(C) (client has privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for purpose of facilitating rendition of professional legal services to lawyer or representative of lawyer representing another party in pending action and concerning a matter of common interest therein); TEX. R. DISCIPLINARY CONDUCT 1.05(c)(1) (lawyer may reveal confidential information when lawyer has been expressly authorized to do so in order to carry out representation); *In re Auclair*, 961 F.2d 65, 69 (5th Cir. 1992) (citing *Hodges, Grant & Kaufmann v. United States Government*, 768 F.2d 719, 721 (5th Cir. 1985)) (attorney-client privilege not waived if privileged communication is shared with third person who has common legal interest with respect to subject matter of communication); see also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 75 (extending attorney-client privilege to communications of co-clients represented by same lawyer in matter of common interest).⁵

You state that a portion of the remaining information is protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. See Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of materials that are subject to copyright protection unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. See Open Records Decision No. 550 (1990).

In summary, the comptroller must withhold the highlighted information under section 552.101 of the Government Code in conjunction with section 171.206 of the

⁴See TEX. R. EVID. 503(a)(2) (defining "representative of the client" as person having authority to obtain legal services or to act on legal advice on behalf of the client, or person who for purpose of effectuating legal representation makes or receives a confidential communication while acting in scope of employment for client).

⁵As our ruling is dispositive, we do not address your remaining argument for this information.

TaxCode. The comptroller may withhold the information you have marked under section 552.107 of the Government Code. The remaining information must be released; however, in releasing the information that is copyrighted, the comptroller must comply with applicable copyright law.

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,



Pamela Wissemann
Assistant Attorney General
Open Records Division

PFW/cc

Ref: ID# 371094

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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c/o Ruth H. Soucy
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