



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 27, 2012

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

OR2012-01378

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# 443617 (Comptroller ID# 7727226840 and 7727230422).

The Texas Comptroller of Public Accounts (the "comptroller") received two requests for information related to three specified hearings. You state the comptroller has released some of the information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.101, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

We turn first to your claim under section 552.107(1) of the Government Code, which protects information coming within the attorney-client privilege. Gov't Code § 552.107(1). 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

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

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, lawyer representatives, and a lawyer representing another party in a pending action and concerning a matter of common interest therein. *See* TEX R. EVID. 503(b)(1). 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.*, 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, orig. proceeding). 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 state the information in exhibits H(1) and H(2) consists of e-mail communications sent between the comptroller’s attorneys and staff in order to facilitate the rendition of legal services to the comptroller. You explain these communications were intended to be, and have remained, confidential. Based on your representations and our review, we agree the comptroller may withhold exhibits H(1) and H(2) under section 552.107(1) of the Government Code.²

We turn next to the remaining information, for which you claim section 552.101 of the Government Code. 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 protected by other statutes, including sections 111.006 and 171.206 of the Tax Code. Section 111.006 of the Tax Code protects from disclosure the following types of taxpayer information obtained from an audit of a taxpayer:

²As our ruling is dispositive, we do not address your remaining arguments against disclosure for this information.

all information secured, derived, or obtained by the comptroller or the attorney general during the course of an examination of the taxpayer's books, records, papers, officers, or employees, including an examination of the business affairs, operations, source of income, profits, losses, or expenditures of the taxpayer.

Tax Code § 111.006(a)(2). Section 171.206 of the Tax Code provides the following information collected under the Franchise Tax Act is generally 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.

Id. § 171.206. The Supreme Court of Texas addressed the applicability of sections 111.006 and 171.206 of the Tax Code to the Act in *A&T Consultants, Inc. v. Sharp*, 904 S.W.2d 668 (Tex. 1995), stating:

The Tax Code prevents the disclosure of data “obtained” or “derived” from a taxpayer . . . Confidentiality under the Tax Code thus turns on the identity of the source of the information. It makes confidential the information obtained or derived from *taxpayers*.

Id. at 676 (citations omitted) (emphasis in original). You state the information you seek to withhold in Exhibits D(1), D(2), D(3), D(4), E(1), E(2), E(3), F(1), F(2), G(1), G(2), G(3), and G(4) was either obtained by the comptroller from the taxpayers or was derived by the comptroller from records submitted by the taxpayer. We note, however, a portion of the information you seek to withhold in Exhibit D(3) was not obtained from the taxpayer and contains no information derived from taxpayer records. Accordingly, this information, which we have marked for release, is not subject to section 111.006 or section 171.206 of the Tax Code and may not be withheld under section 552.101 of the Government Code on those bases. The comptroller must withhold the remaining information you seek to withhold in Exhibits D(1), D(2), D(3), D(4), E(1), E(2), E(3), F(1), F(2), G(1), G(2), G(3), and G(4) under section 552.101 of the Government Code in conjunction with sections 111.006(a)(2) and 171.206 of the Tax Code.

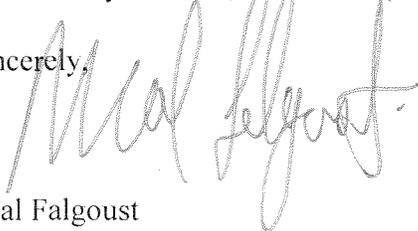
In summary, the comptroller may withhold exhibits H(1) and H(2) under section 552.107 of the Government Code. With the exception of the information we marked for release, the comptroller must withhold the remaining information you seek to withhold in Exhibits D(1),

D(2), D(3), D(4), E(1), E(2), E(3), F(1), F(2), G(1), G(2), G(3), and G(4) under section 552.101 of the Government Code in conjunction with sections 111.006 and 171.206 of the Tax Code. The remaining information 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.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,



Neal Falgoust
Assistant Attorney General
Open Records Division

NF/agn

Ref: ID# 443617

Enc. Submitted documents

c: Requestor
(w/o enclosures)