



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

February 10, 2012

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

OR2012-02164

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# 445122 (Comptroller ID# 7773920647).

The Texas Comptroller of Public Accounts (the "comptroller's office") received a request for all correspondence related to refund claim procedures specific to rule 3.325 of chapter 34 of the Texas Administrative Code from a specified time period.<sup>1</sup> You inform us the comptroller's office will release some of the responsive information to the requestor with e-mail addresses redacted under section 552.137 of the Government Code pursuant to Open Records Decision No. 684 (2009).<sup>2</sup> You claim the submitted information is excepted from disclosure under sections 552.101, 552.107, and 552.111 of the Government Code. We have

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<sup>1</sup>You inform us the TCPA asked for and received clarification of the request. *See* Gov't Code § 552.222(b) (providing that if request for information is unclear, governmental body may ask requestor to clarify request); *see also* *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when governmental entity, acting in good faith, requests clarification or narrowing of unclear or overbroad request for public information, ten-day period to request attorney general ruling is measured from date request is clarified or narrowed).

<sup>2</sup>We note Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including e-mail addresses of members of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision, unless authorized to release the information according to applicable law.

considered the exceptions you claim and reviewed the submitted representative samples of information.<sup>3</sup>

You claim portions of Exhibit D are confidential under section 111.006(a)(2) of the Tax Code in conjunction with section 552.101 of the Government Code. Section 552.101 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. Section 111.006(a)(2) provides that “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” is confidential. Tax Code § 111.006(a)(2).

The supreme court considered the applicability of section 111.006 of the Tax Code 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 have marked in Exhibit D was obtained by the comptroller’s office from taxpayers in the course of examinations of the taxpayers’ business affairs. Based on our review of the information in Exhibit D and *A & T Consultants*, we conclude some of the information in this exhibit, which we have marked, is confidential under section 111.006 of the Tax Code and must be withheld in conjunction with section 552.101 of the Government Code. However, you have failed to demonstrate how the remaining information you have marked in Exhibit D constitutes information obtained from taxpayers or was derived from taxpayer records. Accordingly, none of this information may be withheld under section 552.101 of the Government Code on that basis.

You seek to withhold the remaining information you marked in Exhibit D under section 552.101 of the Government Code in conjunction with section 151.027 of the Tax Code. Section 151.027 of the Tax Code provides in relevant 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

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<sup>3</sup>We 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 that submitted to this office.

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.

(b) Information secured, derived, or obtained during the course of an examination of a taxpayer's books, records, papers, officers, or employees, including the business affairs, operations, profits, losses, and expenditures of the taxpayer, is confidential and not open to public inspection except as provided by Subsection (c) of this section.

Tax Code § 151.027(a)-(b). Upon review, you have provided no arguments explaining how the information at issue is information in or derived from a record, report, or other instrument required to be furnished under chapter 151 for purposes of section 151.027(a). Further, information made confidential under section 151.027(b) is co-extensive with information deemed confidential under section 111.006(a)(2). Thus, none of the remaining information at issue is confidential under section 151.027(b). Therefore, none of the remaining information in Exhibit D may be withheld under section 552.101 of the Government Code on this basis.

You raise section 552.107 of the Government Code for Exhibit E. Section 552.107 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 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). Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. 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.* 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, orig. proceeding). 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 inform us that the draft documents and pleadings submitted in Exhibit E consist of communications between attorneys for the comptroller's office and comptroller's office employees that were made for the purpose of providing legal advice to the comptroller's office. You have identified the parties to these communications. You inform us the communications were intended to be, and have remained, confidential. Based on your representations and our review, we conclude you have established the information at issue is protected by the attorney-client privilege. Therefore, the comptroller's office may withhold Exhibit E under section 552.107(1) of the Government Code.<sup>4</sup>

You assert Exhibit F is excepted from disclosure under section 552.111 of the Government Code. Section 552.111 excepts from disclosure "an interagency or intra-agency 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*, 630 S.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*, 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 section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See ORD 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. 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)*.

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<sup>4</sup>As our ruling for this information is dispositive, we need not address your remaining argument against its release.

Further, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); see ORD 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).

Section 552.111 can also encompass communications between a governmental body and a third-party, including a consultant or other party with a privity of interest. See Open Records Decision No. 561 at 9 (1990) (section 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process). For section 552.111 to apply, the governmental body must identify the third party and explain the nature of its relationship with the governmental body. Section 552.111 is not applicable to a communication between the governmental body and a third party unless the governmental body establishes it has a privity of interest or common deliberative process with the third party. See ORD 561 at 9.

You inform us that Exhibit F consists of the advice, opinions, and recommendations of comptroller's office employees regarding the language to be used in drafting and adopting a version of rule 3.325 of chapter 34 of the Texas Administrative Code, which is the rule governing the procedures for applying for a refund of taxes previously paid to the state. Based on your representations and our review, we find that you have established that the deliberative process privilege is applicable to most of the information in Exhibit F. Therefore, the comptroller's office may withhold the information we have marked under section 552.111 of the Government Code. However, the remaining portions of Exhibit F are purely factual in nature, reflect that they were communicated with parties you have not identified as sharing a common deliberative process with the comptroller's office, or do not consist of advice, opinions, or recommendations. Thus, we conclude you failed to demonstrate the applicability of the deliberative process privilege to the remaining information in Exhibit F, and the comptroller's office may not withhold this information under section 552.111.

We note the remaining information contains e-mail addresses that are subject to section 552.137 of the Government Code.<sup>5</sup> This section excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body," unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). Gov't Code § 552.137(a)-(c). Upon review, we have marked e-mail addresses that do not appear to be

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<sup>5</sup>The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. See Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

of a type specifically excluded by section 552.137(c). Accordingly, the comptroller's office must withhold the e-mail addresses we marked under section 552.137 of the Government Code unless the individuals to whom they belong affirmatively consent to their release. *See id.* § 552.137(b).

In summary, the comptroller's office must withhold the information we marked in Exhibit D under section 552.101 of the Government Code in conjunction with section 111.006 of the Tax Code. Exhibit E may be withheld under section 552.107(1) of the Government Code. The comptroller's office may withhold the information we marked in Exhibit F under section 552.111 of the Government Code. The e-mail addresses we marked must be withheld under section 552.137 of the Government Code unless the individuals to whom they belong affirmatively consent to their release. The comptroller's office must release the remaining information.

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](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,



Kenneth Leland Conyer  
Assistant Attorney General  
Open Records Division

KLC/agn

Ref: ID# 445122

Enc. Submitted documents

c: Requestor  
(w/o enclosures)