



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

April 16, 2015

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

OR2015-07431

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# 560376 (Comptroller ID# 11198292524).

The Texas Comptroller of Public Accounts (the "comptroller's office") received a request for (1) communications regarding D6 Consulting and the definitions of "professional services" and "legal services"; (2) the number of specified companies that were audited by the comptroller's office employing two named individuals and the dispositions of the audits; (3) the number of companies audited by the two named individuals and the dispositions; (4) information pertaining to the number of companies audited by the comptroller's office statewide; (5) the average amount of collections per auditor statewide and the average amount of the two named individuals; (6) personnel information pertaining to the two named individuals; and (7) training materials for auditors.<sup>1</sup> You state you will release some information. You also state some of the requested information is subject to the previous determinations issued to the comptroller's office in Open Records Letter Nos. 2009-14326

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<sup>1</sup> You state the comptroller's office sought and received clarification of the information requested. See Gov't Code § 552.222 (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 a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or over-broad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

(2009), 2007-10491 (2007), 2004-3926 (2004), and 2003-3587 (2003).<sup>2</sup> You claim the submitted information is excepted from disclosure under section 552.107 of the Government Code. We have considered the exception you claim and reviewed the submitted representative sample of information.<sup>3</sup>

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 “to facilitate 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). 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. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (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: (A) to whom disclosure is made to further the rendition of professional legal services to the client; or (B) reasonably necessary to transmit 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,

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<sup>2</sup> Open Records Letter No. 2009-14326 is a previous determination issued to the comptroller’s office authorizing the comptroller’s office to withhold audit method codes under section 552.108(a)(1) of the Government Code, without requesting a decision from the attorney general. Open Records Letter No. 2007-10491 authorized the comptroller’s office to withhold audit working papers created during the course of an audit conducted under the authority of section 111.004 of the Tax Code under section 552.116 of the Government Code, without requesting a decision from the attorney general. Open Records Letter No. 2004-3926 authorized the comptroller’s office to withhold comments entered into its internal Agency Work Manager system that are prepared or maintained in conducting audits under section 552.116 of the Government Code, without requesting a decision from the attorney general. Open Records Letter No. 2003-3587 authorized the comptroller’s office to withhold the amounts of tax adjustments and audit reason codes contained in a listing of completed tax audits without requesting a decision from the attorney general

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

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).

The comptroller's office states the submitted information consists of communications involving comptroller's office attorneys, comptroller's office representatives, and other comptroller's office employees and officials. The comptroller's office states the communications were made for the purpose of facilitating the rendition of professional legal services to the comptroller's office and these communications have remained confidential. Upon review, we find the comptroller's office has demonstrated the applicability of the attorney-client privilege to the submitted information. Thus, the comptroller's office may withhold the submitted information under section 552.107(1) of the Government Code.

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.texasattorneygeneral.gov/open/orl\\_ruling\\_info.shtml](http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml), 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Katelyn Blackburn-Rader  
Assistant Attorney General  
Open Records Division

KB-R/akg

Ref: ID# 560376

Enc. Submitted documents

c: Requestor  
(w/o enclosures)