



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

June 3, 2016

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

OR2016-12714

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# 612728 (Comptroller ID#: 12224865827).

The Texas Comptroller of Public Accounts (the "comptroller's office") received a request for all documents, including position letters issued by the hearings section of the comptroller's office and excluding any documents consisting of attorney-client communications, related to the Texas franchise tax and companies that install flooring during a specified time period.¹ You state you have released some information. You claim the submitted information is excepted from disclosure under sections 552.101 and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

¹You state, and provide documentation showing, the comptroller's office received clarification of the request for information. *See* Gov't Code § 552.222(b) (stating governmental body may communicate with requestor for purpose of clarifying or narrowing request for information); *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 overbroad request for information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

²We 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.

Initially, you assert, and we agree, a portion of the submitted information, which you have marked, is not responsive to the instant request because the requestor excludes attorney-client communications from the scope of her request. This ruling does not address the public availability of any information that is not responsive to the request and the comptroller's office is not required to release that information in response to the request.

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 made confidential by other statutes. Section 111.006(a)(2) of the Tax Code 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 to several categories of information in *A & T Consultants, Inc. v. Sharp*, 904 S.W.2d 668 (Tex. 1995). In doing so, the court not only considered if the information was derived from the taxpayer's records, but also whether the information reveals anything about the taxpayer's business affairs, operations, financial condition, profits, or losses. *Id.* at 676, 680. The court concluded that the starting and ending dates of an audit are not confidential under section 111.006 because although they may indicate the seriousness of an audit, they "reveal[] nothing about a taxpayer's business affairs, operations, or profits or losses." *Id.* at 676. Similarly, the court concluded that while the amounts of deficiencies or refunds are derived from the taxpayer's records, the fact of a deficiency or refund "reveals nothing about taxpayers except that they miscalculated their tax." *Id.* at 680; *see id.* at 680 n. 6. Thus, the fact of a deficiency or refund is not confidential under section 111.006.

You assert Exhibit C consists of information "secured, derived, or obtained" by the comptroller's office during the course of examinations of taxpayers. Based on our review of the information at issue and *A&T Consultants*, we conclude the information we have marked within Exhibit C is confidential under section 111.006 of the Tax Code and must be withheld under section 552.101 of the Government Code. However, based on our review of the information at issue and *A&T Consultants*, we find none of the remaining information within Exhibit C is confidential under section 111.006 because although the information is obtained or derived from a taxpayer's records, it does not reveal a taxpayer's business affairs, financial condition, profits, or losses. Accordingly, the comptroller's office may not withhold the remaining information under section 552.101 of the Government Code in conjunction with section 111.006(a)(2) of the Tax Code.

Section 552.111 of the Government Code excepts from disclosure "[a]n interagency or intraagency 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, writ ref'd n.r.e.); Open Records Decision No. 538 at 1-2 (1990).

In Open Records Decision No. 615 (1993), 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 that 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). Additionally, section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); ORD 615 at 4-5. 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).

This office has also concluded a preliminary draft of a document intended for public release in its final form necessarily represents the drafter's advice, opinion, and recommendation with regard to the form and content of the final document, so as to be excepted from disclosure under section 552.111. *See* Open Records Decision No. 559 at 2 (1990) (applying statutory predecessor). Section 552.111 protects factual information in the draft that also will be included in the final version of the document. *See id.* at 2-3. Thus, section 552.111 encompasses the entire contents, including comments, underlining, deletions, and proofreading marks, of a preliminary draft of a policymaking document that will be released to the public in its final form. *See id.* at 2.

You assert the remaining responsive information consists of advice, opinions, and recommendations relating to the policymaking of the comptroller's office. Further, you inform us some of the information at issue consists of a draft policymaking document. We understand the draft document was intended for release in its final form. Based on these representations and our review, we find you have demonstrated portions of the information at issue consist of advice, opinions, or recommendations on the policymaking matters of the comptroller's office. Accordingly, the comptroller's office may withhold the information we have marked under section 552.111 of the Government Code. However, we find the

remaining information at issue consists of information that is administrative or purely factual in nature, or does not pertain to policymaking. Thus, we find you have failed to establish the remaining information at issue is protected by the deliberative process privilege. Therefore, the comptroller's office may not withhold the remaining information under section 552.111.

In summary, the comptroller's office must withhold the information we have marked within Exhibit C under section 552.101 of the Government Code in conjunction with section 111.006 of the Tax Code. The comptroller's office may withhold the information we have marked under section 552.111 of the Government Code. The remaining responsive 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.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,

A handwritten signature in black ink, appearing to read "Cole Hutchison", with a long horizontal line extending to the right.

Cole Hutchison
Assistant Attorney General
Open Records Division

CH/akg

Ref: ID# 612728

Enc. Submitted documents

c: Requestor
(w/o enclosures)