



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

March 23, 2015

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

OR2015-05497

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# 557181 (Comptroller ID# 11123235112).

The Texas Comptroller of Public Accounts (the "comptroller's office") received a request for e-mail correspondence sent to or from a named employee during a specified time period. You state the comptroller's office will provide some of the requested information upon the requestor's response to a cost estimate. You claim some of the submitted information is not subject to the Act. You also claim the submitted information is excepted from disclosure under sections 552.106, 552.107, 552.111, 552.116, 552.117, 552.137, and 552.139 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

Initially, you contend some of the information at issue is not subject to the Act. The Act is applicable only to "public information." *See* Gov't Code § 552.021. Section 552.002(a) defines "public information" as the following:

¹This letter ruling assumes that the submitted representative sample of information is truly representative of the requested information as a whole. This ruling does not reach, and therefore does not authorize, the withholding of any other requested information to the extent that the other information is substantially different than that submitted to this office. *See* Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

[I]nformation that is written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

- (1) by a governmental body;
- (2) for a governmental body and the governmental body:
 - (A) owns the information;
 - (B) has a right of access to the information; or
 - (C) spends or contributes public money for the purpose of writing, producing, collecting, assembling, or maintaining the information; or
- (3) by an individual officer or employee of a governmental body in the officer's or employee's official capacity and the information pertains to official business of the governmental body.

Id. § 552.002(a). Thus, virtually all the information in a governmental body's physical possession constitutes public information and is subject to the Act. *Id.*; see Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). You generally assert some of the information at issue consists of purely personal e-mails that are unrelated to the transaction of official business of the comptroller's office. See Open Records Decision No. 635 at 4 (1995) (section 552.002 not applicable to personal information unrelated to official business and created or maintained by state employee involving *de minimis* use of state resources). You do not mark or otherwise indicate which information you contend is not subject to the Act. Upon our review, we find the submitted information was written, produced, collected, assembled, or maintained in connection with the transaction of official business by employees of the comptroller's office in their official capacities. Thus, we conclude the submitted information is subject to the Act. Accordingly, we will address your arguments against disclosure of the submitted information.

Next, we note some of the submitted information, which we have marked, is not responsive to the present request for information because it does not consist of e-mail correspondence sent to or from the named employee. This ruling does not address the public availability of any information that is not responsive to the request, and the comptroller's office need not release such information in response to this request.

Section 552.107(1) of the Government Code 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 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). 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 to only 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. 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 to only 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). 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 state the responsive information you have marked constitutes a communication between attorneys and employees for the comptroller’s office in their capacity as clients that was made for the purpose of providing legal services to the comptroller’s office. You state the communication was intended to be confidential and has remained confidential. Based on your representations and our review, we find the responsive information you have marked consists of a privileged attorney-client communication the comptroller’s office may withhold under section 552.107(1) of the Government Code.

We next address your argument under section 552.139 of the Government Code because it is potentially more encompassing than your argument under section 552.111 of the Government Code for some of the submitted information. Section 552.139 provides, in part, the following:

- (a) Information is excepted from [required public disclosure] if it is information that relates to computer network security, to restricted

information under Section 2059.055 [of the Government Code], or to the design, operation, or defense of a computer network.

(b) The following information is confidential:

(1) a computer network vulnerability report; [and]

(2) any other assessment of the extent to which data processing operations, a computer, a computer program, network, system, or system interface, or software of a governmental body or of a contractor of a governmental body is vulnerable to unauthorized access or harm, including an assessment of the extent to which the governmental body's or contractor's electronically stored information containing sensitive or critical information is vulnerable to alteration, damage, erasure, or inappropriate use[.]

Gov't Code § 552.139(a), (b)(1)-(2). Section 2059.055 of the Government Code provides in part:

(b) Network security information is confidential under this section if the information is:

(1) related to passwords, personal identification numbers, access codes, encryption, or other components of the security system of a state agency;

(2) collected, assembled, or maintained by or for a governmental entity to prevent, detect, or investigate criminal activity; or

(3) related to an assessment, made by or for a governmental entity or maintained by a governmental entity, of the vulnerability of a network to criminal activity.

Id. § 2059.055(b). You state the information you have marked relates to and consists of discussions regarding agency computer network security issues, including possible network weaknesses, vulnerabilities, and security controls and protocols used by the comptroller's office's Innovation and Technology Division and Fiscal Management Division. You explain release of the information at issue could reveal how the computer systems of the comptroller's office work, thereby compromising the network's security and providing unauthorized access to confidential data within the network. Upon our review, we find you have demonstrated how this information relates to the design, operation, or defense of a computer network, or an assessment of the vulnerability of harm to data processing operations, a computer program, network, system, or software of the comptroller's office.

Thus, we conclude the comptroller's office must withhold the information you have marked under section 552.139.²

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[.]” *Id.* § 552.111. Section 552.111 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, 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. ORD 615 at 5; *see also City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *Arlington Indep. Sch. Dist. v. Texas Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.). 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). However, 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. ORD 615 at 5-6; *see also Dallas Morning News*, 22 S.W.3d at 364 (section 552.111 not applicable to personnel-related communications that did not involve policymaking).

Further, section 552.111 does not generally except from disclosure facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *Arlington Indep. Sch. Dist.*, 37 S.W.3d at 157; 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). When determining if an interagency memorandum is excepted from disclosure under section 552.111, we must consider whether the agencies between which the memorandum is passed share a privity of interest or common deliberative process with regard to the policy matter at issue. *See* Open Records Decision No. 561 at 9 (1990).

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 id.*

²As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

(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 id.* We note a governmental body does not have a privity of interest or common deliberative process with a private party with which the governmental body is engaged in contract negotiations. *See id.* (section 552.111 not applicable to communication with entity with which governmental body has no privity of interest or common deliberative process).

You contend the remaining information you have marked contains advice, opinion, and recommendations relating to policy matters of the comptroller's office. Based on your representations and upon our review, we find the information we have marked constitutes policymaking advice, opinion, and recommendation. Thus, the comptroller's office may withhold the information we have marked under section 552.111 of the Government Code on the basis of the deliberative process privilege.³ However, we find some of the remaining information at issue includes communications with an individual you have not demonstrated shares a privity of interest or common deliberative process with the comptroller's office. Additionally, we find the remaining information at issue consists of either general administrative information that does not relate to policymaking, or information that is purely factual in nature. Thus, you have failed to demonstrate how the remaining information at issue is excepted under section 552.111. Accordingly, we find none of the remaining information you have marked may be withheld on this basis.

Section 552.106 of the Government Code excepts from disclosure “[a] draft or working paper involved in the preparation of proposed legislation[.]” Gov’t Code § 552.106(a). Section 552.106 resembles section 552.111 of the Government Code in that both exceptions protect advice, opinion, and recommendation on policy matters in order to encourage frank discussion during the policymaking process. *See* Open Records Decision No. 460 at 2 (1987). However, section 552.106 applies specifically to the legislative process and is narrower than section 552.111. *Id.* Therefore, section 552.106 is applicable only to the policy judgments, recommendations, and proposals of persons who are involved in the preparation of proposed legislation and who have an official responsibility to provide such information to members of the legislative body. *Id.* Section 552.106 does not protect purely factual information from public disclosure. *See id.*; *see also* Open Records Decision No. 344 at 3-4 (1982) (for purposes of statutory predecessor, factual information prepared by State Property Tax Board did not reflect policy judgments, recommendations, or proposals concerning drafting of legislation). Upon review of your arguments, we find you have not demonstrated the remaining information you have marked consists of policy judgments, recommendations, or proposals pertaining to the preparation of proposed legislation.

³As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

Accordingly, the comptroller's office may not withhold the remaining information at issue under section 552.106.

Section 552.116 of the Government Code provides the following:

(a) An audit working paper of an audit of the state auditor or the auditor of a state agency, an institution of higher education as defined by Section 61.003, Education Code, a county, a municipality, a school district, a hospital district, or a joint board operating under Section 22.074, Transportation Code, including any audit relating to the criminal history background check of a public school employee, is excepted from the requirements of Section 552.021. If information in an audit working paper is also maintained in another record, that other record is not excepted from the requirements of Section 552.021 by this section.

(b) In this section:

(1) "Audit" means an audit authorized or required by a statute of this state or the United States, the charter or an ordinance of a municipality, an order of the commissioners court of a county, the bylaws adopted by or other action of the governing board of a hospital district, a resolution or other action of a board of trustees of a school district, including an audit by the district relating to the criminal history background check of a public school employee, or a resolution or other action of a joint board described by Subsection (a) and includes an investigation.

(2) "Audit working paper" includes all information, documentary or otherwise, prepared or maintained in conducting an audit or preparing an audit report, including:

(A) intra-agency and interagency communications; and

(B) drafts of the audit report or portions of those drafts.

Gov't Code § 552.116. You state the information you have marked consists of correspondence to and from the State Auditor's Office (the "SAO") regarding audits conducted by the SAO of various functions of the comptroller's office. Thus, you contend the correspondence you have marked consists of audit working papers excepted from disclosure under section 552.116. We note the SAO is the independent auditor for the Texas state government. *See generally id.* ch. 321. The SAO has authority under section 321.013 of the Government Code to conduct audits of all state departments as specified in the audit plan. *Id.* § 321.013(a). We note, however, section 552.116 is intended to protect the auditor's interests. The information at issue pertains to an audit of the comptroller's office

by the SAO. In this instance, the comptroller's office, as the auditee, cannot assert section 552.116 in order to protect the information at issue under section 552.116. You do not inform us the SAO seeks to withhold the information at issue under section 552.116. Accordingly, the comptroller's office may not withhold the information you have marked under section 552.116.

Section 552.117(a)(1) of the Government Code applies to records a governmental body holds in an employment capacity and excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. *Id.* § 552.117(a)(1). Section 552.117 is also applicable to cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (statutory predecessor to section 552.117 of the Government Code not applicable to cellular telephone numbers provided and paid for by governmental body and intended for official use). Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, a governmental body must withhold information under section 552.117 on behalf of a current or former official or employee only if the individual made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made.

You state some of the individuals whose information is at issue timely requested confidentiality of their information pursuant to section 552.024. Thus, the comptroller's office must withhold the information we have marked that pertains to these individuals under section 552.117(a)(1). However, we are unable to determine if the individual whose cellular telephone number we have marked timely requested confidentiality. Accordingly, if this individual timely requested confidentiality pursuant to section 552.024, the comptroller's office must withhold the cellular telephone number we have marked under section 552.117(a)(1) if the cellular telephone service is not paid for by a governmental body. The comptroller's office may not withhold this information under section 552.117 if the individual did not make a timely election to keep the information confidential or if the cellular telephone service is paid for by a governmental body. The remaining information you seek to withhold does not consist of information that is subject to section 552.117; thus, the comptroller's office may not withhold the remaining information at issue on that basis.

Section 552.137 of the Government Code 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). Section 552.137 is not applicable to an institutional e-mail address, an Internet website address, the general e-mail address of a business, an e-mail address of a person who has a contractual relationship with a governmental body, or an e-mail address maintained by a governmental entity for one of its officials or employees. The e-mail addresses we have

marked are not of the types specifically excluded by section 552.137(c). *See id.* § 552.137(c). Accordingly, the comptroller's office must withhold the e-mail addresses we have marked under section 552.137 unless the owners of the addresses affirmatively consent to their release. The remaining information at issue either does not consist of e-mail addresses or consists of e-mail addresses that are specifically excluded by section 552.137(c). *See id.* Thus, the comptroller's office may not withhold the remaining information at issue on that basis.

In summary, the comptroller's office may withhold the responsive information you have marked under section 552.107(1) of the Government Code. The comptroller's office must withhold the information you have marked under section 552.139 of the Government Code. The comptroller's office may withhold the information we have marked under section 552.111 of the Government Code on the basis of the deliberative process privilege. To the extent the individuals whose information we have marked timely requested confidentiality pursuant to section 552.024 of the Government Code, the comptroller's office must withhold the information we have marked under section 552.117(a)(1) of the Government Code; however, the comptroller's office must not withhold the cellular telephone number we have marked if the cellular telephone service is paid for by a governmental body. The comptroller's office must withhold the e-mail addresses we have marked under section 552.137 of the Government Code unless the owners of the addresses affirmatively consent to their release. The comptroller's office must release the remaining responsive 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.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 that reads "Lindsay E. Hale". The signature is written in a cursive, flowing style.

Lindsay E. Hale
Assistant Attorney General
Open Records Division

LEH/akg

Ref: ID# 557181

Enc. Submitted documents

c: Requestor
(w/o enclosures)