



KEN PAXTON  
ATTORNEY GENERAL OF TEXAS

November 8, 2017

Ms. Diane Morris  
Deputy General Counsel  
Office of The Governor  
P.O. Box 12428  
Austin, Texas 78711

OR2017-25656

Dear Ms. Morris:

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# 683445 (OOG ID# 17-309).

The Office of the Governor (the "governor's office") received a request for information pertaining to a specified participant in the Texas Enterprise Project. You state you have released some information. You state you have withheld some information under section 552.137 of the Government Code and Open Records Decision No. 684 (2009).<sup>1</sup> You state you have notified the Texas Comptroller of Public Accounts (the "comptroller's office"). *See* Gov't Code § 552.304 (providing that interested party may submit written comments regarding why information should or should not be released). You claim some of the submitted information is excepted from disclosure under sections 552.101, 552.107, and 552.111 of the Government Code. We have received comments from the comptroller's office. We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>2</sup>

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<sup>1</sup>Open Records Decision No. 684 serves as a previous determination to all governmental bodies authorizing them to withhold certain categories of information, including personal e-mail addresses under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision. *See* ORD 684.

<sup>2</sup>We assume that 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.

Section 552.101 of the Government Code exempts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” *Id.* § 552.101. This section encompasses information protected by other statutes, including section 111.006 of the Tax Code. Section 111.006 of the Tax Code provides as follows:

(a) The following matter is confidential and may not be used publicly, opened to public inspection, or disclosed except as permitted under Subsection (b) of this section:

(1) a federal tax return or federal tax return information required to have been submitted to [the comptroller’s office] with a state tax return or report; and

(2) 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)(1), (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, 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.

The comptroller’s office states the tax refund amounts at issue were obtained or derived from taxpayer furnished information and are thus confidential under section 111.006. *Id.* at 680. Based on these representations and our review, we conclude the comptroller’s office has established the information it seeks to withhold is confidential under section 111.006(a)(2). Accordingly, the governor’s office must withhold the information at issue, which we marked, pursuant to section 552.101 of the Government Code in conjunction with section 111.006(a)(2) of the Tax Code on behalf of the comptroller’s office.<sup>3</sup>

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<sup>3</sup>As our ruling for this information is dispositive, we need not address the remaining arguments against its disclosure.

We note the governor's office also raises section 111.006 of the Tax Code. However, as noted above, section 111.006 of the Tax Code applies to the comptroller's office and makes confidential information submitted to the comptroller's office or information that the comptroller's office obtained during the course of an examination conducted under chapter 111. *Cf.* Open Records Decision No. 520 (1989) (section 151.027 of the Tax Code, which has language similar to section 111.006, applies only to records and information in the custody of the comptroller's office and not to information in another governmental body's possession). Thus, this section is not applicable to information held by the governor's office and the governor's office may not withhold the remaining information at issue on this basis.

Section 552.101 of the Government Code also encompasses section 151.027 of the Tax Code. Section 151.027(a) provides confidentiality for information collected under the Limited Sales, Excise, and Use Tax Act. Tax Code § 151.027(a). Section 151.027(b) provides for the confidentiality of information obtained during the course of an examination of a taxpayer's books. *Id.* § 151.027(b). However, section 151.027 applies only to information furnished to and reviewed by the comptroller's office during its investigation of a taxpayer. *Id.* § 151.027; *see* Open Records Decision No. 520 (1989) (section 151.027 applies only to information in comptroller's office's custody, not to information in another governmental body's possession). The comptroller's office does not seek to withhold the remaining information at issue on this basis. Thus, the governor's office may not withhold it under section 552.101 of the Government Code in conjunction with section 151.027 of the Tax Code.

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, 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 some of the submitted information, which you marked, consists of communications between attorneys for the governor’s office and employees of the governor’s office that were made for the purpose of providing legal services to the governor’s office. You state the communications were intended to be confidential and have remained confidential. Based on your representations and our review, we find the information at issue consists of privileged attorney-client communications. Thus, the governor’s office may withhold the information it marked under section 552.107(1) of the Government Code.<sup>4</sup>

Section 552.111 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 section 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 reexamined 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 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, 364 (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). Further, section 552.111 does not protect facts and written observations of facts and events that are severable from

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<sup>4</sup>As our ruling for this information is dispositive, we need not address the remaining arguments against its disclosure.

advice, opinions, and recommendations. *See Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152, 157 (Tex. App.—Austin 2001, no pet.); 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).*

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 seek to withhold the information you marked under section 552.111 of the Government Code. You state the information at issue consists of advice, opinion, and recommendations related to policymaking matters of the governor's office. You further state the information relates to communications between governor's office employees reflecting the deliberative and policymaking processes of the governor's office. We understand some of the information you marked consists of draft documents that were intended to be released in their final forms. Based on your representations and our review, we find the governor's office has demonstrated the information at issue consists of advice, opinions, or recommendations on policymaking matters of the governor's office. Thus, the governor's office may withhold the information it marked under section 552.111 of the Government Code.

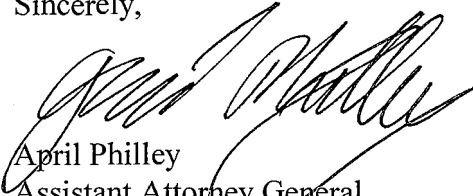
In summary, the governor's office must withhold the information at issue, which we marked, pursuant to section 552.101 of the Government Code in conjunction with section 111.006(a)(2) of the Tax Code on behalf of the comptroller's office. The governor's office may withhold the information it marked under section 552.107 of the Government Code. The governor's office may withhold the information it marked under section 552.111 of the Government Code. The governor'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.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,



April Philley  
Assistant Attorney General  
Open Records Division

AP/tdw

Ref: ID# 683445

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

Third Party  
(w/o enclosures)