



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

November 27, 2017

Mr. James G. Nolan
Associate Deputy General Counsel
Open Records Section
Texas Comptroller of Public Accounts
P.O. Box 13528
Austin, Texas 78711-3528

OR2017-26762

Dear Mr. Nolan:

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# 687359 (ORR# 13725388332).

The Texas Comptroller of Public Accounts (the "comptroller's office") received a request for e-mails during a specified time including any of seven specified names. The comptroller's office states it will release some of the requested information. The comptroller's office claims the submitted information is excepted from disclosure under sections 552.101, 552.107, 552.108, 552.111, and 552.116 of the Government Code.¹ We have considered the exceptions the comptroller's office claims and reviewed the submitted representative sample of information.²

Initially, the comptroller's office states some of the submitted information was the subject of a previous request for information, as a result of which this office issued Open Records

¹Although the comptroller's office also raises additional exceptions to disclosure, the comptroller's office has not provided any arguments to support the remaining exceptions. Therefore, we assume the comptroller's office has withdrawn its claim the remaining exceptions apply to the submitted information. *See* Gov't Code §§ 552.301, .302.

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

Letter No. 2017-13154 (2017). In that ruling, we determined the comptroller's office may withhold the information at issue under section 552.107(1) of the Government Code. The comptroller's office states there has been no change in the law, facts, or circumstances on which the previous ruling was based. Accordingly, to the extent the submitted information is identical to the information previously requested and ruled upon by this office, we conclude the comptroller's office may rely on Open Records Letter No. 2017-13154 as a previous determination and withhold the identical information in accordance with that ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

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.

The comptroller's office asserts some of the information submitted as Attachment 3-1 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 marked 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 the remaining information at issue is not confidential under section 111.006 because the information was not obtained or derived from a taxpayer's records. Accordingly, the comptroller's office may not withhold the remaining information

at issue under section 552.101 of the Government Code in conjunction with section 111.006(a)(2) of the Tax Code.

Section 552.101 of the Government Code also encompasses 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 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, the comptroller's office has provided no arguments explaining the remaining 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). Because we already disposed of the comptroller's office's claims under section 111.006, none of the remaining information at issue may be withheld under section 552.101 of the Government Code in conjunction with section 151.027(b).

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. *See* 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 "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).

The comptroller’s office states the information submitted as Attachment 3-2 and some of the remaining information submitted as Attachment 3-1 consists of communications involving attorneys for the comptroller’s office and comptroller’s office employees and officials in their capacities as clients. The comptroller’s office states these communications were made in furtherance of the rendition of professional legal services to the comptroller’s office. The comptroller’s office states these communications were intended to be, and have remained, confidential. Based on these representations and our review, we find the comptroller’s office has demonstrated the applicability of the attorney-client privilege to the information at issue. Accordingly, the comptroller’s office may withhold Attachment 3-2 and the information it marked in Attachment 3-1 under section 552.107(1) of the Government Code.

Section 552.108 of the Government Code provides, in pertinent part,

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from [required public disclosure] if:

(1) release of the internal record or notation would interfere with law enforcement or prosecution[.]

Gov’t Code § 552.108(b)(1). Section 552.108(b)(1) is intended to protect “information which, if released, would permit private citizens to anticipate weaknesses in a police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate the laws of this State.” *City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 327 (Tex. App.—Austin 2002, no pet.). To prevail on its claim that section 552.108(b)(1) excepts information from disclosure, a governmental body must do more than merely make a conclusory assertion that releasing the information would interfere with law enforcement. Instead, the governmental body must meet its burden of explaining how and why release of the requested information would interfere with law enforcement and crime prevention. *See Open Records Decision No. 562 at 10 (1990)* (construing statutory predecessor). This

office has concluded that section 552.108(b) excepts from public disclosure information relating to the security or operation of a law enforcement agency. *See, e.g.*, Open Records Decision Nos. 531 (1989) (release of detailed use of force guidelines would unduly interfere with law enforcement), 252 (1980) (section 552.108 of the Government Code is designed to protect investigative techniques and procedures used in law enforcement), 143 (1976) (disclosure of specific operations or specialized equipment directly related to investigation or detection of crime may be excepted). Section 552.108(b)(1) is not applicable, however, to generally known policies and procedures. *See, e.g.*, ORDs 531 at 2-3 (Penal Code provisions, common law rules, and constitutional limitations on use of force not protected), 252 at 3 (governmental body failed to indicate why investigative procedures and techniques requested were any different from those commonly known). We note section 552.108 applies only to records created by an agency, or a portion of an agency, whose primary function is the investigation of crimes and enforcement of criminal laws. *See* Open Records Decision Nos. 493 (1988), 287 (1981). Section 552.108 is generally not applicable to records created by an agency whose chief function is essentially regulatory in nature. *See* Open Records Decision No. 199 (1978). The comptroller's office is a law enforcement agency for purposes of administering the Tax Code. *A&T Consultants, Inc. v. Sharp*, 904 S.W.2d 668, 678-79 (Tex. 1995).

The comptroller's office states the information submitted as Attachment 3-3 consists of information maintained for internal use by the comptroller's office's enforcement division for tax collection and enforcement purposes. The comptroller's office explains release of the information at issue could provide tax evaders with knowledge they could use to avoid the law enforcement efforts of law enforcement officers of the comptroller's office. Based on these representations and our review, we find the comptroller's office has demonstrated the release of the information at issue would interfere with law enforcement. Thus, the comptroller's office may withhold Attachment 3-3 under section 552.108(b)(1) of the Government 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, 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).

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).

This office has also concluded a preliminary draft of a document that is 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.

The comptroller's office states some of the information submitted as Attachment 3-5, which it marked, consists of drafts of policymaking documents. The comptroller's office indicates the documents at issue will be made available to the public in their final forms. Based on these representations and our review of the information at issue, we find the comptroller's office may withhold the information it marked in Attachment 3-5 under section 552.111 of the Government Code.

Section 552.116 of the Government Code provides,

(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 [required public disclosure]. If information in an audit working paper is also maintained in another record, that other record is not excepted from [public disclosure] 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. The comptroller's office asserts the information submitted as Attachment 3-4 and the identical information in Exhibit 3-1 consists of audit working papers pertaining to an audit conducted by the comptroller's office. The comptroller's office states the audit is authorized by section 111.004 of the Tax Code. *See id.* § 552.116(b)(1). Based on these representations and our review, we agree the information at issue constitutes audit working papers. Therefore, the comptroller's office may withhold Attachment 3-4 and the identical information in Attachment 3-1 under section 552.116 of the Government Code and the previous determination issued by this office in Open Records Letter No. 2007-10491 (2007).³

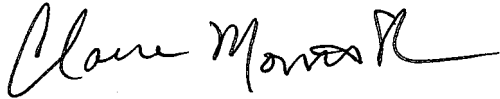
In summary, the comptroller's office must withhold the information we marked in Attachment 3-1 under section 552.101 of the Government Code in conjunction with section 111.006 of the Tax Code. The comptroller's office may withhold Attachment 3-2 and the information it marked in Attachment 3-1 under section 552.107(1) of the Government Code. The comptroller's office may withhold Attachment 3-3 under section 552.108(b)(1) of the Government Code. The comptroller's office may withhold the information it marked in Attachment 3-5 under section 552.111 of the Government Code. The comptroller's office may withhold Attachment 3-4 and the identical information in Attachment 3-1 under section 552.116 of the Government Code. The comptroller's office must release the remaining information.

³Open Records Letter No. 2007-10491 is a previous determination authorizing the comptroller's office to withhold audit working papers created or maintained during the course of a tax audit conducted under the authority of section 111.004 of the Tax Code from the public on the basis of section 552.116 without the necessity of again requesting an attorney general decision under the Act. *See* Gov't Code § 552.301(a); Open Records Decision No. 673 (2001) (listing elements of second type of previous determination under section 552.301(a) 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, 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,



Claire V. Morris Sloan
Assistant Attorney General
Open Records Division

CVMS/som

Ref: ID# 687359

Enc. Submitted documents

c: Requestor
(w/o enclosures)