



April 19, 2001

Mr. Sam Haddad
Assistant General Counsel
Comptroller of Public Accounts
P.O. Box 13528
Austin, Texas 78711-3528

OR2001-1576

Dear Mr. Haddad:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 146207.

The Comptroller of Public Accounts (the "comptroller") received a request for information related to "operation Texcise," the Magnum Oil company, and the Truman Oil Company. The comptroller also received a request for answers to nine related questions. We first note that, although a governmental body must make a good faith effort to relate a request to information which it holds, the Public Information Act does not require it to answer factual questions. Open Records Decision No 555 (1990), 561 (1990). You claim that certain information responsive to the request, which you have provided to this office, is excepted from disclosure by section 552.101 of the Government Code in conjunction with provisions of the Tax Code and with judicial decisions. You have also provided a sample of responsive information that you contend is excepted from disclosure by sections 552.107, 552.108, and 552.111 of the Government Code.¹ The requestor has also submitted comment to this office as provided by section 552.304 of the Government Code. We have considered all comments received and have reviewed the submitted information.

You have submitted information which you label as excepted from disclosure under the informer's privilege aspect of section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision. You cite *Roviaro v. United States*, 353

¹We 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.

U.S. 53, 59 (1957) for the proposition that the identities of individuals who reported violations of law are protected by the informer's privilege. In *Roviaro* the United States Supreme Court explained the rationale that underlies the informer's privilege:

What is usually referred to as the informer's privilege is in reality the Government's privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law. [Citations omitted.] The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law enforcement officials and, by preserving their anonymity, encourages them to perform that obligation.

Texas courts also recognize this privilege, *see Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969); *Hawthorne v. State*, 10 S.W.2d 724, 725 (Tex. Crim. App. 1928), and it is a well-established exception under the Public Information Act. Open Records Decision No. 549 at 4 (1990). For information to come under the protection of the informer's privilege, the information must relate to a violation of a civil or criminal statute. *See* Open Records Decision Nos. 515 at 2-5 (1988), 391 (1983). The informer's privilege excepts information only to the extent necessary to protect the informer's identity. Open Records Decision No. 549 at 5 (1990). We have marked the portion of the subject materials that we find would tend to reveal an informer's identity. The information that we have so marked must be withheld under section 552.101 of the Government Code.

Section 552.101 also protects information made confidential by statute. You have labeled a portion of the submitted documents to indicate that it is made confidential by provisions of the Tax Code. Section 111.006 of the Tax Code provides in part 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) [federal tax return information; 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.² [Footnote added.]

See also Tax Code § 151.027(b) (making confidential identical information). From your representations, we conclude that the records that you have labeled as subject to tax code provisions are information secured, derived, or obtained by the comptroller during the course of an examination by the comptroller of a taxpayer's books and business affairs. We also find that a portion of the materials that you have labeled as excepted under section 552.108 is information secured, derived, or obtained by the comptroller during the course of an examination by the comptroller of a taxpayer's books and business affairs. We have marked the submitted records to indicate the information that is made confidential by section 111.006(a) of the Tax Code and must therefore be withheld under section 552.101 of the Government Code.

You have also submitted information which you label as excepted from disclosure under section 552.107 of the Government Code. Section 552.107(1) excepts from disclosure information protected by the attorney-client privilege. In instances where an attorney represents a governmental entity, the attorney-client privilege protects only an attorney's legal advice and the client's confidences made to the attorney. *See* Open Records Decision No. 574 (1990). Accordingly, these two classes of information are the only information contained in the records at issue that may be withheld pursuant to the attorney-client privilege. From our review of your comments and the submitted materials that you have marked as subject to section 552.107, we conclude that most of this information consists of legal advice and opinion. However, these materials include communications from a prosecuting attorney regarding a criminal matter. The prosecuting attorney does not represent the comptroller and the communication is not in furtherance of a legal service to be performed for the comptroller. We conclude that such communications are not protected by an attorney client privilege that the comptroller may assert. We have marked the submitted information to indicate the portions that may be withheld under section 552.107(1) and those that must be released.

You have also submitted information which you label as excepted from disclosure under section 552.108 of the Government Code. This section provides:

- (a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from the requirements of Section 552.021 if:

²Subsection (b) of section 111.006 regarding the subpoena of confidential information in certain judicial or administrative proceedings is not applicable here.

- (1) release of the information would interfere with the detection, investigation, or prosecution of crime;
 - (2) it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication; or
 - (3) it is information that:
 - (A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or
 - (B) reflects the mental impressions or legal reasoning of an attorney representing the state.
- (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 the requirements of Section 552.021 if:
- (1) release of the internal record or notation would interfere with law enforcement or prosecution;
 - (2) the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication; or
 - (3) the internal record or notation:
 - (A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or
 - (B) reflects the mental impressions or legal reasoning of an attorney representing the state.
- (c) This section does not except from the requirements of Section 552.021 information that is basic information about an arrested person, an arrest, or a crime.

Generally, a governmental body claiming an exception under section 552.108 must reasonably explain how this section applies to the responsive information. *See Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977)(governmental body asserting law enforcement exception to disclosure must explain how release of information would interfere with law enforcement). You have not asserted any particular subsection of 552.108. Nor have you indicated that the responsive information relates to a pending matter or one that resulted in a conviction or otherwise concluded. We find that the comptroller has not demonstrated that its interests in the responsive information are protected by section 552.108 of the Government Code.

You also contend that a portion of the responsive information is held by the comptroller as the custodian of records for the IRS. You notified the IRS of the pending request and provided that agency with the opportunity to assert grounds for withholding the information. The IRS responded but did not request that any information be withheld to protect its interest. We also note that the submitted materials indicate that the related federal criminal matter resulted in a conviction. We conclude that the comptroller has not demonstrated that it may withhold responsive information as the custodian of records under section 552.108.

You also submit information that you have labeled as excepted by section 552.111 of the Government Code. This section excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. An agency's policymaking functions do not encompass internal administrative or personnel matters since disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. ORD 615 at 5-6. Additionally, section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. ORD 615 at 4-5. From our review of the information that you have labeled as excepted under 552.111, we conclude that this information consists of communications related to an administrative matter and that it does not reflect the policymaking process of the comptroller. Therefore we conclude that the subject information may not be withheld under section 552.111 of the Government Code.

In conclusion, you must withhold the information that we have marked as excepted from disclosure by the informer's privilege aspect of section 552.101, and by section 111.06 of the Tax Code. You may withhold the information that we have marked as excepted from disclosure by section 552.107 of the Government Code. The remaining responsive information must be released.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

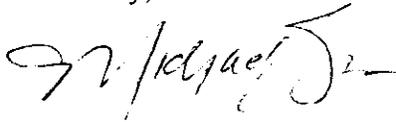
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael Jay Burns". The signature is written in a cursive style with a large initial "M" and a long horizontal stroke at the end.

Michael Jay Burns
Assistant Attorney General
Open Records Division

MJB/rr

Ref: ID# 146207

Encl. Submitted documents

cc: Mr. Joe Haven Beadles
Route 7 Box 610
Mount Pleasant, Texas 75455
(w/o enclosures)