



February 5, 2002

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

OR2002-0538

Dear Ms. Soucy:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 158223.

The Comptroller of Public Accounts (the "comptroller") received a request for:

1. A sum total of the tax refunds awarded to taxpayers between January 1999 and the present.
2. A sum total of the tax refunds awarded to taxpayers represented by Ryan & Co. between January 1999 and the present.

The requestor also states that:

1. I would like a copy of any correspondence, letters or memos to or from Harlan Hall or Lone Star Tax Recovery Service from Jan. 1, 1999, to the present. I would also like a copy of any open records requests that have been given the agency by anyone associated with Lone Star Tax Recovery since Jan. 1, 1999.
2. Any similar information on Mark Eidman or the firm of Scott, Douglass & Lutton.

You indicate that the comptroller does not have information showing total tax refunds awarded to taxpayers represented by Ryan & Company. The Public Information Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266

(Tex. Civ. App.--San Antonio 1978, writ *dism'd*); Open Records Decision No. 452 at 3 (1986). We note, however, that the submitted documents contain certain total refund amounts for taxpayers represented by Ryan & Company. Therefore, we will address whether such information may be withheld from disclosure. You also state that the requestor has "verbally amended his request to include documents that show taxpayer refunds awarded to taxpayers represented by Ryan & Company between January 1999 and the present." Further, in a letter to the requestor, a copy of which you have provided to this office, you confirm that the requestor verbally modified the second part of his request so that he now seeks only "lists that show administrative hearings cases and litigation cases in which this agency is or was represented by the Office of the Attorney General, for the requested time periods and for clients represented by [Harlan Hall, Lone Star Tax Recovery Service, Mark Eidman, or the firm of Scott, Doughlass & Lutton]." You state that you will release some of the requested information to the requestor.<sup>1</sup> You claim, however, that some of the requested information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted representative sample of information.<sup>2</sup>

Initially, we must address the comptroller's obligations under section 552.301 of the Government Code. Pursuant to section 552.301(e), a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. The comptroller received the present request on November 27, 2001. However, the comptroller did not submit comments stating the reasons why the stated exceptions apply and the documents responsive to the request until December 7 and 21, 2001. Therefore, the comptroller failed to submit this information within the fifteen-business-day deadline as required by section 552.301.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling

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<sup>1</sup>You explain that the comptroller will redact taxpayer identifying information from this information in accordance with this office's previous determination in Open Records Letter Ruling No. 98-2388 (1998). *See* Open Records Decision No. 673 (2001). Thus, the information to be redacted from the information to be released is not at issue in this ruling.

<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.

reason to withhold the information from disclosure. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.--Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). As section 552.101 provides a compelling reason to overcome the presumption of openness, we will address your arguments under that exception. *See* Open Records Decision No. 150 (1977) (presumption of openness overcome by a showing that the information is made confidential by another source of law or affects third party interests).

Section 552.101 of the Government Code excepts from required public disclosure information that is confidential by law. 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.<sup>3</sup> [Footnote added.]

*See also* Tax Code §§ 171.206 (making confidential similar information pertaining to franchise tax) & 151.027(b) (making confidential identical information). Some of the submitted documents were created by taxpayers. Thus, these documents are confidential in their entirety and must not be released pursuant to section 111.006(a)(2). You have also submitted several tables that you contend contain information that is confidential under section 111.006(a)(2). We agree that much of the information within these tables is confidential under section 111.006(a)(2). Therefore, the comptroller must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 111.006(a)(2) of the Tax Code.

You also ask whether the sum total of refunds awarded is confidential. *See A&T Consultants, Inc. v. Sharp*, 904 S.W.2d 668, 680 (Tex. 1995) (refund amounts are derived from taxpayer-furnished information and thus are confidential under section 111.006(a)(2)). While the individual refund amounts requested and granted may have been obtained or derived from taxpayer information during the course of an examination, the sum total of

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<sup>3</sup> Subsection (b) of section 111.006 regarding the subpoena of confidential information in certain judicial or administrative proceedings is not applicable here.

those refunds is a number generated by the comptroller, and is therefore not confidential under section 111.006(a)(2). Further, we have no basis for concluding that the public release of this information, in this instance, would identify the taxpayers. Therefore, while you must withhold the information we have marked under section 552.101 in conjunction with section 111.006 of the Tax Code, you must release the sum total of refunds requested, awarded, or denied.

To summarize, we conclude that: (1) the comptroller must withhold the information we have marked under section 552.101 in conjunction with section 111.006 of the Tax Code; and (2) the remaining 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 Texas Building and Procurement 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,



Karen A. Eckerle  
Assistant Attorney General  
Open Records Division

KAE/sdk

Ref: ID# 158223

Enc: Submitted documents

c: Mr. R.G. Ratcliffe  
*Houston Chronicle*  
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(w/o enclosures)