



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 3, 2005

Ms. Ruth H. Soucy
Manager and Legal Counsel
Open Records Division
Comptroller of Public Accounts
P.O. Box 13528
Austin, Texas 78711-3528

OR2005-00029

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# 215208.

The Comptroller of Public Accounts (the "comptroller") received a request for "[a] list or schedule of all taxpayers to whom an 'Amount Subject to Appropriation' has been issued pursuant to the provisions of Rider 11, styled 'Appropriation of Tax Refunds,' that appear in House Bill 1, Article 1, Section 1 (78th Legislative Session ('Rider 11') as of the date of this request." You claim that the requested information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

We begin by noting that most of the information contained in the submitted letters is not responsive to the instant request for information, as the requestor seeks "[a] list or schedule of all taxpayers." Other than the information that is responsive, the controller need not release the remaining portions of the letters in response to this request and this ruling will not address that information. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed).

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This

section encompasses information protected by other statutes. You contend that the requested information is confidential under section 111.006 of the Tax Code. 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.

Based on *A & T Consultants*, only information that is obtained from the taxpayer and reveals the taxpayer’s business affairs, operations, financial condition, profits, or losses is confidential under section 111.006. In this instance, however, the requestor only seeks information concerning taxpayers receiving refunds greater than \$250,000. Upon review, we find that because a list limited to tax refunds greater than \$250,000 encompasses such a large range of amounts, the responsive information does not reveal refund amounts derived from the taxpayer’s records. Furthermore, we find that the submitted information does not reveal the taxpayers’ business affairs, operations, financial condition, profits, or losses. Consequently, the comptroller may not withhold the responsive information pursuant to section 111.006(a)(2) of the Tax Code.

You also contend that the requested information is confidential under section 151.027(a) of the Tax Code. Section 151.027(a) provides confidentiality for information collected under the Limited Sales, Excise, and Use Tax Act and reads as follows:

- (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.

Section 152.027(a) excepts from public disclosure information and data obtained or “derived” from a taxpayer’s records.¹ In this instance, you indicate that the submitted refund list consists of information in or derived, in part, from a report or other instrument required to be submitted by the taxpayers pursuant to chapter 151 of the Tax Code. However, you advise that the submitted refund list was generated from a database that contains most tax types, including sales, excise and use taxes, among others.² Section 151.027 applies only to sales, excise and use taxes. Thus, information concerning other taxes in the database is not confidential under section 151.027. Further, we find that because a list limited to tax refunds greater than \$250,000 encompasses such a large range of amounts, the responsive information does not reveal refund amounts derived from taxpayer’s records. Consequently, we conclude that the submitted information is not made confidential pursuant to section 151.027(a) of the Tax Code and it may not be withheld from the public on that basis.

Next, we consider the applicability of section 552.103 to the submitted information. Section 552.103 provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person’s office or employment, is or may be a party.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

The comptroller has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref’d n.r.e.); Open Records Decision No. 551 at 4 (1990). The comptroller must meet both prongs of this test for information to be excepted under section 552.103(a).

¹We note that the language of section 151.027(a) is similar to the language of section 111.006(a)(2).

²Further, you indicate that the submitted letters relate to severance tax refunds.

You inform us and provide documentation showing that, prior to the comptroller's receipt of the request for information, the comptroller was named as a defendant in a lawsuit that, in part, challenges the constitutionality of Rider 11. We therefore agree that litigation was pending on the date the comptroller received the request. We now examine whether the requested information is related to the pending litigation. "Ordinarily, the words 'related to' mean 'pertaining to,' 'associated with' or 'connected with.'" *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d at 483. You do not explain, nor does the information supply the explanation on its face, how the submitted information relates to the pending litigation. Thus, we conclude that section 552.103 is not applicable to the submitted information. As you make no other arguments against disclosure, the comptroller must release the submitted information to the requestor.

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 Dep't of Pub. 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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 'Cary Grace', with a long horizontal flourish extending to the right.

Cary Grace
Assistant Attorney General
Open Records Division

ECG/jev

Ref: ID# 215208

Enc. Submitted documents

c: Mr. Clinton J. David
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(w/o enclosures)