



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 18, 2014

Mr. David D. Menchaca
Assistant General Counsel
Open Records Section
Texas Comptroller of Public Accounts
P.O. Box 13528
Austin, Texas 78711-3528

OR2014-14490

Dear Mr. Menchaca:

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# 533035 (Comptroller ID Nos. 10401546459, 10401554026, 10401560774, 10401580627, 10401594621, and 10401602415).

The Texas Comptroller of Public Accounts (the "comptroller's office") received six requests for information related to the audits of six specified taxpayers. You state the comptroller's office is withholding responsive audit working papers pursuant to the previous determination issued to the comptroller's office in Open Records Letter No. 2007-10491 (2007). *See* Gov't Code § 552.301(a); Open Records Decision No. 673 at 7-8 (2001). You also state the comptroller's office will release some information. You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.111, and 552.137 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

¹Although you do not raise section 552.137 in your brief, we understand you to raise this section based on your markings in the submitted information.

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

We next note portions of the submitted information are subject to section 552.022 of the Government Code, which provides in relevant part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body;

...

(12) final opinions, including concurring and dissenting opinions, and orders issued in the adjudication of cases; [and]

...

(18) a settlement agreement to which a governmental body is a party.

Gov't Code § 552.022(a)(3), (12), (18). The submitted information includes a check subject to subsection 552.022(a)(3), an order issued in the adjudication of a claim subject to subsection 552.022(a)(12), and a settlement agreement to which the comptroller's office is a party subject to subsection 552.022(a)(18), which must be released unless they are made confidential under the Act or other law. *See id.* § 552.022(a)(3), (18). You seek to withhold the information subject to section 552.022, which we have marked, under section 552.103 of the Government Code. However, section 552.103 is a discretionary exception and does not make information confidential under the Act. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive Gov't Code § 552.103); *see also* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, the comptroller's office may not withhold the information at issue under section 552.103 of the Government Code. However, section 552.101 of the Government Code makes information confidential under the Act. *See id.* § 552.022(a). Therefore, we will consider your argument under that section. We further note the marked check contains information subject to section 552.136 of the Government Code.³ As section 552.136 makes information confidential under the Act, we will also consider the

³The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

applicability of this exception to the information. We will also address your arguments for the information that is not subject to section 552.022 of the Government Code.

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 of the Tax Code in *A&T Consultants, Inc. v. Sharp*, 904 S.W.2d 668 (Tex. 1995), stating:

The Tax Code prevents the disclosure of data “obtained” or “derived” from a taxpayer Confidentiality under the Tax Code thus turns on the identity of the source of the information. It makes confidential the information obtained or derived from *taxpayers*.

Id. at 676 (citations omitted) (emphasis in original). The comptroller’s office states the information at issue 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 the comptroller’s office marked is confidential under section 111.006 of the Tax Code and must be withheld under section 552.101 of the Government Code.

The submitted check contains information subject to section 552.136 of the Government Code. Section 552.136 states “[n]otwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” Gov’t Code § 552.136(b); *see id.* § 552.136(a) (defining “access device”). The comptroller’s office must withhold the information we have marked under section 552.136 of the Government Code.

We next address your arguments for the information not subject to section 552.022. Section 552.103 of the Government Code provides, in relevant part:

(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.

Id. § 552.103(a), (c). The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information relating to litigation through discovery procedures. *See* Open Records Decision No. 551 at 4-5 (1990). A governmental body has the burden of providing relevant facts and documents to show the section 552.103(a) exception applies in a particular situation. The test for meeting this burden is a showing (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the requested information is related to that litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, orig. proceeding); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); ORD 551 at 4. The governmental body must meet both parts of this test for information to be excepted under section 552.103(a). *See* ORD 551 at 4. We note contested cases conducted under the Administration Procedure Act (the “APA”), chapter 2001 of the Government Code, are considered litigation for purposes of section 552.103. *See* Open Records Decision No. 588 at 7 (1991). We further note a contested case before the State Office of Administrative Hearings (the “SOAH”) is considered litigation for the purposes of the APA. *See id.*

You state, and provide documentation showing, the instant requests for information were submitted as part of the requestor’s six requests for tax administrative hearings related to six audits. You explain that requests for tax administrative hearings related to audits are known as requests for redetermination, and a request for redetermination is the initial pleading with which a tax administrative hearing is commenced. You inform us the redetermination hearings are before SOAH between the comptroller’s office and the requestor’s clients. Based on your representations and our review, we determine litigation was pending on the date the comptroller’s office received the requests for information. Furthermore, we find the information at issue relates to the pending litigation. Accordingly, we conclude the comptroller’s office may withhold the information not subject to section 552.022 under section 552.103 of the Government Code.⁴

We note, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, the applicability of

⁴As our ruling is dispositive, we need not address your remaining arguments against disclosure.

section 552.103(a) ends when the litigation has concluded. Attorney General Opinion MW-575 at 2; Open Records Decision Nos. 350 at 3 (1982), 349 at 2.

In summary, the comptroller's office must release the information we have marked pursuant to section 552.022 of the Government Code. In releasing this information, the comptroller's office must withhold the information you have marked under section 552.101 of the Government Code in conjunction with section 111.006 of the Tax Code and the information we have marked under section 552.136 of the Government Code. The comptroller's office may withhold the information not subject to section 552.022 under section 552.103 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,



Britni Fabian
Assistant Attorney General
Open Records Division

BF/bhf

Ref: ID# 533035

Enc. Submitted documents

c: Requestor
(w/o enclosures)