



January 6, 2000

Ms. Ruth Soucy
Open Records Manager
Open Records Division
Comptroller of Public Accounts
LBJ State Office Building
111 East 17th Street
Austin, Texas 78774

OR2000-0052

Dear Ms. Soucy:

You ask whether certain information is subject to required public disclosure under the Texas Public Information Act, chapter 552 of the Government Code. Your request was assigned ID# 30884.

The Office of the Comptroller of Public Accounts (the "comptroller's office") received a request for the following information:

Resale certificates filed for purchases made by . . . [six individuals] (Record Nos. 136, 151, 97, and 70). . . . I am also requesting access to documents from [a certain redetermination] hearing.

Chapter 552 of the Government Code provides that certain information is available to the public, with certain exceptions. You assert that the requested information, which you have marked as Item I, Item II, and Item III, is excepted from required public disclosure based on sections 552.101, 552.103, 552.107(1), and 552.111 of the Government Code.

We first address the disclosure of Item I, the resale certificates, and Item II, which includes the audit working papers. Section 552.101 of the Government Code excepts from required public disclosure information that is confidential by law. You raise this exception in regard to two provisions in the Tax Code, sections 111.006(a)(2) and 151.027. Section 111.006 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.¹ [Footnote added.]

You inform us that generally taxpayers are not required to file resale certificates with the comptroller's office. You advise that the requested resale certificates were obtained by the comptroller's office during the course of an audit of a taxpayer's business. We, therefore, conclude that section 111.006(a)(2) of the Tax Code makes confidential the information in Item I. *See also* Tax Code § 151.027(b) (making confidential identical information). Item II also contains "information secured, derived, or obtained by the comptroller . . . during the course of an examination of the taxpayer's books" made confidential by section 111.006(a) of the Tax Code. Accordingly, pursuant to section 552.101 of the Government Code in conjunction with section 111.006(a)(2) of the Tax Code, the comptroller's office must withhold the information in Items I and II from required public disclosure.

We turn to Item III, the redetermination hearing file. The file contains four documents from the tax division, including a position letter, a post-hearing submission, a response to taxpayer's post-hearing submission, and a response to taxpayer's exceptions. The file also contains three documents submitted by the taxpayer, including a submission at oral hearing, a post-hearing submission, and exceptions to proposed comptroller's decision. The file contains a proposed comptroller's decision, a suggested comptroller decision, and a suggested order of the comptroller. Finally, the files contains miscellaneous motions, orders, and correspondence.

We consider your claims under sections 552.103, 552.107(1) and 552.111 of the Government Code. These discretionary exceptions are inapplicable when the requested information has been released to a member of the public. *See* Open Records Decision Nos. 630 (1994) (Gov't Code § 552.107(1)), 435 (1986) (Gov't Code § 552.111), 349 (1982) (Gov't Code § 552.103). All of the information in the file appears to have been seen by the taxpayer with the exception of two documents, the suggested Comptroller's Decision and the suggested

¹Subsection (b) of section 111.006 regarding the subpoena of confidential information in certain judicial or administrative proceedings is not applicable here.

Comptroller's Order. Thus, we will consider whether these two documents may be excepted from required public disclosure under one of the discretionary exceptions.

Section 552.111 of the Government Code excepts from required public disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." This exception applies to a governmental body's internal communications consisting of advice, recommendations, or opinions reflecting the policymaking process of the governmental body at issue. *See* Open Records Decision No. 615 at 5 (1993). This exception does not except from disclosure purely factual information that is severable from the opinion portions of the communication. *See id.*

We have marked the portions of a memorandum from Lee R. Johnson, Administrative Law Judge, to Ray Bonilla, General Counsel, that contains advice, opinion and recommendation. This information is excepted from required public disclosure based on section 552.111.

The suggested Comptroller Decision and Order are also excepted from required public disclosure pursuant to section 552.111. In considering the application of the statutory predecessor to section 552.111 of the Government Code to preliminary drafts of a document that is intended for release in a final form, a prior decision of this office concluded that such a draft necessarily represents the advice, opinion, and recommendation of the drafter as to the form and content of the final document. *See* Open Records Decision No. 559 (1990). Thus, section 552.111 excepts from required public disclosure a preliminary draft of a document. *See id.* Having concluded that section 552.111 of the Government Code applies to this information, we need not address your claims under section 552.103 or section 552.107(1) of the Government Code.²

As for the other information in the hearing file, that is, the information that is not excepted from disclosure under a discretionary exception, we consider your section 552.101 claim. Section 151.027 of the Tax Code states that:

(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

²We assume, however, that the comptroller's office has released to the requestor a de-identified copy of the final Comptroller Decision and Order. *See* Open Records Letter No. 99-0255 (1999) (requestor's knowledge of taxpayer's identity not relevant to determination as to whether requestor has right of access to information in comptroller's final decision and order).

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.

(c) [Listing five situations not applicable here in which disclosure of information is not prohibited].

Information in these documents that is “in or derived from a record, report, or other instrument required to be furnished under” chapter 151 of the Tax Code or that was “secured, derived, or obtained during the course of an examination of [the] taxpayer’s books, records, papers, officers, or employees” is confidential and must be withheld from required public disclosure under section 552.101 of the Government Code in conjunction with section 151.027 of the Tax Code. We have marked some information which on its face appears to have been obtained from a source covered by the confidentiality provisions. However, we are unable to determine the source of all of the information in these documents. Therefore, in addition to the information we have marked, the comptroller’s office must withhold all other information that “is in or derived from” or “secured, derived or obtained from” a source covered by subsection (a) or (b) of section 151.027.

You contend that section 151.027 of the Tax Code requires the comptroller to withhold the entire hearing file to adequately protect the taxpayer’s privacy interests. You say that redacting the information about the taxpayer’s business will result in the release of documents that have “little, if any useful information” in them. While we agree that section 151.027 of the Tax Code protects a significant amount of information in the hearing file, we note that section 151.027 does not make confidential all information in the file. Such information as the legal analyses and authorities, as well as information about the procedures followed in the case, are public information.

Finally, the file contains some financial information about a private individual other than the taxpayer. As this information does not concern a transaction with the comptroller, but with a private individual, the information implicates the common-law right to privacy of that individual. *See* Open Records Decision No. 591 (1991). Consequently, the comptroller’s office must withhold this individual’s identity based on section 552.101 of the Government Code. We have marked a representative sample of the types of information that must be withheld.

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).

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,



Kay Hastings
Assistant Attorney General
Open Records Division

KHH/RWP/jc

Ref.: ID# 30884

Encl.: Marked documents

cc: Ms. Deborah Tedford
Houston Chronicle
P.O. Box 4260
Houston, Texas 77210
(w/o enclosures)