



**THE ATTORNEY GENERAL
OF TEXAS**

February 17, 1989

**JIM MATTOX
ATTORNEY GENERAL**

Mr. W. Roger Wilson
Matthews & Branscomb
One Alamo Center
San Antonio, Texas 78205

Open Records Decision No. 520

Re: Whether section 151.027 of Tax Code in conjunction with the Texas Open Records Act, article 6252-17a, V.T.C.S., protects from public disclosure the sales tax status of a municipal utility's commercial and industrial rate payers (RQ-1514)

Dear Mr. Wilson:

The San Antonio City Public Service Board received a request under the Texas Open Records Act, article 6252-17a, V.T.C.S., ("the act") for the name and address of customers, the most recent utility bill, and sales tax status of commercial and industrial municipal utility customers. The board has released the name and address of the customers. You, as attorney for the Board, claim that sections 3(a)(1), 3(a)(4), and 3(a)(10) of the act protect the remaining information. You have also asked us to interpret section 151.027 of the Texas Tax Code in conjunction with section 3(a)(1). We will assume that by the term "tax status" you inquire whether or not a particular business is exempt from paying sales tax on gas and electricity.

The specific information requested that you claim is exempt from disclosure includes the sales tax status of customer accounts and billing amounts for these customers. Whether or not this information is public will depend on the resolution of the following issues:

- 1) Does the information fall within the scope of section 151.027 of the Tax Code, and is thus exempt from disclosure under section 3(a)(1)?
- 2) Would the information give a competitive advantage to bidders if released, and

thus be exempt from disclosure under section 3(a)(4)?

3) Is the information a trade secret or commercial or financial information made confidential by a statute or judicial decision and thus exempt under section 3(a)(10)?

I.

Section 3(a)(1) of the Open Records Act protects from required disclosure:

information deemed confidential by law, either Constitutional, statutory, or by judicial decision.

Section 3(a)(1) includes protection for information deemed confidential by statute, and thus includes information that falls within the scope of section 151.027 of the Tax Code.

Section 151.027 of the Texas Tax Code reads:

(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 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. (Emphasis added.)

Subsection (c) of section 151.027 sets out exceptions to the confidentiality requirement in subsections (a) and (b).

In our opinion, section 151.027 applies only to records and information in the possession of the comptroller's office. It does not apply to the same information and records in the hands of the taxpayer that prepared and

submitted the reports to the comptroller. See Tax Code §§ 111.003(d) (taxpayer is person liable for tax); 111.016 (person who collects tax from another person is liable to state for tax).

The predecessor of section 151.027 was article 20.11(G) of Taxation-General. Acts 1961, 57th Leg., 1st C.S., ch. 24 at 98. It reads in part:

It shall be a misdemeanor for any official or employee of the Comptroller to make known in any manner whatever the business affairs, operations or information obtained by an investigation of records and activities of any retailer or any other person visited or examined in the discharge of official duty.
(Emphasis added.)

Tax-Gen. art. 20.11(G)(1).

This provision applied only to records in the possession of the Comptroller's office. Attorney General Opinion H-223 (1974) stated of article 20.11(G)(1) and another provision of Taxation-General that the

effect of these provisions is to make certain information in the possession of the Comptroller confidential and thereby bring it within the § 3(a)(1) exception to the Open Records Act. . . . (Emphasis added.)

Attorney General Opinion H-223 (1974) at 3. See also Attorney General Opinion H-661 (1975); Open Records Decision No. 300 (1981).

Article 20.11(G)(1) of Taxation-General was amended in 1979 to delete the misdemeanor penalty. Acts 1979, 66th Leg., ch. 740, at 1822. The amendment to article 20.11(G)(1) revised its language in significant respects to read as section 151.027 does. However, the legislature did not give any indication that it intended to broaden the scope of article 20.11(G)(1) to make it apply to information and materials not in the physical possession of the comptroller's office. See Bill Analysis C.S.H.B. 1012, 66th Leg. (1979) (House Comm. on Ways & Means); Bill Analysis H.B. 1012, 66th Leg. (1979) (Senate Comm. on Finance). It was recodified in 1981 as part of the nonsubstantive recodification of tax laws as title II of the Tax Code. Acts 1981, 67th Leg., ch. 389, at 1490.

Based on this legislative history, we believe that the changes in the language of this prohibition since this office construed it in Attorney General Opinion H-223 were not intended to broaden its coverage to include records in the physical custody of the taxpayer. Accordingly, we conclude that section 151.027 has no application to information and reports in the physical custody of the City Public Service Board of San Antonio. Accordingly, none of the requested material is excepted from disclosure as information "deemed confidential" by section 151.027 of the Tax Code. V.T.C.S. art. 6252-17a, § 3(a)(1).

II.

You also stated that section 3(a)(4) of the Open Records Act might exempt the information from disclosure. Section 3(a)(4) exempts information which, if released, would give an advantage to competitors or bidders. In order to claim this exemption, there must be a showing of some specific and actual harm which would result from disclosure; a general allegation or a remote possibility of an advantage being gained is not enough. Open Records Decision No. 463 (1987). You did not specify how release of the requested information would affect a particular utility customer. Absent such a showing, section 3(a)(4) does not apply.

III.

You also asserted that section 3(a)(10) may exempt the information from disclosure. Section 3(a)(10) excepts:

trade secrets and commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision.

The information at issue here does not meet the definition of "trade secret" adopted by the Texas Supreme Court in Hyde Corp. v. Huffines, 314 S.W.2d 763, 776 (Tex.), cert. denied, 358 U.S. 898 (1958).

Nor does the information constitute commercial or financial information as contemplated by section 3(a)(10). Commercial or financial information is excepted under section 3(a)(10) if disclosure of the information 1) is likely to impair the government's ability to obtain necessary information in the future, or 2) to cause substantial harm to the competitive position of the person from whom the information was obtained. Open Records Decision Nos. 406 (1984); 309 (1982). No showing of

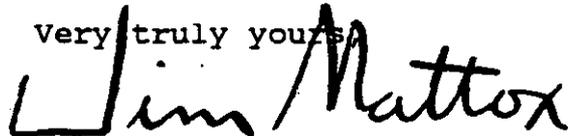
substantial harm has been made here, and since the municipality issues the utility bills and determines the tax status itself there could be no impact on the government's ability to obtain the information. Section 3(a)(10) does not exempt the information from disclosure.

Finally, please note that section 6(3) of the act specifically makes public "information in any account, voucher, or contract dealing with the receipt or expenditure" of public funds. This section is not meant to override the effect of section 3 exceptions to disclosure. Open Records Decision No. 280 (1981). However, section 6 reflects the legislature's intent that the categories of information listed in section 6 will ordinarily be available for public inspection. See Open Records Decision No. 233 (1980).

S U M M A R Y

The tax status of a municipal utility customer is not exempt from public disclosure under sections 3(a)(4) or 3(a)(1) of the Texas Open Records Act, article 6252-17a, V.T.C.S., or under section 3(a)(1) of the act in conjunction with subsections 151.027 (a) or (b) of the Tax Code.

Very truly yours,



J I M M A T T O X
Attorney General of Texas

MARY KELLER
First Assistant Attorney General

LOU MCCREARY
Executive Assistant Attorney General

JUDGE ZOLLIE STEAKLEY
Special Assistant Attorney General

RICK GILPIN
Chairman, Opinion Committee

JENNIFER S. RIGGS
Chief, Open Government Section
of the Opinion Committee

Prepared by Patricia Barnhard
Assistant Attorney General