



**THE ATTORNEY GENERAL
OF TEXAS**

**JIM MATTOX
ATTORNEY GENERAL**

September 12, 1990

Honorable Ann W. Richards
Treasurer
Treasury Department
P.O. Box 12608
Capitol Station
Austin, Texas 78711

Open Records Decision No. 568

Re: Whether the names and "percentages" of cigarette distributors' participation in the Cigarette Tax Recovery Trust Fund are subject to disclosure under the Open Records Act, article 6252-17a, V.T.C.S. (RQ-2079)

Dear Ms. Richards:

You ask whether certain requested information is subject to required public disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S.

Specifically, the requestor seeks "the names and percentages" of each member of the Cigarette Tax Recovery Trust Fund (hereinafter the "fund") created by section 154.051 of the Tax Code. By "percentages" the requestor means that percentage of the fund represented by each distributor's account balance. The fund provides a method by which cigarette distributors may purchase cigarette tax stamps without advance payment. Moreover, a distributor's participation in the fund and the extent of such participation is purely discretionary. Distributors may use other methods of purchasing stamps in addition to or in lieu of participation in the fund. However, we take note that the sixty-six participants in the fund include the largest distributors and that among participants in the fund virtually all purchases are made through the fund.¹

1. In the period beginning February 1, 1990, and continuing through April 30, 1990, 99.92% of the stamps purchased by fund participants were purchased through the fund.

You assert that, because section 154.415 of the Tax Code grants the treasurer "all of the rights and powers granted the comptroller" in chapter 111 of the Tax Code, the amount of cigarette tax paid by a distributor is made confidential by section 111.006 of the Tax Code which prohibits disclosure of

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, sources of income, profits, losses, or expenditures of the taxpayer.

This argument implies that the requested information is excepted from public disclosure by section 3(a)(1) as information deemed confidential by law.

It is not necessary here to determine the applicability of section 111.006 to the treasurer because it only applies to information developed during the course of an examination. See Tax Code § 111.004. Information generated by a distributor's participation in the trust fund or the amount of taxes actually paid by a taxpayer is not information generated by an examination. Tax information is not, per se, confidential. As you point out in your brief, there are provisions of statutory law providing confidentiality for certain types of tax information, e.g., section 151.027 of the Tax Code. See Attorney General Opinion JM-590 (1986). However, we find no case or statute, and have been cited to none, which makes information regarding the amount of cigarette tax paid by a distributor through the purchase of tax stamps confidential.

Given the level of participation in the fund, and the use of the fund by participants, the requested information permits some calculation of a participant's market share or sales volume relative to other participants in the fund. You assert that this will result in a likelihood of specific and substantial competitive harm to participants in the trust fund because smaller companies are "at risk from those competitors with large distribution networks and a demonstrated goal of market dominance." You therefore assert that the requested information is excepted from public disclosure as "commercial or financial information" under section 3(a)(10) or as "information which, if released, would give advantage to competitors or bidders" under section 3(a)(4).

For information to be excepted from public disclosure as "commercial or financial information" under section 3(a)(10), it must be established that the information is (1) commercial or financial, (2) obtained from a person, and (3) confidential. Open Records Decision No. 550 (1990). For the information to be considered confidential, the release of the information must likely (1) impair the government's ability to obtain necessary information in the future, or (2) cause substantial harm to the competitive position of the person from whom it was obtained. Open Records Decision No. 541 (1990). General allegations of unspecified competitive harm will not suffice. Open Records Decision No. 494 (1988).

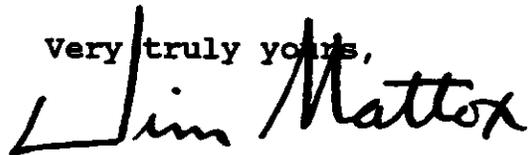
The information in question is not "obtained" from a distributor but generated by a distributor's participation in the trust fund. Accordingly, we do not believe that the requested information is "commercial or financial information" obtained from a person within the meaning of section 3(a)(10) of the Open Records Act. However, even assuming, arguendo, that the information could be so characterized, the amount of cigarette tax paid by a distributor is public information. The public availability of the amount of cigarette tax paid by each distributor obviates any protection of the competitive position of a fund participant that excepting the requested information from public disclosure might afford. After all, the actual amount of cigarette tax paid affords an even better indicator of sales volume and market share, as such tax payments may include purchases of stamps both through the fund and otherwise.

Section 3(a)(4) protects the interests of a governmental body, generally in a situation involving competitive bidding. Open Records Decision No. 541. No showing has been made that the release of the requested information will harm the treasury's interests in the marketplace. Therefore, we conclude that section 3(a)(4) may not be invoked to withhold the requested information.

S U M M A R Y

The names and percentages of each member of the Cigarette Tax Recovery Trust Fund and the amount of cigarette tax paid by a distributor are public information.

Very truly yours,

A handwritten signature in black ink that reads "Jim Mattox". The signature is written in a cursive style with a large, prominent "J" and "M".

J I M M A T T O X
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