



**THE ATTORNEY GENERAL  
OF TEXAS**

April 24, 1989

**JIM MATTOX  
ATTORNEY GENERAL**

Mr. A. W. Pogue  
Commissioner  
State Board of Insurance  
1110 San Jacinto  
Austin, Texas 78701-1998

Dear Mr. Pogue:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S. Your request was assigned ID# 5758; this decision is OR89-130.

Under the Open Records Act, all information held by governmental bodies is open unless the information falls within one of the act's specific exceptions to disclosure. The act places on the custodian of records the burden of proving that records are excepted from public disclosure. If a governmental body fails to claim an exception, the exception is ordinarily waived unless the information is deemed confidential under the act. See Attorney General Opinion JM-672 (1987). The act does not require this office to raise and consider exceptions that you have not raised.

The State Board of Insurance (the Board) received a request from an officer from the district office of the Department of the Treasury, Internal Revenue Service (I.R.S.) for information on a company named CGH&W, Inc., d/b/a Williamson County Title Company. The revenue officer seeks:

(1) The names and addresses of all title insurance underwriters that provide title coverage sold by this company.

(2) The names and addresses of any bonding companies that bond this company.

(3) The location of the trust accounts held by this company at financial institutions including account numbers and account styling of the account.

(4) Any other information held by [the Board] that provide the sources of income to this company, including but not limited to, specific identification and location of the payor's [sic] of such income.

(5) A listing of tangible and intangible assets including any known lienholder information, including net worth of the company.

You inform us that you will release the items requested in numbers 1 and 2, but that the Board does not have within its custody information requested in numbers 4 and 5. The Open Records Act does not require a governmental body to prepare new information, Open Records Decision No. 342 (1982), nor does it require a governmental body to obtain information that is not within its possession.<sup>1</sup> Open Records Decision Nos. 445 (1986); 317 (1982). If the items numbered 4 and 5 are not held by a consultant acting as an agent for the Board, the Board is not required to produce these items. See Open Records Decision No. 462 (1987).

At issue is the availability of information concerning the trust accounts of the Williamson County Title Company. You argue that this information is protected from required public disclosure under section 3(a)(1) of the Open Records Act. Section 3(a)(1) protects "information deemed confidential by law," including statutory law. This section incorporates specific statutes that protect information from public disclosure. Article 9.39 of the Texas Insurance Code governs annual audits of trust fund accounts by title insurance agents representing title insurance companies. Article 9.39 provides that a copy of such report, its findings and analysis, be sent to the State Board of Insurance. Article 9.39 further provides:

All such reports and analyses furnished by the title insurance company to the Board shall, at the election of the Commissioner, be classed as confidential and privileged after having been filed with the Board.

Ins. Code art. 9.39. You inform us that as Commissioner of Insurance, you have designated the Williamson County Title

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1. This letter does not address whether the Board may be compelled to obtain and produce the information described in categories 4 and 5 pursuant to other law, e.g., the Internal Revenue Code.

Company trust account reports and analyses as confidential and privileged.

Your letter indicates that your office has treated the Internal Revenue Service's inquiry as a request for information under the Open Records Act. You note, however, that the I.R.S. request is predicated on its authority to obtain such information under sections 7602 and 6333 of the Internal Revenue Code. Section 7602 provides the following in pertinent part:

(a) Authority to summon, etc. -- For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized --

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry.

26 U.S.C. § 7602(a)(1). Section 6333 provides the following:

If a levy has been made or is about to be made on any property, or right to property, any person having custody or control of any books or records, containing evidence or statements relating to the property or right to property subject to levy, shall, upon demand of the Secretary or his delegate, exhibit such books or records to the Secretary or his delegate.

Id. § 6333. Because the I.R.S. request is made not as a member of the public, but in pursuit of its official duties and pursuant to explicit statutory authority, we do not believe the Open Records Act governs the Board's duty to provide the information. Rather, we think the real issue is whether article 9.39 of the Insurance Code authorizes the Commissioner to deny the I.R.S. access to the requested information.

When a federal law and a state law are in conflict, the federal law prevails. The general rule is that a valid federal law will preempt any conflicting state legislation. Free v. Bland, 369 U.S. 663 (1962). The United States

Constitution gives primacy to laws enacted by the Congress as the "supreme law of the land." U.S. Const. art. VI, § 2. This supremacy is clear when a state law conflicts directly with a federal law or when state law stands as an obstacle to the accomplishment of Congress' purposes and objectives. KVUE, Inc. v. Moore, 709 F.2d 922, 931 (5th Cir. 1983), aff'd 465 U.S. 1092 (1984); see also United States v. State of Texas, 695 F.2d 136 (5th Cir.), cert. denied, 464 U.S. 933 (1983).

The 1988 edition of Internal Revenue Code was enacted by Congress under the Tax Reform Act of 1986. Pub. L. No. 99-514, 100 Stat. 2085, 2095 (1986). As a law enacted by Congress, primacy is given to the Internal Revenue Code over any state legislation that impairs the authority of the Secretary of the Treasury to determine the potential liability of any person for any internal revenue tax. Accordingly, we believe the provisions of the Internal Revenue Code must prevail over any conflicting provisions of the Insurance Code of Texas. You suggest, though, that there is no conflict between article 9.39 and either section of the Internal Revenue Code quoted above because neither grants the I.R.S. authority to examine the records of the State Board of Insurance.

You argue that section 7602 does not address disclosure of records in the custody of the state. You also claim that the state of Texas is not a "person" as defined in section 7701 of the Internal Revenue Code. You contend that section 6333 does not compel the Board to supply the requested information because the I.R.S. has not provided evidence that a levy has been or is about to be made. Again, you assert that the state is not a "person" for purposes of section 6333.

A careful reading of section 7602 will reveal that the definition of "person" is relevant only for determining liability for any internal revenue tax. It does not limit the class of individuals or entities whose records the Secretary may examine. Furthermore, federal courts have consistently ruled that section 7602 preempts state laws, either constitutional or statutory, that attempt to designate information sought under that section as confidential or privileged. See United States v. Cortese, 410 F.Supp. 1380 (E.D. Pa.), aff'd, 540 F.2d 640 (3d Cir. 1976). See also Colton v. United States, 306 F.2d 633 (2d Cir. 1962), cert. denied, 371 U.S. 951 (1963); Falsone v. United States, 205 F.2d 734 (5th Cir.), cert. denied, 346 U.S. 864 (1953). The Cortese case, moreover, demonstrates that section 7602 reaches information held by state officers. In that case, the court enforced an I.R.S. summons issued to the prothonotary of the Philadelphia state courts for

information relating to contingent fee arrangements of an attorney whose potential liability was under investigation by the I.R.S. Consequently, the Commissioner's classification of the information sought by the I.R.S. as confidential does not limit the authority of the I.R.S. to examine that information. The information concerning the trust accounts must be provided to the I.R.S.

Please note that the release of this information to the I.R.S. does not waive any claims of confidentiality the State Board of Insurance may have under the Open Records Act if this, or similar information, is requested by a member of the public. Moreover, the act provides that a governmental body may request a decision from the attorney general regarding the availability of information under the act, if there has been no previous determination from the attorney general that the information falls within one of the act's specific exceptions. V.T.C.S. art. 6252-17a, § 7(a). This ruling limits its application to information sought by the I.R.S. in pursuit of its official duties under the Internal Revenue Code.

If you have any questions about this ruling, please refer to OR89-130.

Yours very truly,

*Open Government Section*  
*of the Opinion Committee*  
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Assistant Attorney General

SA/FAF/bc

cc: Ms. A. LaMonica  
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