



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

October 20, 1997

Ms. Sandra C. Joseph
Open Records Counsel/Disclosure Officer
Office of the Comptroller of Public Accounts
LBJ State Office Building
Austin, Texas 78774

OR97-2330

Dear Ms. Joseph:

You have asked whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 109576.

The Texas Comptroller of Public Accounts (the "comptroller") received a request for information about (1) hotel occupancy tax audits and (2) sales, excise, and use tax audits. You indicate that most of the requested information has been provided to the requestor. However, you assert that the audit generation lists may be excepted from public disclosure under section 552.108 of the Government Code. You also assert that information showing that penalties and interest were assessed against taxpayers is confidential under section 552.101 of the Government Code in conjunction with section 111.006(a) of the Tax Code. Sample information responsive to the request has been submitted to this office for review.¹

Section 552.108(a)(1) provides that information held by a law enforcement agency that deals with the detection, investigation, or prosecution of crime is excepted from required public disclosure if release of the information would interfere with the detection, investigation, or prosecution of crime. *See* Act of June 1, 1997, H.B. 951, § 1, 75th Leg., R.S. You assert that section 552.108 protects the requested audit generation lists from disclosure:

The audit generation list contains the names and taxpayer numbers of taxpayers who have been selected for audit, but who have not yet been notified.

¹We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision No. 499 (1988), 497 (1988). Here, we do not address any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Disclosure of this list might allow some taxpayers to alter or fabricate records prior to the beginning of the audit. Disclosure of this information may also permit the public to determine what strategies and conditions our offices uses to select taxpayers for audit by knowing the type of taxpayer appearing at any given time. This would seriously hamper our agency's ability to detect wrongdoing via the audit process.

You cite to the Texas Supreme Court's ruling in *A & T Consultants, Inc. v. Sharp*, 904 S.W.2d 668, 677-678 (Tex. 1995). In *A & T Consultants*, the court agreed that, when an audit has not yet been concluded, releasing the date that a taxpayer's name appeared on a list of prospective audits and the date the audit was assigned would interfere with law enforcement. *Id.* The court also stated, however, that releasing scheduling and assignment dates of completed audits "cannot provide other taxpayers, who are unaware that they will be audited in the future, with any information that they could use to thwart the comptroller's enforcement of the tax laws." *Id.* at 678.

We agree that the comptroller has shown that section 552.108 is applicable as to audit generation lists of audits that have not been completed. This type of information may be withheld from disclosure. However, the generation lists of completed audits are not protected from disclosure under section 552.108.

Section 552.101 of the Government Code provides that information made confidential by law is excepted from disclosure under the Texas Open Records Act. Section 111.006(a)(2) of the Tax Code provides:

(a) Except as provided by subsection (d), 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:²

...

(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 (emphasis and footnote added).

²Subsection (b) of section 111.006 provides that the information made confidential under subsection (a) may not be subject to subpoena directed to the comptroller or the attorney general except in a judicial or an administrative proceeding in which this state, another state, or the federal government is a party. Subsection (d) of section 111.006 provides that information made confidential under subsection (a) may be examined by certain state officers, law enforcement officers, tax officials, federal officials, or the authorized representatives of such officers or officials under certain conditions not at issue here.

This provision makes confidential information the comptroller secured, derived, or obtained during the course of an examination. *A & T Consultants, Inc. v. Sharp*, 904 S.W.2d 668 (Tex. 1995).

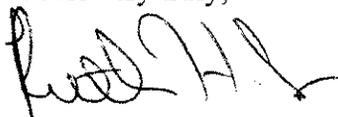
You state that “[p]enalty and interest are assessed when our auditors discover certain kinds of errors.” You assert that disclosing the fact of whether a taxpayer was assessed any type of penalty or interest would reveal to the public what types of errors were made by taxpayers. In *A & T Consultants*, the court concluded that while the amount of an audit deficiency assessment or refund is made confidential by statute, the *fact* that an audit resulted in a deficiency assessment or refund is not confidential. *Id.* at 680-681. The court reasoned that “[t]he fact of a deficiency or refund reveals nothing about taxpayers except that they miscalculated their tax.” *Id.* at 680. The court also concluded, however, that information showing the primary and secondary errors of taxpayers is confidential pursuant to section 111.006(a)(2). *Id.* At 679. The court reasoned that disclosure of “the precise nature of the errors” would reveal information derived from taxpayer records. *Id.*

You have provided guidelines to this office showing that penalties are assessed in certain situations, based upon information about the taxpayer that can be derived or obtained from taxpayer records. Thus, disclosing the *fact* that penalties were assessed could reveal more than simple taxpayer miscalculation of taxes. Based upon the information you provided to this office, we agree that information as to whether penalties were assessed is protected from disclosure under section 111.006(a)(2).

The guidelines submitted to this office also indicate that interest is assessed whenever there is a deficiency. However, the guidelines indicate that interest is waived only in certain special circumstances, none of which involve information derived or obtained from a taxpayer. Since interest is assessed when the audit reveals a deficiency, revealing the fact that interest was assessed reveals no more than the fact that there has been a deficiency assessment. Thus, pursuant to the court’s reasoning in *A & T Consultants*, the fact that interest is assessed is public. *A & T Consultants, Inc. v. Sharp*, 904 S.W.2d 668, 679 (Tex. 1995). Of course, the amount of interest is confidential under section 111.006(a)(2). *Id.*

We are resolving this matter with this informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Ruth H. Soucy
Assistant Attorney General
Open Records Division

RHS/ ch

Ref.: #109576

Enclosures: Submitted documents

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(w/o enclosures)