



OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

April 28, 2003

Ms. Ruth H. Soucy
Open Government Section
Comptroller of Public Accounts
P.O. Box 13528
Austin, Texas 78711-3528

OR2003-2848

Dear Ms. Soucy:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 180139.

The Comptroller of Public Accounts (the "comptroller") received a request for various categories of information pertaining to the Telecommunication Infrastructure Fund. The requestor does not seek the identity of any specific taxpayer. You state that you will provide the requestor with some responsive information, however, you claim that the remaining responsive information is excepted from disclosure under sections 552.101, 552.111, and 552.116 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

Initially, we note that section 552.022 of the Government Code makes certain information public, unless it is expressly confidential under other law. *See* Gov't Code § 552.022(a). One category of public information under section 552.022 is "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by [s]ection 552.108[.]" Gov't Code § 552.022(a)(1). Some of the submitted documents, which we have marked, are completed reports created by the comptroller. You claim that these

¹We note that section 552.103 was raised as an exception in your request for a decision from this office, however, as section 552.103 was not briefed in your subsequent correspondence we do not address that exception with regard to any of the submitted information.

²We 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 Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

documents are excepted from disclosure pursuant to sections 552.111 and 552.116 of the Government Code. We note, however, that sections 552.111 and 552.116 are discretionary exceptions under the Act and, as such, do not make information confidential. *See* Open Records Decision Nos. 473 (1987) (governmental body may waive section 552.111), 522 at 4 (1989) (discretionary exceptions in general). Accordingly, the comptroller may not withhold from disclosure any portion of the documents to which section 552.022 is applicable pursuant to sections 552.111 or 552.116 of the Government Code. However, you also claim that the documents that are subject to section 552.022(a)(1) of the Government Code are excepted from disclosure pursuant to section 552.101 of the Government Code. Therefore, we will consider your argument under that exception for that information.

Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” This section encompasses information protected by other statutes. Section 111.006(a)(2) of the Tax Code provides that 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” is confidential. Tax Code § 111.006(a)(2). You indicate that the information at issue was obtained or derived from records of taxpayers during an examination of the taxpayers’ books, records, papers, officers, or employees, or during an examination of the taxpayers’ business affairs, operations, source of income, profits, losses, or expenditures. Based on your representation and our review of the submitted information, we conclude that some of the information to which section 552.022 is applicable is confidential under section 111.006 because it is information obtained from taxpayers. Therefore, the comptroller must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 111.006 of the Tax Code.

We will address your section 552.116 argument with respect to the remaining information. Section 552.116 of the Government Code provides as follows:

(a) An audit working paper of an audit of the state auditor or the auditor of a state agency or institution of higher education as defined by Section 61.003, Education Code, is excepted from [public disclosure]. If information in an audit working paper is also maintained in another record, that other record is not excepted from [public disclosure] by this section.

(b) In this section:

(1) ‘Audit’ means an audit authorized or required by a statute of this state or the United States and includes an investigation.

(2) 'Audit working paper' includes all information, documentary or otherwise, prepared or maintained in conducting an audit or preparing an audit report, including:

(A) intra-agency and interagency communications; and

(B) drafts of the audit report or portions of those drafts.

You state that "the requested audit files were prepared by the auditors while conducting audits of providers to ensure their compliance with Utilities Code Section 57.048." Citing to section 111.004 of the Tax Code, you explain that the comptroller's auditing authority is provided by the Tax Code. *See also* Tax Code §§ 111.001, 111.021, and 111.004. Based on your representations, we conclude that the remaining submitted information constitutes audit working papers under section 552.116(b)(2) of the Government Code and is therefore excepted from disclosure under section 552.116. As we are able to make this determination, we need not address your remaining arguments.

In summary, with the exception of the information that we have marked for protection under section 552.101 in conjunction with section 111.006 of the Tax Code, the comptroller must release the information that we have marked under section 552.022. The comptroller may withhold the remaining submitted information to which section 552.022 is inapplicable under section 552.116.

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 Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,



Heather Pendleton Ross
Assistant Attorney General
Open Records Division

HPR/sdk

Ref: ID# 180139

Enc: Submitted documents

c: Ms. Kathleen LaValle
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(w/o enclosures)