



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 4, 2003

Ms. Ruth H. Soucy
Deputy General Counsel
Comptroller of Public Accounts
P.O. Box 13528
Austin, Texas 78711-3528

OR2003-6214

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# 187139.

The Comptroller of Public Accounts (the "comptroller") received a request for:

all information related to the individual(s) or company(s) who requested any information on [five specified] companies . . . and copies of all information provided to said individual(s). This would include copies of any requests for information, copies of information provided (whether requested or not), any agreements between the Comptroller's office and said individual(s) or company(s) (whether written or otherwise), and any other correspondence between the Comptroller's office and said individual(s) or company(s). Such information would include all correspondence with the requesting individual(s) or company(s) within the previous 6 months, and would include any information regarding documents faxed to the Comptroller's office to the attention of [a named individual,] on or about June 6, 2003. The information requested would NOT include correspondence or information requested by, or provided to, employees of the listed companies.

You claim that responsive information is excepted from disclosure under sections 552.101 and 552.116 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing for submission of public comments).

Initially, we address the requestor's assertion that some of the requested information has previously been released. The comptroller makes no representation as to whether or not any information has been previously released. Whether this information has previously been voluntarily released is a fact question that cannot be determined in the ruling process. *See* Attorney General Opinions GA-0087 at 1 (2003), GA-0003 at 1 n. 2 (2003), JC-0534 at 1 (2002) (this office does not make factual determinations in opinion process). Accordingly, if in fact any portion of the requested information has been voluntarily released to a third party, it may not be withheld on the basis of the informer's privilege or section 552.116. *See* Gov't Code § 552.007 (if governmental body voluntarily releases information to member of public, such information may not later be withheld unless confidential under law). However, we will address your arguments in case this information was not voluntarily disclosed.

We next address the comptroller's assertion that, on the date it received this request, it did not maintain some of the requested information. It is implicit in several provisions of the Public Information Act (the "Act") that the Act applies only to information in existence at the time a request for information is received. *See* Gov't Code §§ 552.002, .021, .227, .351. A governmental body need not release information that did not exist when it received a request or create new information in response to a request. *See Economic Opportunities Dev. Corp. of San Antonio v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.-San Antonio 1978, writ dismissed). However, a governmental body that receives a request has a duty to make a good faith effort to relate the request to information that it holds or to which it has a right of access. *See* Open Records Decision No. 561 at 8 (1990).

In this instance, the comptroller states that it "does not have any information that is responsive to that portion of the request" that seeks "information related to the individuals or entities that requested information on five named companies and copies of information provided to those requestors." The requestor asserts that "information was provided to at least one individual without a Public Information Request." As noted above, this office is unable to make factual determinations or resolve factual disputes in the opinion process. *See* Attorney General Opinions GA-0087 at 1, GA-0003 at 1 n. 2, JC-0534 at 1. We therefore must rely on a governmental body's representations with regard to such issues. Based on the comptroller's representation, we conclude that the comptroller is not required to create new information in response to this request or to release information that it did not maintain at the time this request was received but must only make a good faith effort to relate this request to the information that it maintained or to which it had a right of access on the date that it received this request.¹

We next note that some of the submitted information is subject to section 552.022 of the Government Code. This section provides that "the following categories of information are

¹We note that some of the submitted information appears to have been created after the comptroller received this request. To the extent the submitted information was created after the comptroller received this request, it is likewise not subject to the request and need not be released.

public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law: . . . (3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]” Gov’t Code § 552.022(a)(3). One of the submitted documents, which we have marked, constitutes a contract relating to the expenditure of public funds.

You claim that the submitted documents are excepted from disclosure pursuant to the common law informer’s privilege incorporated by section 552.101² as well as the audit working papers exception found in section 552.116 of the Government Code. We note, however, that the common law informer’s privilege and section 552.116 are discretionary exceptions, which are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.,* Open Records Decision Nos. 549 at 6 (1990) (governmental body may waive informer’s privilege), 522 at 4 (1989) (discretionary exceptions in general). Discretionary exceptions therefore do not constitute “other law” that makes information confidential.

However, the informer’s privilege is also found in Rule 508 of the Texas Rules of Evidence. The Texas Supreme Court has held that “[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are ‘other law’ within the meaning of section 552.022.” *In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001). We will therefore consider whether any portion of the contract is confidential under Rule 508.

Rule 508 provides in relevant part:

(a) Rule of Privilege. The United States or a state or subdivision thereof has a privilege to refuse to disclose the identity of a person who has furnished information relating to or assisting in an investigation of a possible violation of a law to a law enforcement officer or member of a legislative committee or its staff conducting an investigation.

(b) Who May Claim. The privilege may be claimed by an appropriate representative of the public entity to which the information was furnished, except the privilege shall not be allowed in criminal cases if the state objects.

Thus, an informer’s identity is confidential under Rule 508 if a governmental body demonstrates that an individual has furnished information relating to or assisting in an investigation of a possible violation of a law to a law enforcement officer or member of a legislative committee or its staff conducting an investigation, and the information does not fall within the purview of the exceptions to the privilege enumerated in Rule 508(c).

²Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision” and encompasses the common law informer’s privilege.

The information at issue here involves a report made to the comptroller, which is a law enforcement agency that “uses audits to further [its] law enforcement objectives” in enforcing tax laws. *A & T Consultants, Inc. v. Sharp*, 904 S.W.2d 668, 679 (Tex. 1995). We find that the contract at issue demonstrates that an individual has furnished information relating to or assisting in an investigation of a possible violation of a law to a law enforcement officer. Furthermore, having reviewed all of the submitted information, we find no indication that the privilege has been waived. We therefore conclude that the identifying information we have marked in the contract is protected under the informer’s privilege as provided in Rule 508 of the Texas Rules of Evidence. The remainder of this document is not so protected or otherwise confidential by law and must therefore be released in accordance with section 552.022(a)(3).

We turn now to the arguments you make for the remaining submitted information, which is not subject to section 552.022. Because your claim regarding section 552.116 is broader, we address it first. Section 552.116 of the Government Code provides:

(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 contend that the remaining records at issue constitute “audit working papers” that are excepted from disclosure under section 552.116(a) of the Government Code. The comptroller represents that the information at issue consists of records “compiled and maintained by [the comptroller’s] Audit Division while conducting tax audits and investigations” authorized under the Tax Code. The requestor asserts that “[t]o our knowledge, we are not under audit and no audit has been generated on any of the companies in question.” Given our inability to make factual determinations, we must rely on the comptroller’s representation that the submitted information does in fact pertain to an audit. See Attorney General Opinions GA-0087 at 1, GA-0003 at 1 n. 2, JC-0534 at 1 (this office does not make factual determinations in opinion process). Thus, based on the comptroller’s

representations, we agree that it may withhold the remaining submitted records pursuant to section 552.116. As we are able to make this determination, we need not address the comptroller's remaining arguments for this information.

In summary, to the extent the submitted information was created after the comptroller received this request, it need not be released. In accordance with section 552.022(a)(3), the comptroller must release the contract we have marked after redacting the identifying information that is protected under Rule 508. The remaining submitted information may be withheld pursuant to 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).

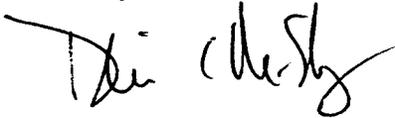
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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,



Denis C. McElroy
Assistant Attorney General
Open Records Division

DCM/lmt

Ref: ID# 187139

Enc. Submitted documents

c: Mr. John Bates
Paymentech
1601 Elm Street
Dallas, Texas 75201
(w/o enclosures)