



**ATTORNEY GENERAL OF TEXAS**  
**GREG ABBOTT**

August 26, 2004

Ms. Ruth H. Soucy  
Manager and Legal Counsel  
Open Records Division  
Comptroller of Public Accounts  
P.O. Box 13528  
Austin, Texas 78711-3528

OR2004-7308

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# 207932.

The Comptroller of Public Accounts (the "comptroller") received three requests for a copy of the October 2003 draft report of an audit of the comptroller conducted by the State Auditor's ("SAO") office. One of these requestors also seeks "any and all correspondence between the comptroller and the [SAO] occurring in 2004 regarding any audits or other reviews of the comptroller's office tax administration or tax settlements." This requestor, as well as another requestor, additionally seeks "those letters or e-mails that imply, state or otherwise indicate motivations and reasons behind the audit, and not necessarily correspondence that would be material to the actual conduct of the audit." You raise no exceptions to disclosure of the requested information and, in fact, maintain that the information is public and should be released to the requestors. The SAO has submitted comments to this office and objects to "any release of this draft report and any other documentation relating to this audit that constitute audit working papers" under section 552.116 of the Government Code. *See Gov't Code § 552.304* (providing that interested party may submit comments stating why information should or should not be released). We have considered the arguments of the comptroller and the comments of the SAO and have reviewed the submitted information.

First, we note that the information at issue in this case consists of a draft audit report prepared by the SAO and submitted to the comptroller for the comptroller's review and

comment,<sup>1</sup> as well as intra- and inter-agency communications relating to the audit, which are held by the audited entity, the comptroller. In this regard, we note that the Public Information Act (the "Act") applies to "public information," which is defined under section 552.002 as:

information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

- (1) by a governmental body; or
- (2) for a governmental body and the governmental body owns the information or has a right of access to it.

Gov't Code § 552.002; *see also id.* § 552.021. Thus, under this provision, information is generally "public information" within the scope of the Act when it relates to the official business of a governmental body or is maintained by a public official or employee in the performance of official duties, even though it may be in the possession of one person. In addition, section 552.001 states it is the policy of this state that each person is entitled, unless otherwise expressly provided by law, at all times to complete information about the affairs of government and the official acts of public officials and employees. *See id.* § 552.001(a). Upon review of the submitted information, we find that the information at issue in this case, maintained by the comptroller and relating to the transaction of the official business of the comptroller, is the public information of the comptroller under the Act.

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<sup>1</sup>*See* Gov't Code §§ 321.014(a), (c), providing that "[t]he [SAO] shall prepare a written report for each audit conducted by the [SAO]... The State Auditor shall submit each report to the committee prior to publication. The State Auditor shall file a copy of each report prepared under this section with: ... (6) each member of the governing body and the administrative head of each entity that is the subject of the report...."

As noted above, the comptroller raises no exceptions to disclosure and indicates that it seeks to voluntarily disclose the requested information to the requestors. *See* Gov't Code § 552.007(a) (providing that “[t]his chapter does not prohibit a governmental body or its officer for public information from voluntarily making part or all of its information available to the public, unless the disclosure is expressly prohibited by law or the information is confidential under law”). The comptroller states that

[w]e believe that core audit working papers can be protected under Government Code section 552.116, in appropriate circumstances to protect the integrity of the tax audit process. However, the Comptroller is also a staunch believer in government in the sunshine and in ensuring that Texans have access to their public records. We thus object strongly to any application of . . . section 552.116 that would close from public view all internal communications concerning the audit and all inter-agency communications with the [SAO].

Therefore, the comptroller may only be prohibited in this case from releasing the information at issue if disclosure is expressly prohibited by law or the information is confidential under law. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475 (Tex. App.—Dallas 1999, no pet.) (noting that section 552.007 provides that governmental body may choose not to raise exception and may voluntarily disclose information that is not confidential by law); *Birnbaum v. Alliance of American Insurers*, 994 S.W.2d 766, 776 (Tex. App.—Austin 1999, pet. denied) (noting that government agency may waive permissive exception and release information unless release is expressly prohibited by law or information is confidential under law).

The SAO notes in its comments to this office that it marked the draft report submitted to the comptroller as confidential. However, information is not confidential under the Act simply because the party submitting the information anticipates or requests that it be kept confidential. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). In other words, a governmental body cannot, through an agreement or contract, overrule or repeal provisions of the Act. Attorney General Opinion JM-672 (1987); Open Records Decision No. 541 at 3 (1990) (“[T]he obligations of a governmental body under [the predecessor to the Act] cannot be compromised simply by

its decision to enter into a contract.”). Consequently, unless disclosure of the submitted information is expressly prohibited by law or the information is confidential under law, it must be released to the requestors, notwithstanding any expectation of privacy on the part of the SAO or agreement otherwise.

The SAO also argues that the requested information should be withheld from the requestors under section 552.116, which excepts from disclosure, among other information, an audit working paper of an audit of the SAO. Section 552.116, however, is a discretionary exception to disclosure. *See* Open Records Decision No. 522 at 4 (1989) (discretionary exceptions in general). Such exceptions are designed to protect only the interests of governmental bodies rather than third parties and may be raised or waived by a governmental body that receives a request for information at its discretion. Section 552.116 does not make information confidential by law and does not expressly prohibit disclosure of the submitted information. Because the comptroller does not raise a claim under section 552.116, the information at issue may not be withheld under that section in this instance. As we do not otherwise find that the submitted information is confidential by law, or that its release is prohibited by law, we conclude that the comptroller may release the requested information.

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 Department of Public 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,

  
Michael A. Pearle  
Assistant Attorney General  
Open Records Division

MAP/jh

Ref: ID# 207932

Ms. Ruth H. Soucy - Page 6

Enc. Submitted documents

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Mr. John Moritz  
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