



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

September 29, 2004

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

OR2004-8295

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# 209192.

The Comptroller of Public Accounts (the "comptroller") received a request for lists of taxpayers whose accounts the State Auditor's Office (the "SAO") has been reviewing in connection with an audit of the comptroller. The requestor also seeks "any related requests made of the [comptroller] by the [SAO]." You raise sections 552.101 and 552.116 of the Government Code as possible exceptions to disclosure of the requested information. In addition, the SAO has submitted briefing to this office in which it claims that the information at issue is excepted from disclosure under section 552.116 of the Government Code, and that the list of taxpayers is confidential under section 321.0138 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 comments of both the comptroller and the SAO and have reviewed the submitted sample information.<sup>1</sup>

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<sup>1</sup>We 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.

The comptroller suggests that section 321.0138(e) of the Government Code may be applicable to the requested list of taxpayers. Section 321.0138 provides in pertinent part:

(a) This section applies to:

- (1) a settlement of a claim for a tax, refund, or credit of a tax, penalty, or interest imposed by Title 2, Tax Code;
- (2) a settlement of a taxpayer suit under Chapter 112, Tax Code; or
- (3) any circumstance in which a taxpayer received a warrant, offset, check, payment, or credit from the comptroller or comptroller's office arising from the filing of a tax return with the state.

(b) The state auditor and the committee<sup>2</sup> shall review the comptroller's records of all tax refunds, credits, payments, warrants, offsets, checks, and settlements for the preceding six years from the effective date of this section. The state auditor and the committee may review the comptroller's records of all tax refunds, credits, payments, warrants, offsets, checks, and settlements that occur following the effective date of this section. Notwithstanding any other law, in reviewing these tax refunds, credits, payments, warrants, offsets, checks, and settlements, the state auditor and the committee are entitled to access to related information to the same extent they would be entitled under Section 321.013 if the information were in a department or entity that is subject to audit. In accordance with Section 321.013(h), neither the state auditor nor the committee may conduct audits of private entities concerning the collection or remittance of taxes or fees to this state.

(c) Within six months following the effective date of this section, the comptroller shall provide to the state auditor information designated by the state auditor, after consultation with the comptroller, relating to tax refunds, credits, payments, warrants, offsets, checks, and settlements made in the past six years as requested by the state auditor. Commencing February 1, 2004, on a monthly basis, the comptroller shall provide to the state auditor information

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<sup>2</sup>The term "committee" as used in this section refers to the legislative audit committee. *See* Gov't Code §§ 321.001(3), 321.002.

designated by the state auditor relating to tax refunds, credits, payments, warrants, offsets, checks, and settlements to which this section applies.

(d) A review by the state auditor under this section is considered an audit for purposes of the application of Section 552.116, relating to confidentiality of audit working papers. Information obtained or possessed by the state auditor or the committee that is confidential under law when in the possession of the comptroller remains confidential while in the possession of the state auditor or committee, except as provided by Subsection (e).

(e) The committee shall determine the manner in which the state auditor shall report information obtained pursuant to Subsection (b). The report may include any information obtained during the review, except that the report may not be formatted in a manner or include any information that discloses or effectively discloses the specific identity of an individual or taxpayer. The report must state the information by category or by numeric pseudonym and may include other information maintained by the Texas Ethics Commission.

Gov't Code § 321.0138(a)-(e). The SAO indicates that the submitted information consists of records generated during a taxpayer settlement review for purposes of section 321.0138 and notes that subsection 321.0138(e) "states that the SAO's final report may not disclose the identity of a taxpayer or individual." Further, the SAO asserts to this office that "the SAO considers the names of individuals that are included in any audit work paper to be protected under Govt. Code 552.116 as well as under the plain language of Govt. Code 321.0138(e)."

As the SAO notes, subsection 321.0138(e) provides that a report prepared by the SAO may not include information that discloses the specific identity of an individual or taxpayer. Upon review of the SAO's arguments and the submitted information, however, we do not have enough information to determine whether or not the submitted list of taxpayers is contained within a report prepared pursuant to subsection 321.0138(e), whether or not a report as contemplated by subsection 321.0138(e) has been created by the SAO, and whether or not this information may be confidential under subsection 321.0138(e). Accordingly, we will address the applicability of section 552.116 to the submitted list of taxpayers as well as to the remaining submitted information.

The comptroller has raised section 552.116. In addition, the SAO argues that the information at issue should be withheld from the requestor under section 552.116, which excepts from disclosure, among other information, an audit working paper of an audit of the SAO. Section 552.116 provides:

(a) An audit working paper of an audit of the state auditor...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.

Gov't Code § 552.116. We note that the SAO is the independent auditor for Texas state government. Further, it has authority under section 321.013 of the Government Code to conduct audits of all state departments as specified in the audit plan. *See, e.g.,* Gov't Code §321.0134 (audit to determine whether audited entity is managing or utilizing its resources in an economical and efficient manner). The SAO asserts that any records created by the SAO in the course of this audit are the audit working papers of the SAO. *See* Gov't Code § 321.0138(d) (review of comptroller records under section 321.0138 is considered an audit for purposes of application of section 552.116). After reviewing the submitted information, we conclude that the information consists of the audit working papers of the SAO for purposes of section 552.116 of the Government Code. Therefore, the comptroller may withhold the submitted information, including the submitted list of taxpayers, under section 552.116.

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

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§ 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# 209192

Enc. Submitted documents

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