



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 3, 2011

Mr. Charles L. Lacallade
Brown & Lacallade, P.C.
Attorneys for 3G Water Supply Corporation
P.O. Box 1956
Kingsland, Texas 78639

OR2011-00050

Dear Mr. Lacallade:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 404378.

3G Water Supply Corporation (the "corporation"), which you represent, received two requests for several categories of information related to the operations of the corporation. You state that the corporation has withheld W-2 and W-4 forms under section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code and in accordance with Open Records Decision No. 684 (2009).¹ You claim that the submitted information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted representative sample of information.² We have also received and considered comments

¹Open Records Decision No. 684 is a previous determination to all governmental bodies that authorizes withholding ten categories of information, including W-2 and W-4 forms under section 552.101 in conjunction with section 6103(a) of title 26 of the United States Code, without the necessity of requesting an attorney general decision.

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.

submitted by the requestor. *See* Gov't Code § 552.304 (providing that an interested party may submit comments stating why information should or should not be released).

Initially, we note the requestor has excluded from the request social security numbers, withholding information, and net pay. Thus, any such information is not responsive to the request. This decision does not address the public availability of non-responsive information, and that information need not be released.

We must next address the corporation's obligations under the Act. Section 552.301 of the Government Code prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Pursuant to section 552.301(b) of the Government Code, the governmental body must request a ruling from this office and state the exceptions to disclosure that apply within ten business days after receiving the request. *See id.* § 552.301(b). Under section 552.301(e), a governmental body must submit to this office within fifteen business days of receiving the request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *See id.* § 552.301(e). In this instance, you state, and the submitted information reflects, that the corporation received the requests for information on December 1, 2009 and July 13, 2010. However, you did not request a ruling from this office or submit any of the information required by section 552.301(e) until October 22, 2010. Further, although your brief references a checkbook register as Exhibit N, you did not submit this information for our review. Thus, we find the corporation failed to comply with the requirements of section 552.301.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the requirements of section 552.301 results in the legal presumption that the information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ); *see also* Open Records Decision No. 630 (1994). Generally, a compelling reason to withhold information exists where some other source of law makes the information confidential or where third-party interests are at stake. Open Records Decision No. 150 at 2 (1977). You claim that the submitted information is excepted from disclosure under section 552.101 of the Government Code. Because section 552.101 can provide a compelling reason for non-disclosure, we will consider the applicability of this exception to the submitted information. However, we have no basis for concluding that the checkbook register is excepted under this section because you failed to submit it to us for our review. Therefore, we have no choice but to order you

to release the checkbook register. If you believe that the information at issue is confidential and may not lawfully be released, you must challenge this ruling in court pursuant to section 552.324 of the Government Code.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information made confidential by other statutes. Prior decisions of this office have held that section 6103(a) of title 26 of the United States Code renders tax return information confidential. Attorney General Opinion H-1274 (1978) (tax returns); 226 (1979) (W-2 forms). Section 6103(b) defines the term "return information" as "a taxpayer's identity, the nature, source, or amount of income, payments, . . . tax withheld, deficiencies, overassessments, or tax payments . . . or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary [of the Internal Revenue Service] with respect to a return or . . . the determination of the existence, or possible existence, of liability . . . for any tax, penalty, . . . or offense[.]" See 26 U.S.C. § 6103(b)(2)(A). Federal courts have construed the term "return information" expansively to include any information gathered by the Internal Revenue Service regarding a taxpayer's liability under title 26 of the United States Code. See *Mallas v. Kolak*, 721 F. Supp 748, 754 (M.D.N.C. 1989), *aff'd in part*, 993 F.2d 1111 (4th Cir. 1993). A taxpayer is defined as "any person subject to any internal revenue tax." 26 U.S.C. § 7701(a)(14).

Upon review, we find the submitted 940 and 1099 forms are tax return information that the corporation must withhold under section 552.101 of the Government Code in conjunction with section 6103 of title 26 of the United States Code. However, in the context of the 941 and 1096 forms, the corporation is not a taxpayer; instead, it is an employer reporting to the Internal Revenue Service the amounts of income tax withheld from employee taxpayer wages in a given time period as required by federal law. See *id.* § 3402(a) ("every employer making payment of wages shall deduct and withhold upon such wages a tax"). Thus, we find you have failed to demonstrate how the 941 and 1096 forms, which only indicate the total wages paid by the corporation to its employees and reflect the total income tax withheld for a given time period, constitute "return information" as defined in section 6103(b). We also find you have failed to demonstrate how the payroll and contractor information in the remaining submitted records, which only references salaries and wages, constitutes "return information" as defined in section 6103(b). Accordingly, we find the remaining information does not constitute tax return information for the purposes of section 6103 of title 26 of the United States Code, and the corporation may not withhold it under section 552.101 of the Government Code on that basis. Cf. Gov't Code § 552.022(a)(2) (requiring disclosure of "the name, sex, ethnicity, salary, title, and dates of employment of each employee and officer of a governmental body"), (3) (requiring disclosure of "information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body").

In summary, the corporation must withhold the submitted 940 and 1099 forms under section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code. The corporation must release the remaining responsive information to the requestor.

Finally, you request that this office issue a "previous determination" that would permit the corporation in the future to withhold from disclosure employee wages and amounts paid to a contractor or subcontractor without the need of requesting a ruling from us about whether such information can be withheld from disclosure. We decline to issue such a previous determination at this time. Accordingly, this letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/dls

Ref: ID# 404378

Enc. Submitted documents

c: Requestor
(w/o enclosures)