



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 8, 2011

Mr. James G. Nolan
Assistant General Counsel
Texas Comptroller of Public Accounts
P.O. Box 13528
Austin, Texas 78711-3528

OR2011-11394

Dear Mr. Nolan:

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# 426275 (CPA ORTS # 7248312337 and 724846911).

The Texas Comptroller of Public Accounts (the "comptroller") received two requests for (1) information relating to a named individual's tax liability associated with a specified State Office of Administrative Hearings ("SOAH") hearing number, and (2) all tax returns and tax reports filed by the Commemorative Air Force, West Houston Squadron during a specified time period. You state the comptroller is withholding the requested tax returns of the Commemorative Air Force under section 552.101 of the Government Code in conjunction with section 151.027 of the Tax Code pursuant to the previous determination issued to the comptroller in Open Records Letter No. 2003-7642 (2003). You also state the comptroller is withholding audit working papers and Audit Work Manager comments subject to section 552.116 of the Government Code pursuant to the previous determinations issued to the comptroller in Open Records Letter Nos. 2007-10491 (2007) and 2004-3926 (2004), respectively. *See* Gov't Code § 552.301(a); Open Records Decision No. 673 at 7-8 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). You state you will release some information to the first requestor, who in this instance, is the named taxpayer. You claim the remaining information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code. We have

considered the exceptions you claim and reviewed the submitted representative sample of information.¹

Section 552.101 of the Government Code exempts 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 statute. 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).

The supreme court considered the applicability of section 111.006 to several categories of information in *A & T Consultants, Inc. v. Sharp*, 904 S.W.2d 668 (Tex. 1995). In doing so, the court not only considered if the information was derived from the taxpayer’s records, but also whether the information reveals anything about the taxpayer’s business affairs, operations, financial condition, profits, or losses. *Id.* at 676, 680. The court concluded that the starting and ending dates of an audit are not confidential under section 111.006 because although they may indicate the seriousness of an audit, they “reveal nothing about a taxpayer’s business affairs, operations, or profits or losses.” *Id.* at 676. Similarly, the court concluded that while the amounts of deficiencies or refunds are derived from the taxpayer’s records, the fact of a deficiency or refund “reveals nothing about taxpayers except that they miscalculated their tax.” *Id.* at 680; *see id.* at 680 n. 6. Thus, the fact of a deficiency or refund is not confidential under section 111.006. The court further determined that taxpayer identities are not confidential under section 111.006 and order them released. *Id.* at 676. Additionally, the court held a taxpayer’s response to an audit “is unquestionably ‘information . . . obtained by the comptroller . . . during the course of an examination’” for purposes of section 111.006 of the Tax Code. *Id.* at 679 (quoting Tax Code § 111.006).

The information you seek to withhold under section 111.006 consists of correspondence generated by the comptroller, the comptroller’s examination results for the named taxpayer, and correspondence from the named taxpayer regarding the examination results. Based on our review, we conclude some of the submitted information is confidential under section 111.006 as it was obtained by the comptroller during the course of an examination or derived from a taxpayer’s records and reveals the taxpayer’s business affairs, operations, financial condition, profits, or losses. Accordingly, the comptroller must withhold the information we have marked pursuant to section 552.101 of the Government Code in

¹This letter ruling assumes that the submitted representative sample of information is truly representative of the requested information as a whole. This ruling does not reach, and therefore does not authorize, the withholding of any other requested information to the extent that the other information is substantially different than that submitted to this office. *See* Gov’t Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

conjunction with section 111.006 of the Tax Code.² However, you have failed to demonstrate how the remaining information constitutes information obtained from or derived from a taxpayer's records and reveals the taxpayer's business affairs, operations, financial condition, profits, or losses for section 111.006 purposes. Accordingly, none of the remaining information may be withheld under section 552.101 of the Government Code on this basis.

You seek to withhold a portion of the remaining information under section 552.101 of the Government Code in conjunction with section 151.027 of the Tax Code. Section 151.027 of the Tax Code provides in relevant part:

(b) Information secured, derived, or obtained during the course of an examination of a taxpayer's books, records, papers, officers, or employees, including the business affairs, operations, profits, losses, and expenditures of the taxpayer, is confidential and not open to public inspection except as provided by Subsection (c) of this section.

Tax Code § 151.027(b). We note information made confidential under section 151.027(b) is co-extensive with information deemed confidential under section 111.006(a)(2). Because we have already disposed of the comptroller's claims under section 111.006, none of the remaining information at issue may be withheld under section 151.027(b). Therefore, none of the remaining information may be withheld under section 552.101 of the Government Code on this basis.

You seek to withhold a portion of the remaining information under section 552.103 of the Government Code, which provides in pertinent part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

²As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

Gov't Code § 552.103(a), (c). The comptroller has the burden of providing relevant facts and documents to show the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date of the receipt of the request for information and (2) the information at issue is related to the pending or anticipated litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The comptroller must meet both prongs of this test for information to be excepted under section 552.103(a). We note contested cases conducted under the Administration Procedure Act (the “APA”), chapter 2001 of the Government Code, are considered litigation for purposes of section 552.103. *See* Open Records Decision No. 588 at 7 (1991). We further note a contested case before SOAH is considered litigation for the purposes of the APA. *See id.*

You state the present requests are related to a contested case hearing before SOAH between the comptroller and the named taxpayer, Hearing No. 102,566. You further explain the information at issue relates to the subject matter of the pending litigation. Based on your representations and our review, we determine litigation was pending on the date the comptroller received the request for information. Furthermore, we find the information at issue relates to the pending litigation. Accordingly, section 552.103 of the Government Code is applicable to the information you have marked.

We note, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the pending litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, the applicability of section 552.103(a) ends when the litigation has concluded. Attorney General Opinion MW-575 at 2; Open Records Decision Nos. 350 at 3 (1982), 349 at 2.

In summary, the comptroller must withhold the information we have marked pursuant to section 552.101 of the Government Code in conjunction with section 111.006 of the Tax Code. The comptroller may withhold the information it has marked under section 552.103 of the Government Code. The remaining information must be released.

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,

A handwritten signature in cursive script that reads "Kirsten Brew".

Kirsten Brew
Assistant Attorney General
Open Records Division

KB/em

Ref: ID# 426275

Enc. Submitted documents

c: Requestor
(w/o enclosures)