



JOHN SHARP
Comptroller

COMPTROLLER OF PUBLIC ACCOUNTS
STATE OF TEXAS
AUSTIN, 78774

600 RO-561-DM
file # ~~ML 19810~~ 92
ID# 17810

October 26, 1992

Mr. Robert W. Patterson
Legal Assistant
Office of the Attorney General
Opinion Committee
Post Office Box 12548
Austin, Texas 78711-2548

RECEIVED
OCT 28 1992
Opinion Committee

RO-561

Dear Robert:

As you requested, enclosed are copies of Open Records requests that we have received in recent months which are similar to those which are the subject of Open Records Requests I.D. Nos. 9837 and 10672.

Please let me know if you have any questions or need additional information.

Sincerely,

Sandra C. Joseph
Open Records Request/Disclosure Officer

SCJ:bb

Enclosures



512-465-4800

L B J
State Office
Building

Bob Bullock

Comptroller of Public Accounts

Austin, Texas 78774

June 12, 1990

File # RQ-00561-DM
ID # 20864

#9837
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Opinion Committee

The Honorable James A. Mattox
Attorney General
State of Texas
Supreme Court Bldg., 7th Floor
Austin, Texas 78701

Dear General Mattox:

This is to request an Open Records Decision on a matter that my General Counsel, Larry Craddock, discussed with Susan Garrison, Director of the Open Government Section of your Opinion Committee, on June 8, 1990.

A former member of my audit staff, Ms. Barbara A. Britt, now of the Houston Office of Arthur Andersen & Co., has requested magnetic tapes containing the following information:

- On taxpayers audited for sales tax or franchise tax in the last four years:

Taxpayer names
Taxpayer identification number
Master mailing address
Tax type
Period covered by the audit
Audit deficiency amount; and
Name of the auditor and audit office responsible.

- On taxpayers now under audit or for whom an audit has been generated:

Taxpayer names
Taxpayer identification number
Master mailing address
Tax type
Period covered by the audit; and
Name of the auditor and audit office responsible.

- Sign-out logs for auditors in the Comptroller's Houston Office for the period September 1, 1989, through May 31, 1990; and
- Future sign-out logs for auditors in the Comptroller's Houston Office on a monthly basis.

A copy of the request for this information is enclosed.

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Most of the requested information is available under the Open Records Act, and I have directed my staff to prepare and furnish it to Arthur Andersen & Co. However, I believe some requested information is not subject to mandatory disclosure under the Open Records Act and should not be furnished to Arthur Andersen & Co.

Specifically, it is my understanding that, with certain other statutory exceptions, I cannot disclose an audit deficiency amount in the sales tax or franchise tax audit of a particular taxpayer unless it becomes necessary to do so to protect the state's interest (as by disclosure of the amount when filing a lien or certification of the deficiency to the attorney general for collection). See §3(a)(1) of the Open Records Act, article 6252-17a, V.T.C.S. (exception from open record act disclosure requirements of records made confidential by other law), and Tax Code §§111.006 (general tax audit confidentiality statute), 151.027 (sales tax audit confidentiality statute), and 172.206 (franchise tax audit confidentiality statute). See also Texas Attorney General Opinions Nos. JM-590 (1986), H-661 (1975) and H-223 (1974), and Open Records Decision No. 300 (Mark White 1981). Therefore, I do not intend to disclose the audit deficiency amounts on individual tax audits to Arthur Andersen & Co. unless you direct me to do so.

Similarly, I intend to withhold information regarding the list of taxpayers for whom an audit has been generated, but who are not yet under audit. This is a tentative list which includes taxpayers whose names have been randomly chosen and "recommended for audit" by a computer random selection program; taxpayers whose names have been generated as audit leads in the audit of other taxpayers; taxpayers whose names have been generated as audit leads through newspaper or other reported financial information that does not correspond to tax return information furnished the Comptroller; taxpayers whose names have been generated as audit leads from personal observations of Comptroller staff; and taxpayers whose names have been generated as audit leads through information reported by business competitors, current or former employees, or others.

Information as to which taxpayers will probably be audited and when they will probably be audited I believe to be exempt from mandatory Open Records Act disclosure under Art. 6252-17a, Sec. (11), V.T.C.S. (internal agency memoranda exemption) or, alternatively, to be exempt under Art. 6252-17a, §(8) (investigatory record exemption). Internal Revenue Service (IRS) investigations are exempt from mandatory disclosure under 5 U.S.C. §552(b)(7), the Federal Freedom of Information Act (FOIA) investigatory record exemption which corresponds to Art. 6252-17a, §8. Williams v. IRS, 479 F.2d 317, 318 (3d Cir. 1973), cert. denied, sub nom., Donlon v. IRS, 414 U.S. 1024, 94 S.Ct. 448, 38 L.Ed.2d 315 (1973); Pope v. U.S., 599 F.2d 1383, 1386 (5th Cir. 1979); B & C Tire Co. v. IRS, 376 F.Supp. 708 (N.D.Ala.1974) (phrase "law enforcement purposes" as used in FOIA includes civil tax law enforcement); Luzaich v. U.S., 435 F.Supp. 31, 34 (Minn.1977), aff'd without opinion, 564 F.2d 101 (8th Cir. 1977); White v. IRS, 528 F.Supp. 119 (N. D. Ohio 1981) (taxpayer request for ". . . letters, documents, memoranda or other materials about the choice or method of choosing taxpayers for investigation and audit . . ." was a request for records exempt from mandatory disclosure under the FOIA investigation exemption, or alternatively, under the FOIA internal agency memoranda exemption).

Quite obviously, Texas tax collections, like federal tax collections, would seriously suffer from advance disclosure of information regarding whether and when particular taxpayers will probably be audited. I urge you to decide, in keeping with the federal cases, that information identifying state taxpayers who will soon be audited is exempt from mandatory Open Records Act disclosure

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requirements as internal memoranda and privileged investigatory information of the Comptroller's office.

My staff and I don't usually determine who will do an audit or the precise period it will cover until very shortly before it begins. The beginning date of each audit depends on when the workload will permit it to be scheduled; the auditor assigned depends upon who is available when there is time to schedule it; the audit period is determined by the period that the statute of limitations will allow as of the date it is finished; and its completion date depends largely on what shape the auditor finds the records to be in and the complexity of the audit which we cannot foresee in advance. Therefore, even if it were determined that I should disclose advance information about planned audits, I would be unable to comply with Arthur Andersen's request to provide advance information as to which auditor will be assigned a particular audit and the audit period to be covered; nor would I be able to give an exact date when an audit would be scheduled until almost immediately before it starts. Further, the scheduled audit list is always tentative with some audits added or dropped from the list, depending on whether another audit appears likely to generate more revenue, whether other audits take a longer or shorter time than originally expected, staff turnover and other factors.

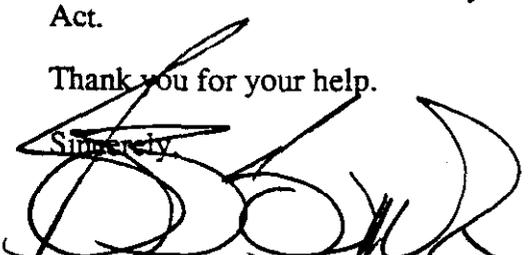
The last information requested which I don't intend to provide unless you advise me to do so is any auditor sign-out logs that might be generated in the future, but which do not presently exist. See Texas Attorney General Opinion No. JM-48 (1983), in part, as follows:

... This office has said that the Open Records Act applies only to information in existence, and does not require a governmental body to prepare new information. Open Records Decision No. 342 (1982). Since the act requires a governmental body to furnish only information which is in existence at the time a request is made, we believe it follows that such request cannot be deemed a proper request for relevant information which may become available in the future. In our opinion, the act does not require a governmental body to treat a request for information as a continuing one.

Please advise me if I am correctly interpreting my duties under the Tax Code and the Open Records Act.

Thank you for your help.

Sincerely,



BOB BULLOCK
Comptroller of Public Accounts

BB:bb

Attachment

cc: Ms. Barbara A. Britt, Arthur Andersen & Co.

Ed # 10672
SG
GAV

Bob Bullock

Comptroller of Public Accounts

file # RQ-00561-DM
ID# 20880

State of Texas

Larry J. Craddock
General Counsel
Disclosure Officer



LBJ State Office Building
Austin, Texas 78774
512/463-4904

FAX 512/463-4902

Board Certified—Administrative Law
Texas Board of Legal Specialization

September 20, 1990

Mr. Rick Gilpin
Chief, Opinion Committee
Office of the Attorney General
State of Texas
Supreme Court Building, 5th Floor
Austin, Texas 78711-2548

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Opinion Committee

Dear Mr. Gilpin:

Troy Harrison, a former employee who worked as an auditor in our Audit Division, has filed an Open Records request dated August 28, 1990. Mr. Harrison is now a tax consultant.

Mr. Harrison's request covers many records, including all interoffice memos to our audit field offices for the past three years. Upon receiving an estimate of cost for reproducing all the records requested, Mr. Harrison suspended the request, renewing it by telephone on September 10, 1990.

We are editing out taxpayer names, dollar amounts, advice and opinion and other confidential information. Contingent on receiving payment for our expense in reproducing this information, we will be furnishing the edited memos to Mr. Harrison.

Also, on September 13, 1990, Mr. Harrison requested the names of franchise taxpayers assessed a penalty in audits over the past six (6) years and the amount of penalty assessed.

The Tax Code requires us to edit out names of taxpayers receiving penalties for late payments. Tax Code §171.206 makes confidential and prevents the Comptroller from releasing information in a record or other instrument required to be filed under the franchise tax act. Tax Code §171.206 also makes confidential and prevents the Comptroller from disclosing information about a corporation's business affairs, operations, profits, losses or expenses obtained from an examination of corporate books, records, officers or employees.

Franchise tax penalty being directly proportionate to amount of tax owed by a corporation (Tax Code §171.362), it follows we cannot release the penalty information requested by Mr. Harrison since that would show how much tax was owed.

Alternatively, we are claiming that the edited information may be withheld under Art. 6252-

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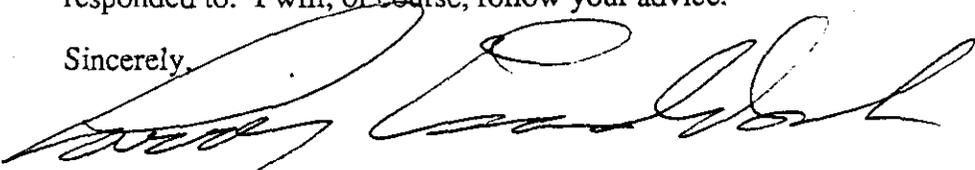
17a, Sec. 3 (a)(8) (investigatory record exemption).^{*} Internal Revenue Service (IRS) investigations are exempt from mandatory disclosure under 5 U.S.C. §552(b)(7), the Federal Freedom of Information Act investigatory record exemption which corresponds to Art. 6252-17a, Sec. 3 (a)(8). Williams v. IRS, 479 F.2d 317, 318 (3d Cir. 1973), cert. denied, sub nom., Donlon v. IRS, 414 U.S. 1024, 94 S.Ct. 448, 38 L.Ed.2d 315 (1973); Pope v. U.S., 599 F.2d 1383, 1386 (5th Cir. 1979); B & C Tire Co. v. IRS, 376 F.Supp. 708, 713 fn. 11 (N.D.Ala. 1974); Luzaich v. U. S., 435 F.Supp. 31, 34 (Minn. 1977), aff'd without opinion, 564 F.2d 101 (8th Cir. 1977); White v. Internal Revenue Service, 528 F.Supp. 119 (N. D. Ohio 1981).

Quite obviously, disclosure of audit strategy information and investigatory techniques might seriously weaken voluntary compliance with state tax law. Assuming for example, that one of the deleted memoranda indicates there are types of transactions which it is not considered cost efficient to audit and that information became common knowledge, it might seriously impair reporting of the types of transactions which are not audited. Similarly, if there are amounts below which it is considered cost inefficient to audit, revealing the cut-off figure might be expected to impair voluntary reporting of amounts below the cut-off figure.

We are forwarding to you a separate package of edited and unedited material being furnished Mr. Harrison. Except for the edited documents, all other requested documents are being furnished in their entirety.

I would appreciate you examining the documents and confirming that the request has been properly responded to. I will, of course, follow your advice.

Sincerely,



LARRY J. CRADDOCK
General Counsel

LJC:sgr

cc: Mr. Troy Harrison
Mr. Jim Moellinger

* The assertion that the investigatory record exemption is available to the Comptroller in tax audits is pending before your office in an Open Records Request (ID # 9837) involving a request from Barbara A. Britt of Arthur Anderson & Co. for a list of taxpayers we are intending to audit in the future but who have not yet been contacted. Your computer shows that this Request, which was submitted on June 12, 1990, has been assigned to Jim Moellinger for research.