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December 15, 2004

Ms. Ann Marie Maloney
Office of Policy Analysis
120 Legislative Services Building
90 State Circle
Annapolis, Maryland 21401

Dear Ms. Maloney:

You have asked for advice concerning the legality of making certain information publicly available. Specifically, you have asked about the legality of requiring disclosures about the value of tax credits and exemptions provided to a specific business, and also of requiring the disclosure of salary and health benefits of employees of recipients of State aid. You have also asked whether information about a company specific tax credit would be available to a person who filed a public information request with the Department of Business and Economic Development ("DBED"). It is my view that information gained from federal tax forms and information could not be subject to a requirement of disclosure. However, information gained from other sources could be disclosed. It is also my view that a document that reflected qualification of a specific company for a tax credit would be available to a person who filed an MPLA request with DBED, at least with respect to the existence and amount of the credit.

Background - Senate Bill 502 of 2004

Your question arises in the context of Senate Bill 502 of 2004, which is the subject of interim study by the Budget and Taxation Committee. Senate Bill 502 would have required the Department of Assessments and Taxation ("SDAT") to submit an annual unified property tax exemption and credit report to the General Assembly by December 31 of each year that would include a listing of all property tax exemptions or credits for the previous fiscal year that were development subsidies. "Development subsidy" was defined as "an expenditure of at least \$25,000 of public funds for the purpose of stimulating economic development within the State." The listing would include the name of the property owner, the address of the property, the starting and ending dates for the property tax exemption or credit, the schedule of the property tax exemption or credit, each property tax exemption or credit for the property, and the amount of property tax revenue not collected by the taxing authority as a result of the property tax exemption or credit. This report would also be posted on the SDAT website. The bill specifies that this information is to be considered public information notwithstanding § 1-301 of the Tax - Property Article.

Senate Bill 502 would also have required DBED to submit an annual report to the General Assembly by December 31 of each year. That report would contain a listing of all types of expenditures made by the State for economic development purposes during the prior fiscal year, including the amount of uncollected State tax revenues resulting from every corporate or other business tax credit, abatement, and reduction provided by the State, including of gross receipts tax, income tax, sales and use tax, excise tax, property tax, utility tax and inventory tax. The report would also list the name of each corporate or other business taxpayer who claimed a tax credit, abatement exemption or reduction worth \$ 5,000 or more and the dollar amount received by the taxpayer, and the number of corporate or other business taxpayers who claimed a tax credit, abatement, exemption, or reduction worth less than \$5,000 and a sum of the dollar amount received by all such taxpayers.

Finally, the bill required each agency that grants development subsidies to file an annual development subsidy report with DBED before February 1 of each year for each project for which a development subsidy was granted.¹ The report was to include the name, address and phone number of the recipient, the number of jobs created or lost, broken down by full-time positions, part-time positions, and temporary positions, the average hourly wage paid to all current and new employees at a project site, the type and amount of health care coverage provided to an employee at a project site, a comparison of the total employment in the State by the subsidy recipient on the date of the recipient's application for the development study and at the end of the fiscal year, a statement as to whether the use of the development subsidy during the previous fiscal year has reduced employment at any other site controlled by the subsidy recipient or its corporate parent, a certification signed by an authorized representative of the subsidy recipient that the information provided by the recipient to the granting body for use in the annual report is accurate, and a statement by the granting body as to whether the subsidy recipient is in compliance with its job creation and wage and benefit goals, and whether the corporate parent is in compliance with its state employment requirement. This information would go on DBED's web site. These provisions state that the information in the economic development report and annual reports are to be considered public information, notwithstanding § 13-202 of the Tax - General Article.

Confidentiality of Tax Information

Section 13-202 of the Tax - General Article provides that "[e]xcept as otherwise provided in this subtitle, an officer, employee, former officer, or former employee of the State or of a political subdivision of the State may not disclose any tax information." Section 13-201 defines "tax information" as "(1) the amount of income or any other particulars disclosed in a tax return required

¹ As discussed above, a "development subsidy" is "an expenditure of at least \$25,000 of public funds for the purpose of stimulating economic development within the State." The term includes bonds, grants, loans, loan guarantees, enterprise and empowerment zones, fee waivers, land price subsidies, matching funds, and tax abatements, exemptions and credits.

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under this article, if the return contains return information, as defined in § 6103 of the Internal Revenue Code; (2) any return information, as defined in § 6103 of the Internal Revenue Code, required to be attached to or included in a tax return required under this article; or (3) any information contained in an admissions and amusement tax return or a sales and use tax return.” Section 1-301 of the Tax - Property Article contains a similar definition of “tax information” and provides that an officer, employee, former officer, or former employee of the State or any political subdivision of the State may not make known, in any manner, any tax information, except in accordance with proper judicial or legislative order; and to an officer of the State or of any political subdivision of the State who by reason of the office has a right to tax information.

Both § 13-202 and § 1-301 were enacted by Chapter 8, Laws of Maryland 1979, in response to threats by the IRS to stop sharing tax information with the State if it did not pass confidentiality laws. This action was taken pursuant to 26 U.S.C. § 6103(p)(8)(A), which prohibits disclosure of returns or return information after December 31, 1978 to an officer or employee of a State that does not have statutory protections for confidentiality of this information. Under this provision a return is any tax or information return, declaration of estimated tax, or claim for refund required by, or provided for or permitted under the federal tax code. 26 U.S.C. § 6103(b)(1). Return information includes a taxpayer’s identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments, any part of any written determination or any background file document relating to such written determination, any advance pricing agreement entered into by a taxpayer and the Secretary and any background information related thereto, and agreements with relation to payment of tax amounts that are due. 26 U.S.C. § 6103(b)(2).

Thus, federal law prevents the State from requiring disclosure of information protected by 26 U.S.C. § 6103, and by extension by Tax - General Article § 13-202 and Tax - Property Article § 1-301. Attempts to require such disclosure could lead to a refusal on the part of the IRS to share information with the Comptroller for purposes of tax collection. As a result, any disclosure required by a bill such as Senate Bill 502 may not apply to this material. This would apply both to disclosures by SDAT and DBED and to disclosures by other agencies to those agencies under the mandate of the bill to assist them in compliance with the law. However, it is my view that the bill could be substantially implemented without violating these provisions.

Application of Senate Bill 502 to other material

The term “return information” does not apply to information that has not been filed with the IRS, or which was not obtained from the IRS or from forms filed with the IRS. Thus, information about a taxpayer’s identity, amount of income, assets, net worth and so on, may be revealed if obtained from a source other than forms filed with the IRS. *Baskin v. United States*, 135 F.3d 338 (5th Cir. 1998) (Matters obtained from grand jury); *Thomas v. United States*, 890 F.2d 18 (7th Cir. 1989) (Matters appearing in published decision of the tax court). *Cf.*, *Lomont v. O’Neill*, 285 F.3d

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9 (D.C. Cir. 2002) (Requirement that information in form be disclosed to local official in the course of preparation not violate 6103 where form had not yet been filed). However, the fact that information is also available from some other source does not permit disclosure by an entity, such as the Comptroller, that would use tax information or return information as a source for the disclosure. Thus, it is my view that information that comes from sources other than federal tax forms or forms that require the inclusion of federal tax forms or information can be disclosed without violation of federal confidentiality requirements, but that information from those sources may not be disclosed even if it is obtainable from other sources.

The assessment of property for purpose of State property tax is conducted under State law and does not use federal returns or return information. As a result, these assessments are public information and are already available on the SDAT web site. It is my understanding that for the more common credits, both the assessment and adjustments that result from credits, is shown. In other cases, only the original assessment is currently available. However, there is no bar to requiring the publication of that amount in most cases. The amount of the tax saving from a credit could also be revealed in the ordinary case. To the extent that credits against the amount due are available, it is my view that, to the extent that this data is available from the application process, rather than from tax returns, and so long as tax returns or return information are not required as a part of the application process, this information also could be disclosed.

With respect to the disclosure of business tax credits, abatements, and reductions, it may be that the bill would apply to some taxes that are collected without any requirement that federal tax forms or information be attached or included. Federal law would not prevent disclosure of information with respect to these taxes. With respect to taxes that parallel federal taxes or require the inclusion of federal forms or information, no information could be obtained from the Comptroller, from SDAT, or from the tax forms. However, it is my understanding that the intent of the law is to reach only those credits, abatements and reductions that are granted by agencies based on an individualized application. To the extent that the application process does not involve federal tax forms or information, it is my view that information gained in the application process could be disclosed.

A similar analysis would apply to grants by State agencies. So long as the application process did not require attachment of federal tax forms or the provision of return information, compliance with the requirements of the bill would not violate federal law.

Maryland Public Information Act

You have also asked whether information what companies received specific tax credits and the amount would be available under the Maryland Public Information Act ("MPIA"). The MPIA provides that public records are generally available for inspection and copying by the public unless otherwise provided by law. State Government Article § 10-612. Among the types of information

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that are not subject to disclosure are records that are privileged or confidential by law or as to which inspection would be contrary to law, § 10-615, commercial information, § 10-617(d), and information about the finances of an individual, § 10-617(f).


As discussed above, the confidentiality of tax information and return information are protected by law. As a result, they would not be available under the MPIA. *Cf.*, *Church of Scientology of California v. IRS*, 484 U.S. 9, 11 (1987) (Material protected by 26 U.S.C. § 6103 not available under federal Freedom of Information Act).

State Government Article § 10-617(d) reflects that "commercial information" consists of trade secrets, confidential commercial information, confidential financial information, or confidential geological or geophysical information. Whether specific information falls within this definition is subject to an objective rather than a subjective test. *62 Opinions of the Attorney General* 355, 358-359 (1978). Information is to be treated as "confidential" "only if such information is customarily regarded as confidential in a particular trade and only if a recognized government interest is served which is sufficiently compelling to override the general policy in favor of disclosure." *Id.* at 359. While it may be the general practice of companies to keep information about their tax credits confidential, it is my view that whether a tax credit has been negotiated with the State and the nature of that credit is not the type of commercial information ordinarily considered "commercial information." As a result it is my view that § 10-617(d) does not prevent disclosure under the MPIA of documents that reflect the fact that a specific company has been found eligible for a credit, or the amount of the credit, if the amount is a part of the negotiation process.² However, the exception for commercial information would, in many cases, prevent disclosure of much of the information disclosed to the State in order to obtain the credit.

Finally, it is my view that information about a tax credit granted to a business would not ordinarily constitute information about the finances of an individual within the meaning of § 10-617(f). However, this provision could present a problem in instances where a business that is a sole proprietorship has applied for a credit.

Thus, it is my view that, documents containing information about whether tax credits were authorized for specific corporations would be generally be available under the MPIA.

Sincerely,



Kathryn M. Rowe
Assistant Attorney General

² It is my understanding that ordinarily the amount is determined as part of the filing process and is not known to DBED, but only to the Comptroller.

