



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 26, 2011

Mr. Robert Schell
Assistant Director General Counsel
North Texas Tollway Authority
5900 West Plano Parkway, Suite 100
Plano, Texas 75093

OR2011-07481

Dear Mr. Schell:

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# 418795.

The North Texas Tollway Authority (the "authority") received a request for copies of any written request for documents under the Act over a specified time period. You claim that the requested information is excepted from disclosure under sections 552.101 and 552.108 of the Government Code and protected from disclosure under Texas Rule of Civil Procedure 192.5. We have considered your arguments and reviewed the submitted information.

Initially, we must address the authority's obligations under the Act. Section 552.301 describes the procedural obligations placed on a governmental body that receives a written request for information it wishes to withhold. 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* Gov't Code § 552.301(b). You state the authority received the request for information on March 18, 2011. Accordingly, the authority's ten-business-day deadline was April 1, 2011. Although the authority timely requested a ruling and raised sections 552.101 and 552.108 of the Government Code on March 23, 2011, the authority did not raise its claim under Texas Rule of Civil Procedure 192.5 until April 8, 2011. Consequently, we find the authority failed to comply with the procedural requirements of section 552.301 with respect to its claim under Texas Rule of Civil Procedure 192.5.

Generally, a governmental body's failure to comply with section 552.301 results in the waiver of its claims under the provisions at issue, unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *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, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); *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 the information at issue is privileged pursuant to Texas Rule of Civil Procedure 192.5. This rule, however, is discretionary in nature. It serves only to protect a governmental body's interests and may be waived. *See* Open Records Decision Nos. 677 at 10 (2002) (attorney work-product privilege under section 552.111 or rule 192.5 is not compelling reason to withhold information under section 552.302), 665 at 2 n.5 (2000) (discretionary exceptions in general). As such, Texas Rule of Civil Procedure 192.5 does not constitute a compelling reason to withhold information for purposes of section 552.302. Consequently, the authority may not withhold any of the submitted information pursuant to Texas Rule of Civil Procedure 192.5. We will, however, consider your timely raised arguments against disclosure under sections 552.101 and 552.108 of the Government Code for the submitted information.

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 exception encompasses information other statutes make confidential. You state the authority is governed by the Regional Tollway Authority Act, chapter 366 of the Transportation Code. You contend the submitted information is confidential under section 366.179 of the Transportation Code, which provides, in part:

(a) For purposes of this section, a transponder is a device placed on or within an automobile that is capable of transmitting or receiving information used to assess or collect tolls. A transponder is insufficiently funded if there is no money in the account for which the transponder was issued.

...

(d) Transponder customer account information, including contact and payment information and trip data, is confidential and not subject to disclosure under [the Act].

Transp. Code § 366.179(a), (d). You assert the submitted information contains customer account information that is confidential pursuant to section 336.179(d). We note the submitted information consists of public information requests sent to the authority and one

e-mail informing a requester he must make a written request for information. Upon review, we find that none of the submitted information consists of a particular customer's account information maintained by the authority. Accordingly, we conclude the authority may not withhold any of the submitted information under section 552.101 on the basis of section 366.179(d) of the Transportation Code.

You also claim the submitted information is excepted from disclosure under sections 552.108(a)(1) and 552.108(b)(3) of the Government Code. Section 552.108 provides, in relevant part:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure] if:

(1) release of the information would interfere with the detection, investigation, or prosecution of crime;

...

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from [required public disclosure] if:

...

(3) the internal record or notation:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) reflects the mental impressions or legal reasoning of an attorney representing the state.

Gov't Code § 552.108(a)(1),(b)(3). Section 552.108 applies only to records created by an agency, or a portion of an agency, whose primary function is to investigate crimes and enforce criminal laws. *See* Open Records Decision Nos. 493 (1988), 287 (1981). Section 552.108 generally does not apply to records created by an agency whose chief function is essentially regulatory in nature. Open Records Decision No. 199 (1978). In this instance, you have not adequately demonstrated to this office that the authority is a "law enforcement agency" for purposes of section 552.108. *See* Attorney General Opinion MW-575 (1982) (regulatory agency not "law enforcement agency," even though it is charged with duty of enforcing its own statute); ORD 199.

However, this office has determined where an incident involving alleged criminal conduct is still under active investigation or prosecution, section 552.108 may be invoked by any proper custodian of information that relates to the incident. *See* Open Records Decision Nos. 474 (1987), 372 (1983). Where a non-law enforcement agency has custody of information relating to a pending case of a law enforcement agency, the agency having custody of the information may withhold the information under section 552.108 if the agency demonstrates the information relates to the pending case and provides this office with a representation from the law enforcement entity the law enforcement entity wishes to withhold the information. Thus, this office requires a representation from the law enforcement entity explaining how release of the submitted information will interfere with its pending case. You indicate that an arson investigator with the Dallas Fire-Rescue Department has informed the authority that release of the information pertaining to her investigation would impede that ongoing criminal investigation. Therefore, we find that release of the information pertaining to the arson investigator's ongoing criminal investigation would interfere with the detection, investigation, or prosecution of crime. *See Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975) (court delineates law enforcement interests that are present in active cases), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). Accordingly, we conclude the authority may withhold the information we have marked under section 552.108(a)(1) of the Government Code on behalf of the Dallas Fire-Rescue Department. However, the remaining information does not pertain to this criminal investigation. Further, this office has not received any representations from other law enforcement agencies seeking to withhold the remaining information. Therefore, we conclude the authority has failed to demonstrate the applicability of section 552.108 to the remaining information. Thus, the authority may not withhold any of the remaining information under section 552.108(a)(1) or section 552.108(b)(3) of the Government Code.

We note the submitted documents contain information subject to section 552.130 of the Government Code.¹ Section 552.130 excepts from disclosure "information [that] relates to . . . a motor vehicle operator's or driver's license or permit issued by an agency of this state [or] a motor vehicle title or registration issued by an agency of this state." Gov't Code § 552.130(a)(1), (2). Accordingly, the authority must withhold the Texas motor vehicle record information we have marked pursuant to section 552.130 of the Government Code.²

¹The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

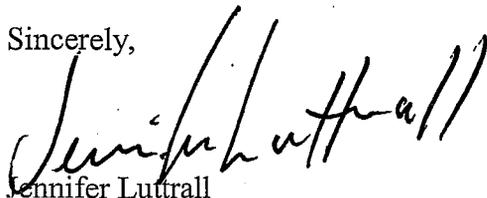
²We note Open Records Decision No. 684 (2009) is a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including Texas license plate numbers under section 552.130 of the Government Code, without the necessity of requesting an attorney general decision.

In summary, the authority may withhold the information we have marked under section 552.108(a)(1) of the Government Code on behalf of the Dallas Fire-Rescue Department. The authority must withhold the information we have marked under section 552.130 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,



Jennifer Luttrall
Assistant Attorney General
Open Records Division

JL/dls

Ref: ID# 418795

Enc. Submitted documents

c: Requestor
(w/o enclosures)