



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 29, 2011

Ms. Ruth H. Soucy
Deputy General Counsel for Open Records
Texas Comptroller of Public Accounts
P.O. Box 13528
Austin, Texas 78711-3528

OR2011-09240

Dear Ms. Soucy:

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# 424228 (Comptroller ID# 7191513678).

The Comptroller of Public Accounts (the "comptroller") received a request for the incident report and internal records concerning a security incident.¹ You state the comptroller will release some of the requested information. You claim that the submitted information is excepted from disclosure under sections 552.103, 552.107, 552.108, 552.111, and 552.139 of the Government Code. We have also received correspondence from the Office of the Attorney General (the "OAG") objecting to the release of the information. *See Gov't Code* § 552.304 (interested party may submit comments stating why information should or should not be released). We have considered the submitted arguments and reviewed the submitted representative sample of information.²

¹We note the comptroller asked for and received clarification regarding this request. *See Gov't Code* § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information).

²We assume 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 those records contain substantially different types of information than that submitted to this office.

We begin by noting that some of the submitted documents are not responsive to the instant request for information, as they were created after the date that the comptroller received the request. This ruling does not address the public availability of any information that is not responsive to the request, and the department need not release that information in response to this request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dism'd); Open Records Decision No. 452 at 3 (1986) (governmental body not required to disclose information that did not exist at time request was received).

You state that some of the submitted information was the subject of a previous ruling by this office. In Open Records Letter No. 2011-09160 (2011), this office ruled that the information at issue may be withheld under section 552.108 of the Government Code. As we have no indication that the law, facts, and circumstances on which the prior ruling was based have changed, the comptroller must continue to rely on the prior ruling as a previous determination and withhold the submitted information we previously ruled on in accordance with Open Records Letter No. 2011-09160. *See* Open Records Decision No. 673 (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). However, to the extent the information in the current request is not encompassed by the previous decision, we will address your arguments for the remaining information.

Section 552.108 of the Government Code excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]” *Id.* §§ 552.108(a)(1). Generally, a governmental body claiming section 552.108 must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977).

However, section 552.108 applies only to records created by an agency, or a portion of an agency, whose primary function is the investigation of crimes and enforcement of criminal laws. *See* Open Records Decision Nos. 493 (1988), 287 (1981). Section 552.108 is generally not applicable to records created by an agency whose chief function is essentially regulatory in nature. *See* Open Records Decision No. 199 (1978). The comptroller is a law enforcement agency for purposes of administering the Tax Code. *A&T Consultants, Inc. v. Sharp*, 904 S.W.2d 668, 678-79 (Tex. 1995). However, you have not explained how the information at issue pertains to the administration of the Tax Code; thus, the comptroller has not established it is a law enforcement entity for purposes of section 552.108 in this context. Nevertheless, section 552.108 may be invoked by the proper custodian of information relating to an investigation or prosecution of criminal conduct. Open Records Decision No. 474 at 4-5 (1987). Where a non-law enforcement agency possesses information relating to a pending case of a law enforcement agency, the custodian of the records may withhold the information under section 552.108 if (1) it demonstrates that the information relates to

the pending case and (2) this office is provided with a representation from the law enforcement entity that the law enforcement entity wishes to withhold the information.

The OAG objects to the release of the requested information under section 552.108(a)(1) because the information relates to a pending criminal investigation being conducted by the OAG's Law Enforcement Division and its release would interfere with the pending investigation. Accordingly, we conclude the release of the information at issue 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). Therefore, the comptroller may withhold the remaining submitted information under section 552.108(a)(1) of the Government Code on behalf of the OAG.³

In summary, the comptroller must continue to rely on the prior ruling as a previous determination and withhold the submitted information previously ruled on in accordance with Open Records Letter No. 2011-09160. The comptroller may withhold the remaining submitted information under section 552.108(a)(1) of the Government Code on behalf of the OAG.

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

³As we are able to resolve this matter under section 552.108, we do not address your other arguments to withhold this information.

Ref: ID# 424228

Enc. Submitted documents

c: Requestor
(w/o enclosures)