



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

January 11, 2012

Ms. Sharon Alexander  
Associate General Counsel  
Texas Department of Transportation  
125 East 11<sup>th</sup> Street  
Austin, Texas 78701-2483

OR2012-00536

Dear Ms. Alexander:

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# 442163.

The Texas Department of Transportation (the "department") received a request for the internet usage reports for nine department employees from December 2010 through September 2011. We have reviewed the submitted arguments.

Initially, you state information responsive to request from December 1, 2010 to July 21, 2011 is not maintained by the department. The Act does not require a governmental body to release information that did not exist when it received a request or create responsive information. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983). You indicate some of the information at issue has been deleted from the department's computers, and you state the information at issue is stored offsite on backup tapes.

In general, computer software programs keep track of the location of files by storing the location of data in the "file allocation table" (FAT) of a computer's hard disk. The software then displays the file as being in a specific storage location. Usually, but not always, when a file is "deleted," it is not actually deleted, but the display of the location is merely shown to be moved to a "trash bin" or "recycle bin." Later, when files are "deleted" or "emptied" from these "trash bins," the data is usually not deleted, but the location of the data is deleted from the FAT. Some software programs immediately delete the location information from the FAT when a file is deleted. Once the location reference is deleted from the FAT, the data may be overwritten and permanently removed.

You state the department does not maintain the information at issue because it is stored offsite on backup tapes that are created through Team for Texas. We understand you to claim the information is not maintained on hard drives of the department's computers or on the department's servers. You state the department does not have a way to search the backup tapes electronically for responsive information or to separate out the responsive information. Based on your representations, we determine the locations of the files have been deleted from the FAT system. Accordingly, we find that the deleted information was no longer being "maintained" by the department at the time of the request, and is not public information subject to disclosure under the Act. *Bustamante* at 266; *see also* Gov't Code §§ 552.002, 552.021 (public information consists of information collected, assembled, or maintained by or for governmental body in connection with transaction of official business). Accordingly, we conclude in this instance, the Act does not require the department to recover and release any information that was stored only remotely on the department's backup tapes on the date the present request was received.

Next, we must address the department's obligations under the Act for the requested information from July 21, 2011 to September 2011. 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 id.* § 552.301(b). Pursuant to section 552.301(e) of the Government Code, the governmental body is required to submit to this office within fifteen business days of receiving the request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *See id.* § 552.301(e). In this instance, you state the department received the request for information on October 20, 2011. Accordingly, the department's ten-business-day deadline was November 3, 2011 and its fifteen-business-day deadline was November 10, 2011. However, as of the date of this ruling, you have not claimed any exceptions to disclosure, provided any written explanation as to why the information at issue should be withheld from disclosure, or submitted to this office a copy or representative sample of any of the requested information from July 21, 2011 to September 2011. Consequently, we find the department failed to comply with section 552.301 of the Government Code with respect to the information at issue.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to submit to this office the information required in section 552.301 results in the legal presumption that the information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See 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); Open Records Decision No. 319 (1982). Normally, 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. *See* Open Records Decision No. 150 at 2 (1977). However, because you have not submitted any responsive information to this portion of the request for our review, we have no basis for finding any of the information at issue excepted from disclosure or confidential by law. Thus, we have no choice but to order the information at issue released to the requestor pursuant to section 552.302 of the Government Code.

In summary, the department is not required to recover and release any information that was stored only remotely on the department's backup tapes on the date the present request was received. The remaining requested 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](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,



Vanessa Burgess  
Assistant Attorney General  
Open Records Division

VB/dls

Ref: ID# 442163

No enclosures

c: Requestor