



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

August 21, 2012

Mr. Robert Schell  
Assistant Director General Counsel  
North Texas Tollway Authority  
P.O. Box 260729  
Plano, Texas 75026

OR2012-13175

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# 462753.

The North Texas Tollway Authority (the "authority") received a request for all written correspondence to or from a named authority employee discussing policy changes affecting the collection of fines for running toll booths or failing to pay tolls since January 1, 2012, a communications survey, and customer service comments or complaints regarding authority collections made during April 2012.<sup>1</sup> You state some information will be released to the requestor. You claim that the remaining information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.111, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>2</sup>

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<sup>1</sup>You state the requestor narrowed her request. See Gov't Code § 552.222 (if request for information is unclear, governmental body may ask requestor to clarify request); see also *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or over-broad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

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

Initially, we note some of the submitted information is not responsive to the instant request because it was created outside the date range specified by the requestor or it does not involve the employee specified in the request. We have marked this non-responsive information. This ruling does not address the public availability of any information that is not responsive to the request and the authority is not required to release non-responsive information in response to the request.<sup>3</sup>

You contend the information contained in Attachment D is the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2012-06010 (2012). In that ruling, we determined the authority may withhold its business rules under section 552.103 of the Government Code. However, the responsive information in Attachment D was created after the date of the previous request, and thus, is not encompassed by the previous ruling. Therefore, the authority may not rely on Open Records Letter No. 2012-06010 as a previous determination with respect to the responsive information. *See* Open Records Decision No. 673 (2001). Accordingly, we will address your arguments against disclosure for the responsive information.

Section 552.103 of the Government Code provides:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The governmental body has the burden of providing relevant facts and documents to show the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd

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<sup>3</sup>As our ruling is dispositive, we need not address your arguments under sections 552.107 and 552.111 of the Government Code for this information.

n.r.e.); Open Records Decision No. 551 at 4 (1990). The governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

You inform us that a lawsuit, styled *Reyes, et al. vs. North Texas Tollway Authority, et al.*, was pending in the United States District Court for the Northern District of Texas prior to the receipt of the instant request for information. You state the information contained in Attachment D is related to the pending lawsuit. We note the responsive information in Attachment C is identical to the responsive information in Attachment D. Based on your representations and our review, we agree that the information in Attachments C and D is related to litigation, to which the authority is a party, that was pending on the date the authority received the request. Therefore, the authority may withhold the responsive information in Attachments C and D under section 552.103 of the Government Code.<sup>4</sup>

However, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to all parties to the pending litigation is not excepted from disclosure under section 552.103(a) and must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. Section 552.101 of the Government Code 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 a portion of the information at issue 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].

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<sup>4</sup>As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

Transp. Code § 366.179(a), (d). You inform us “[i]n connection with the operation of its toll projects, the [authority] issues transponders or ‘TollTags’ to [authority] customers wishing to establish an account with the [authority].” You assert the remaining information contains customer account information that is confidential under section 336.179(d). However, we note the information you seek to withhold is contained in an e-mail sent to the authority from an individual who utilized the authority’s ZipCash collection system. Thus, we find none of the information at issue pertains to a TollTag transponder customer. Accordingly, the authority may not withhold any of the remaining responsive information under section 552.101 on the basis of section 366.179(d) of the Transportation Code.

Chapter 730 of the Transportation Code is also encompassed by section 552.101 of the Government Code. Section 730.004 of the Transportation Code provides “[n]otwithstanding any other provision of law to the contrary, including Chapter 552, Government Code, except as provided by Sections 730.005-730.007, an agency may not disclose personal information about any person obtained by the agency in connection with a motor vehicle record.” Transp. Code § 730.004; *see also id.* § 730.003(4) (defining motor vehicle record to include a record that pertains to a motor vehicle operator’s or driver’s license or permit, motor vehicle registration, motor vehicle title, or identification document issued by an agency of this state). For purposes of chapter 730 of the Transportation Code, section 730.013 provides in part:

(a) An authorized recipient of personal information may not resell or redisclose the personal information in the identical or a substantially identical format the personal information was disclosed to the recipient by the applicable agency.

(b) An authorized recipient of personal information may resell or redisclose the information only for a use permitted under Section 730.007.

*Id.* § 730.013(a)-(b). You state the authority uses license plate numbers collected through the ZipCash system to obtain information regarding the vehicles’ owners from the Texas Department of Motor Vehicles. However, as noted above, the information at issue is contained in an e-mail submitted by a ZipCash customer to the authority. Therefore, this information was not obtained from the Texas Department of Motor Vehicles, and therefore it may not be withheld under section 552.101 in conjunction with section 730.013 of the Transportation Code.

You also raise section 2721 of title 18 of the United States Code for portions of the remaining responsive information. Section 2721 is also encompassed by section 552.101 of the Government Code and provides, in relevant part:

(a) In general.—A State department of motor vehicles, and any officer, employee, or contractor thereof, shall not knowingly disclose or otherwise make available to any person or entity:

(1) personal information, as defined in 18 U.S.C. 2725(3), about any individual obtained by the department in connection with a motor vehicle record, except as provided in subsection (b) of this section; or

(2) highly restricted personal information, as defined in 18 U.S.C. 2725(4), about any individual obtained by the department in connection with a motor vehicle record, without the express consent of the person to whom such information applies, except uses permitted in subsections (b)(1), (b)(4), (b)(6), and (b)(9)[.]

(b) Permissible uses.—Personal information referred to in subsection (a) . . . subject to subsection (a)(2), may be disclosed as follows:

(1) For use by any government agency . . . in carrying out its functions[.]

(c) Resale or redisclosure.—An authorized recipient of personal information (except a recipient under subsection (b)(11) or (12)) may resell or redisclose the information only for a use permitted under subsection (b) (but not for uses under subsection (b)(11) or (12)). . . . Any authorized recipient (except a recipient under subsection (b)(11)) that resells or rediscloses personal information covered by this chapter must keep for a period of 5 years records identifying each person or entity that receives information and the permitted purpose for which the information will be used and must make such records available to the motor vehicle department upon request.

18 U.S.C. § 2721(a)-(c). For purposes of section 2721, section 2725 of title 18 of the United States Code defines “motor vehicle record” and “personal information” as follows:

(1) “[M]otor vehicle record” means any record that pertains to a motor vehicle operator’s permit, motor vehicle title, motor vehicle registration, or identification card issued by a department of motor vehicles;

...

(3) “[P]ersonal information” means information that identifies an individual, including an individual’s photograph, social security number, driver identification number, name, address (but not the 5-digit zip code), telephone number, and medical or disability information, but does not include information on vehicular accidents, driving violations, and driver’s status.

*Id.* § 2725(1), (3). However, as noted above, the information at issue is contained in an e-mail submitted by a ZipCash customer to the authority. Thus, this information was not obtained from the Texas Department of Motor Vehicles, and it may not be withheld under section 552.101 of the Government Code in conjunction with section 2721 of title 18 of the United States Code.

Section 552.130 of the Government Code excepts from disclosure information relating to a motor vehicle title or registration issued by an agency of this state or another state or country. Gov't Code § 552.130(a)(2). Upon review, we find none of the remaining responsive information is subject to section 552.130. Accordingly, the authority may not withhold any of the remaining responsive information under section 552.130 of the Government Code.

We note the remaining responsive information contains an e-mail address subject to section 552.137 of the Government Code.<sup>5</sup> Section 552.137 of the Government Code excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body,” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *Id.* § 552.137(a)-(c). The authority must withhold the e-mail address we have marked under section 552.137 of the Government Code, unless the owner of the address affirmatively consented to its release.<sup>6</sup> *See id.* § 552.137(b).

In summary, the authority may withhold the responsive information in Attachments C and D under section 552.103 of the Government Code. Unless the owner of the e-mail address has affirmatively consented to its release, the authority must withhold the marked e-mail address under section 552.137 of the Government Code. The remaining responsive 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

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<sup>5</sup>The 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).

<sup>6</sup>Open Records Decision No. 684 (2009) is a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

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,

A handwritten signature in black ink, appearing to read "Kathleen J. Santos". The signature is fluid and cursive, with the first name being the most prominent.

Kathleen J. Santos  
Assistant Attorney General  
Open Records Division

KJS/dls

Ref: ID# 462753

Enc. Submitted documents

c: Requestor  
(w/o enclosures)