



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 6, 2008

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

OR2008-10668

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# 318220.

The Texas Department of Transportation (the "department") received a request for information relating to two specified vehicles and a toll tag station on State Highway 130. You state that the department has no responsive incident reports regarding the vehicles.¹ You have submitted information that the department seeks to withhold under section 552.101 of the Government Code. You also contend that some of the submitted information is not subject to the Act. We have considered your arguments and have reviewed the submitted information.² We also have considered the comments that we received from the requestor.³

We begin with your contention that some of the submitted information is not "public information" for the purposes of section 552.002 of the Government Code and is therefore

¹We note that 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).

²This letter ruling assumes that the submitted representative sample of information is truly representative of the requested information as a whole. This ruling neither reaches nor authorizes the department to withhold any information that is substantially different from the submitted information. *See Gov't Code* §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

³*See Gov't Code* § 552.304 (any person may submit written comments stating why information at issue in request for attorney general decision should or should not be released).

not subject to the Act. The Act is applicable to "public information," as defined by section 552.002. Section 552.002(a) provides that "public information" consists of

information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

(1) by a governmental body; or

(2) for a governmental body and the governmental body owns the information or has a right of access to it.

Gov't Code § 552.002(a). Thus, virtually all of the information in a governmental body's physical possession constitutes public information and thus is subject to the Act. *Id.* § 552.002(a)(1); *see* Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). The Act also encompasses information that a governmental body does not physically possess, if the information is collected, assembled, or maintained for the governmental body, and the governmental body owns the information or has a right of access to it. Gov't Code § 552.002(a)(2); *see* Open Records Decision No. 462 at 4 (1987). You point out that pursuant to section 222.058 of the Transportation Code, "[a]utomated enforcement technology approved by the department . . . may be used only for the purpose of producing, depicting, photographing, or recording an image of a license plate attached to the front or rear of a vehicle." Trans. Code § 228.058(b); *see id.* § 228.058(a) (department may use automated enforcement technology to aid in collection of tolls and enforcement of toll violations). You contend that because the submitted photographs were generated by automated enforcement technology to capture vehicle license plate numbers, the license plate numbers are the only information depicted in the photographs that constitutes public information for the purposes of section 552.002. Having considered your arguments and reviewed the photographs, we find that all of the information depicted in the photographs was collected and is maintained by the department under a law or in connection with the transaction of official business. We therefore conclude that all of the information in the photographs is public information under section 552.002 that must be released unless it falls within an exception to public disclosure. *See* Gov't Code §§ 552.002, .021; *cf.* Open Records Decision No. 432 at 2 (1985) (photographs, negatives, and processed film are subject to Act).

Next, we consider your arguments against disclosure. Section 552.101 of the Government Code excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses information that other statutes make confidential. You raise section 552.101 in conjunction with section 228.057 of the Transportation Code, which provides as follows:

(a) For purposes of this section, a "transponder" means a device, placed on or within an automobile, that is capable of transmitting information used to assess or to collect tolls. A transponder is "insufficiently funded" when there

are no remaining funds in the account in connection with which the transponder was issued.

(b) Any peace officer of this state may seize a stolen or insufficiently funded transponder and return it to the department, except that an insufficiently funded transponder may not be seized sooner than the 30th day after the date the department has sent a notice of delinquency to the holder of the account.

(c) The department may enter into an agreement with one or more persons to market and sell transponders for use on department toll roads.

(d) The department may charge reasonable fees for administering electronic toll collection customer accounts.

(e) Electronic toll collection customer account information, including contact and payment information and trip data, is confidential and not subject to disclosure under Chapter 552, Government Code.

(f) A contract for the acquisition, construction, maintenance, or operation of a toll project must ensure the confidentiality of all electronic toll collection customer account information under Subsection (e).

Transp. Code § 228.057. You contend that the submitted photographs and the electronic toll account customer toll tag identification numbers that you have marked constitute confidential electronic toll collection customer account information for the purposes of section 228.057(e). Having considered your arguments, we find that the information in question falls within the scope of section 228.057(e). *See id.* § 228.057(e) (for purposes of Transp. Code § 228.057, “account information” includes contact and payment information and trip data). We therefore conclude that the department must withhold the photographs and the marked electronic toll account customer toll tag identification numbers under section 552.101 of the Government Code in conjunction with section 228.057(e) of the Transportation Code. The rest of the submitted information must be released.

You also ask this office to issue a previous determination that would permit the department to withhold information under section 228.057 of the Transportation Code without the necessity of again requesting a decision under the Act. *See Gov’t Code § 552.301(a)*; Open Records Decision No. 673 (2001) (previous determinations). We decline to issue such a decision at this time. This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the

governmental body wants to challenge this ruling, the governmental body must file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3). If the governmental body does not file suit over this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

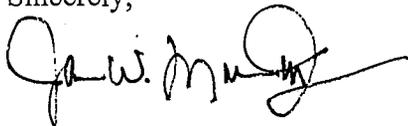
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can challenge that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Office of the Attorney General at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "James W. Morris, III". The signature is written in a cursive style with a large, looping initial "J".

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/jh

Ref: ID# 318220

Enc: Submitted documents

c: Mr. Michael A. Thomas
Naman Howell Smith & Lee
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(w/o enclosures)