



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

February 27, 2009

Mr. Gary Henrichson
Assistant City Attorney
City of McAllen
P.O. Box 220
McAllen, Texas 78505-0220

OR2009-02621

Dear Mr. Henrichson:

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# 336143 (City Request No. 08-1217).

The City of McAllen (the "city") received a request for all information, including accident reports, from the last ten years at a specific intersection, a specific investigation report, and all agreements and correspondence between the city and the Texas Department of Transportation (the "department"). You state you are releasing some of the requested information. You claim that the submitted information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Initially, you state that information responsive to the request for e-mails pertaining to any investigation of the intersection at issue, or e-mails between the city and the department, are no longer in the city's possession. 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 that the responsive information has been deleted from the city's computers and is only stored in a "backup" location.

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 that the city no longer maintains some of the requested information because it "is in backup files." We understand you to claim that the information is not maintained on the hard drive of the computers at issue. We also understand you to claim that to restore the information at issue, the city would be required to load backup tapes and restore the data contained on each tape. Based on your representations, we determine that the locations of the files have been deleted from the FAT system. Accordingly, we find that the deleted information is no longer being "maintained" by the city 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). Thus, we conclude the Act does not require the city to release the requested e-mails that have not been recovered. However, as you have identified and submitted recovered documents that contain information the requestor seeks, we will address whether you must release this information.

Next, we note the city did not comply with section 552.301 of the Government Code in requesting this decision. Pursuant to section 552.301(b), the governmental body must ask for the attorney general's decision and state the exceptions that apply within ten business days after receiving the request. See Gov't Code § 552.301(a), (b). You state that the city received the request on December 4, 2008. However, you did not request a ruling from our office until December 19, 2008. Consequently, we find that the city failed to comply with the procedural requirements of section 552.301.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the requirements of 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). 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. See Open Records

Decision No. 150 at 2 (1977). Because the city has failed to comply with the procedural requirements of the Act, the city has waived section 552.103. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally); 663 at 5 (1999) (untimely request for decision resulted in waiver of discretionary exceptions). However, because section 552.130 of the Government Code can provide a compelling reason to withhold information, we will address the applicability of section 552.130 to the submitted information.¹

Section 552.130 of the Government Code 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. We note that the purpose of section 552.130 is to protect the privacy interests of individuals. Because the right of privacy lapses at death, Texas motor vehicle record information that pertains to a deceased individual may not be withheld under section 552.130. *Moore v. Charles B. Pierce Film Enters., Inc.*, 589 S.W.2d 489, 491 (Tex. App.—Texarkana 1979, writ ref’d n.r.e.); *see also Justice v. Belo Broadcasting Corp.*, 472 F. Supp. 145, 146-47 (N.D. Tex. 1979) (“action for invasion of privacy can be maintained only by a living individual whose privacy is invaded”) (quoting Restatement of Torts 2d); *see also* Attorney General Opinions JM-229 (1984); H-917 (1976); Open Records Decision No. 272 at 1 (1981). We have marked the Texas motor vehicle registration information which generally must be withheld under section 552.130. However, we note that some of the vehicles in question appear to have been owned by individuals who are now deceased. Therefore, any motor vehicle registration information that pertains to a deceased individual must be withheld under section 552.130 only if a living person owns an interest in the vehicle at issue. If no living person owns an interest in the vehicle at issue, then the information in question is not excepted from disclosure and must be released. The city must withhold the remaining information we have marked under section 552.130.

In summary, any motor vehicle registration information which pertains to a deceased individual must be withheld under section 552.130 of the Government Code only if a living person owns an interest in the vehicle at issue. The city must withhold the remaining information we have marked under section 552.130 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.

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

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 at (512) 475-2497.

Sincerely,


Chris Schulz
Assistant Attorney General
Open Records Division

CS/cc

Ref: ID# 336143

Enc. Submitted documents

cc: Requestor
(w/o enclosures)