



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

October 23, 2020

Mr. Brian O'Reilly
Counsel for the North Texas Tollway Authority
Locke & Lord, L. L. P.
600 Congress Avenue, Suite 2200
Austin, Texas 78701

OR2020-20853A

Dear Mr. O'Reilly:

This office issued a letter to the North Texas Tollway Authority (the "authority") for ID# 851936 on August 19, 2020. Since that date, we have received new information that affects the facts on which this letter was based. Consequently, this decision serves as the correct ruling and is a substitute for the letter issued on August 20, 2020. *See generally* Gov't Code § 552.011 (providing that Office of Attorney General may issue decision to maintain uniformity in application, operation, and interpretation of Public Information Act (the "Act"), chapter 552 of the Government Code). This ruling was assigned ID# 851936 (Req. ID No 2020-01201).

The authority, which you represent, received a request for search warrants and subpoenas from a specified time period. You state the authority will release some information. You claim some of the submitted information is not subject to the Act. You claim the submitted information is excepted from disclosure under sections 552.101, 552.107, and 552.108 of the Government Code. We have considered your arguments and reviewed the submitted representative sample of information.¹

Initially, we note some of the information in Exhibit B, which we indicated, is not responsive to the present request because it does not consist of the requested search warrants or subpoenas. This ruling does not address the public availability of any information that is not responsive to the request, and the authority need not release such information in response to this request.

¹ We 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 that those records contain substantially different types of information than that submitted to this office.

You assert the responsive information in Exhibit B is not subject to the Act. The judiciary is expressly excluded from the requirements of the Act. *Id.* § 552.003(1)(B). This office has determined for purposes of the Act, a grand jury is a part of the judiciary and therefore not subject to the Act. *See* Open Records Decision No. 411 (1984). Further, records kept by a governmental body that is acting as an agent for a grand jury are considered records in the constructive possession of the grand jury and are also not subject to the Act. *See* Open Records Decisions Nos. 513 (1988), 411, 398 (1983). Upon review, we find the authority failed to demonstrate the information at issue consists of records of the judiciary and, therefore, is subject to the Act. *See* Gov't Code § 552.002 (providing information collected, assembled, or maintained in connection with the transaction of official business by a governmental body is "public information"). Accordingly, we will address the applicability of the Act to the responsive information.

Section 552.107(2) provides information is excepted from disclosure if "a court by order has prohibited disclosure of the information." Gov't Code § 552.107(2). Article 18B.354 of the Code of Criminal Procedure permits a court, on application by an authorized peace officer, to issue a search warrant for electronic customer data held in electronic storage. *See* Crim. Proc. Code art. 18B.354; *see also id.* art. 18B.001 (defining terms). Article 18B.105 states "[a] district court shall seal an application and order granted under this chapter." *Id.* art. 18B.105. The information in Exhibit C consists of a search warrant we understand was granted under article 18B.354. We also understand article 18B.105 requires this document to be sealed. As we understand the document at issue has been sealed by a court pursuant to article 18B.105, we conclude the authority must withhold Exhibit C under section 552.107(2) of the Government Code.

Section 552.108 of the Government Code provides, in relevant part, the following:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime [is excepted from required public disclosure] if:

(1) release of the information would interfere with the detection, investigation, or prosecution of crime; [or]

...

(4) it is information that:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) reflects the mental impressions or legal reasoning of an attorney representing the state.

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from the requirements of Section 552.021 if:

...

(3) the internal record or notation:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) reflects the mental impressions or legal reasoning of an attorney representing the state.

Gov't Code § 552.108(a)(1), (a)(4), (b)(3). A governmental body raising section 552.108 must explain the applicability of that section. *See id.* § 552.301(e)(1)(A) (governmental body must provide comments explaining why exceptions raised should apply to information requested). Where a non-law enforcement agency has custody of information that would otherwise qualify for exception under section 552.108 as information relating to the pending case of a law enforcement agency, the custodian of the records may withhold the information if it provides this office with a demonstration the information relates to the pending case and a representation from the law enforcement agency that it wishes to have the information withheld.

You provide documentation showing the Colling County District Attorney's Office (the "district attorney's office") objects to disclosure of some of the information at issue because it pertains to ongoing criminal investigations and prosecutions, and its release would interfere with the pending criminal investigations and prosecutions. Based on these representations, 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). Thus, section 552.108(a)(1) is applicable to the information at issue. Accordingly, the authority may withhold the information we indicated under section 552.108(a)(1) of the Government Code on behalf of the district attorney's office. However, you do not state, and have not otherwise demonstrated, any investigative agency with a law enforcement interest seeks to withhold the remaining information at issue. Thus, you have failed to demonstrate section 552.108(a)(1) of the Government Code is applicable to any of the remaining information at issue, and the authority may not withhold any portion of the remaining information on that basis. Further, we find you failed to demonstrate the applicability of either section 552.108(a)(4) or section 552.108(b)(3) to the remaining information at issue and no portion of it may be withheld on that basis.

In summary, the authority must withhold Exhibit C under section 552.107(2) of the Government Code. The authority may withhold the information we indicated under section

552.108(a)(1) of the Government Code on behalf of the district attorney's office. The authority must release the remaining responsive information.

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 <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,

Matthew Taylor
Assistant Attorney General
Open Records Division

MT/jxd

Ref: ID# 851936

Enc. Submitted documents

c: Requestor
(w/o enclosures)