



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

July 23, 1996

Ms. Jennifer D. Soldano
Associate General Counsel
Texas Department of Transportation
125 E. 11th Street
Austin, Texas 78701-2483

OR96-1246

Dear Ms. Soldano:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 100150.

The Texas Department of Transportation (the "department") received a request for

a copy of all documents, reports, or records relating to the inspections of bridges on Cypress Rosehill Road in Harris County, Texas, including, but not limited to, bridge inspection reports prepared by or for the State of Texas or the Texas Department of Transportation, from 1990 to the present. I would also like to request any other documents, reports, or records relating to the weight limits for bridges located on Cypress Rosehill Road from 1990 to the present.

You have submitted for our review a representative sample of the records you inform us are responsive to the request for information.¹ You contend that the requested information is excepted from disclosure under section 552.101 of the Government Code.

¹In reaching our conclusion here, 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.

Section 552.101 excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." You state that the requested information "sought by the requestor would include inspection reports and related documents prepared by [the department] to identify possible safety problems." You contend that the information is confidential under section 409 of title 23 of the United States Code which provides:

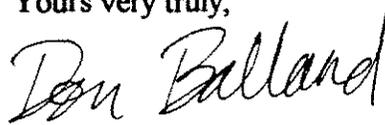
Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled for the purpose of identifying evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144, and 152 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds *shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data.* [Emphasis added.]

Section 409 deals specifically with court proceedings. The information is protected from "discovery" or from being "admitted into evidence" in state or federal court, or from being "considered for other purposes in any action for damages." While section 409 protects the department from producing the report in a lawsuit or having the report used as evidence against it in a lawsuit, it does not prohibit the department from releasing the reports, or make the information confidential outside of the litigation context. Open Records Decision No. 561 (1990), upon which you rely, dealt with information which was expressly confidential under federal law, and is therefore distinguishable. Open Records Decision No. 561 (1990) at 7; *see also* Attorney General Opinion JM-830 (1987) (state agencies must have *specific* authority under state or federal law to make information confidential). Furthermore, this office has determined that section 552.101 does not cover discovery privileges. *See* Open Records Decision No. 575 (1990). Accordingly, you may not withhold the information under section 552.101 of the Government Code.²

²You express concern that some "individual whose motivation was to gather evidence [to bring suit]...would be allowed to procure evidence which absolutely could not be procured by discovery proceedings." Section 552.222 of the Government Code prohibits the inquiry by the governmental body into the motives of the person applying for inspection or copying of records. *See* Open Records Decision No. 542 (1990). We also note that, generally, when other evidence is based on or uses information protected by 23 U.S.C. § 409, it is also inadmissible. *See Lusby v. Union Pac. R.R. Co.*, 4 F.3d 639 (8th Cir. 1993); *Harrison v. Burlington N. R.R. Co.*, 965 F.2d 155 (7th Cir. 1992); *Robertson v. Union Pac. R.R. Co.*, 954 F.2d 1433 (8th Cir. 1992); *Taylor v. Saint Louis Southwestern Ry. Co.*, 746 F.Supp. 50 (D. Kan. 1990).

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Don Ballard
Assistant Attorney General
Open Records Division

JDB/ch

Ref.: ID# 100150

Enclosures: Submitted documents

cc: Ms. Cynthia D. Vreeland
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(w/o enclosures)