



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

May 30, 1997

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

OR97-1244

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# 106001.

The Texas Department of Transportation (the "department") received a request for: 1) information about "the planned expansion of area railroad operations" and "the planned underpass or overpass;" 2) "reports on the recent Beltway 8-Houston-Hwy 90 railroad crash;" and 3) a copy of "the Weyauwega report." You state that item 1 will be provided to the requestor. You state that item 3 does not exist.<sup>1</sup> As for item 2 of the request, you contend that the responsive information is excepted from disclosure under section 552.101 of the Government Code in conjunction with section 409 of title 23 of the United States Code. We have considered the exception you claim and reviewed the submitted information.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. You claim that federal law prohibits release of the submitted information. Section 409 of title 23 of the United States Code 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

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<sup>1</sup>The Open Records Act does not require a governmental body to obtain or create new information in order to comply with a request for information. Open Records Decision No. 534 (1989). We note, however, that a governmental body must make a good faith effort to relate a request to information which it holds and should advise the requestor of the types of information available. Open Records Decision No. 561 (1990).

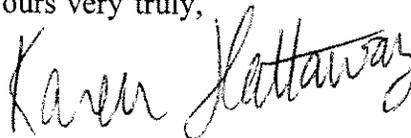
not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data.

You argue that "it would make a mockery of this proscription to compel production of these records by a Public Information Request." However, chapter 552 of the Government Code differs in purpose from statutes and procedural rules providing for discovery in judicial proceedings. Attorney General Opinion JM-1048 (1989); *see* Open Records Decision No. 575 (1990) (section 552.101 does not encompass discovery privileges); Gov't Code § 552.006 (chapter 552 does not authorize withholding public information or limit availability of public information to public except as expressly provided by chapter 552). The statute on which the department relies regulates discovery in court proceedings and not the availability of information under chapter 552 of the Government Code.<sup>2</sup>

You also contend that the submitted information is confidential based on the rationale set forth in Open Records Decision No. 561 (1990). We disagree. In Open Records Decision No. 561 (1990) we ruled that where a federal agency shares federally created information with a governmental body in Texas, section 552.101 of the Government Code will except the information from disclosure if the information is confidential in the hands of the federal agency under federal law. Here, the information at issue was created by a state agency that is subject to the Texas Open Records Act, not the federal Freedom of Information Act ("FOIA"). We note also that even if information is excepted from disclosure under FOIA, the same information is not necessarily excepted from disclosure under the Texas Open Records Act. Open Records Decision No. 124 (1976). For these reasons, we conclude that section 552.101 of the Government Code does not except the submitted information from required public disclosure.

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 any questions about this ruling, please contact our office.

Yours very truly,



Karen E. Hattaway  
Assistant Attorney General  
Open Records Division

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<sup>2</sup>We note that at least one court decision implicitly recognizes that the information encompassed by this federal statute may be used by a newspaper in an article about the hazardousness of a particular railroad crossing. *See Robertson v. Union Pac. R.R.*, 954 F.2d 1433, 1435 (8th Cir. 1992).

Ref: ID# 106001

Enclosures: Submitted documents

cc: Mr. Jerry N. Brown  
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(w/o enclosures)

