



August 1, 2001

Ms. Janice Mullenix
Associate General Counsel
Texas Department of Transportation
DeWitt C. Greer State Highway Building
125 E. 11th Street
Austin, Texas 78701-2483

OR2001-3348

Dear Ms. Mullenix:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 150175.

The Texas Department of Transportation (the "department") received a request for information relating to a railroad crossing in Laredo, Texas. You state that the department will release some of the requested information. You claim that the remaining information is excepted from disclosure under section 552.111 of the Government Code. We have considered the exception you raise and have reviewed the information you submitted.

We first note that some of the submitted information falls within the scope of section 552.022 of the Government Code. Section 552.022 provides that

the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body[;]

...

(5) all working papers, research material, and information used to estimate the need for or expenditure of public funds or taxes by a governmental body, on completion of the estimate[.]

Gov't Code § 552.022(a)(1), (5) (emphasis added). Section 552.111 of the Government Code is a discretionary exception to disclosure that protects the governmental body's interests and may be waived. As such, this exception is not other law that makes information confidential for the purposes of section 552.022(a). *See* Open Records Decision No. 470 at 7 (1987) (stating that governmental body may waive statutory predecessor to section 552.111). Thus, the department may not withhold the requested information that falls within the scope of section 552.022 under section 552.111.

You also contend, however, that this information is confidential under section 409 of title 23 of the United States Code. This statute provides as follows:

Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled or collected for the purpose of identifying [sic] 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.

23 U.S.C. § 409. We agree that this statute constitutes other law that makes information confidential for purposes of section 552.022(a) of the Government Code. *See In re City of Georgetown*, No. 00-0453, 2001 WL 123933, *5-*6 (Tex. Feb. 15, 2001). Therefore, the requested information that falls within the scope of section 552.022 must be withheld from disclosure under section 409 of title 23 of the United States Code.

We next consider whether the department may withhold the remaining information under section 552.111 of the Government Code. Section 552.111 protects "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." You claim that the remaining information is excepted from disclosure under section 552.111 because it would be protected from discovery in civil litigation under section 409 of title 23 of the United States Code. Federal courts have stated that section 409 excludes from evidence data compiled for purposes of highway and railroad crossing safety enhancement and construction for which a state receives federal funding, in order to facilitate candor in administrative evaluations of highway safety hazards and to prevent federally-required record-keeping from being used for purposes of private litigation. *See Harrison v. Burlington N. R.R. Co.*, 965 F.2d 155, 160 (7th Cir. 1992); *Robertson v. Union Pac. R.R. Co.*, 954 F.2d 1433, 1435 (8th Cir. 1992).

You generally refer to the remaining information as “an intraagency memorandum.” You inform this office, however, that these records include communications with the City of Laredo, a railroad, and a private entity affected by the railroad crossing to which the information pertains. We note that section 552.111 protects communications with another governmental entity, such as the city, with which the department shares a privity of interest or common deliberative process. Similarly, you explain that safety information was exchanged with the railroad in connection with repairs that it made at the crossing in question on behalf of and under contract with the department. You do not demonstrate, however, that the department shared information relating to the crossing for such purposes with the other private entity. Thus, based on your representations, we conclude that most of the remaining information, including the information shared with the City of Laredo and the railroad, would be protected from discovery in litigation under section 409 of title 23 of the United States Code. Therefore, the department may withhold this information under section 552.111 of the Government Code. We have marked the information that is not excepted from disclosure under section 552.111. You must release this information to the requestor.

In summary, some of the submitted information falls within the scope of section 552.022 of the Government Code. This information is confidential under section 409 of title 23 of the United States Code. Most of the remaining information is excepted from disclosure under section 552.111 of the Government Code. The information that is neither confidential under section 409 nor excepted from disclosure under section 552.111 must be released.

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 appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal 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, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records

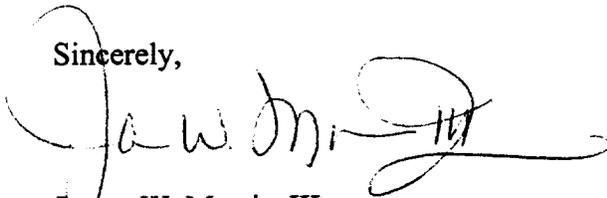
will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure 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 appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public 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 General Services Commission 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', with a stylized flourish at the end.

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

JWM/sdk

Ref: ID# 150175

Enc: Marked documents

c: Mr. Joseph S. Hinton
J. S. Hinton & Associates, Inc.
P.O. Box 10685
Houston, Texas 77206
(w/o enclosures)