



August 24, 2001

Ms. Janice Mullenix  
Associate General Counsel  
Texas Department of Transportation  
125 East 11<sup>th</sup> Street  
Austin, Texas 78701-2483

OR2001-3758

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# 151122.

The Texas Department of Transportation (the "department") received a request for "any file, project, or correspondence concerning Federal Cost Policy on projects to upgrade warning devices" at a particular railroad crossing. You inform us that some of the requested information will be released, but claim that the remaining requested information is excepted from disclosure under section 552.111 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.

Initially, we note that the submitted documents contain information that falls within the purview of section 552.022(a)(5). Section 552.022(a)(5) provides that "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[,]" are not excepted from required disclosure unless they are made expressly confidential by law. A portion of the submitted information falls under this category of information. Therefore, the department may withhold the information only if it is made confidential under other law.

Section 552.111 excepts from disclosure "an interagency or intra-agency memorandum or letter that would not be available by law to a party in litigation with the agency." Section 552.111 encompasses information that is protected by civil discovery privileges. *See*

Open Records Decision Nos. 647 at 3 (1996), 251 at 2-4 (1980). Although you argue that the submitted information is excepted under section 552.111 of the Government Code, this provision is a discretionary exception and therefore is not "other law" for purposes of section 552.022.<sup>1</sup>

You claim that the requested information is excepted from disclosure under section 552.111 because it would be privileged from discovery under section 409 of title 23 of the United States Code. Section 409 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. 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 (7<sup>th</sup> Cir. 1992); *Robertson v. Union Pac. R.R. Co.*, 954 F.2d 1433, 1435 (8<sup>th</sup> Cir. 1992). We agree that section 409 of title 23 of the United States Code consists of other law 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, we conclude that the department may withhold the information otherwise made public by section 552.022 under section 409 of title 23 of the United States Code.

You characterize the remaining information that the department seeks to withhold as intra-agency and interagency memoranda. You further assert that section 409 of title 23 would protect this information from discovery in civil litigation. You therefore contend that the

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<sup>1</sup>Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.*, Open Records Decision Nos. 665 at 2 n.5 (2000) (governmental body may waive litigation exception, section 552.103), 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 592 at 8 (1991) (governmental body may waive section 552.104, information relating to competition or bidding), 549 at 6 (1990) (governmental body may waive informer's privilege), 522 at 4 (1989) (discretionary exceptions in general). Discretionary exceptions therefore do not constitute "other law" that makes information confidential.

remaining requested information is excepted from disclosure under section 552.111. We first note that some of the submitted information appears to be communications to and from third parties. You inform us that one of these third parties, the Atchison Topeka and Santa Fe Railway Company (Exhibit C), was under contract with the department. You also notify us that the communications in Exhibit D contain correspondence with the Federal Highway Administration. Therefore, we find that these third-party communications are *interagency or intra-agency* memoranda or letters excepted under section 552.111. See Open Records Decision Nos. 474 (1987), 462 (1987).

The remainder of the submitted information contained in Exhibit B appears to constitute reports, surveys, schedules, lists, or data compiled or collected for the purpose of developing a highway safety construction improvement project and intra-agency memoranda. With respect to this information, we find, based on your representations and our review of the information in question, that section 409 of title 23 of the United States Code would protect this information from discovery in civil litigation; therefore, it is excepted from disclosure under section 552.111 of the Government Code. The department may withhold all of the submitted information from disclosure.

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,



Cindy Nettles  
Assistant Attorney General  
Open Records Division

CN/seg

Ref: ID# 151122

Enc. Submitted documents

c: Mr. Charlie Johnson  
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(w/o enclosures)