



June 24, 2002

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

OR2002-3421

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# 164716.

The Texas Department of Transportation (the “department”) received a request for “the files under your custody pertaining to: Rail Division Accident Number 069 Titus, which occurred on 06-08-00, at a grade crossing on Crossing Number 789434U, in Mt. Pleasant, Titus County, Texas.” You state that the department will provide some of the requested information but claim other information is excepted from disclosure under section 552.111 of the Government Code. We have considered the exception you claim and reviewed the submitted representative sample of information.¹

We begin by noting that much of the submitted information is made expressly public under section 552.022 of the Government Code. Section 552.022 provides, in relevant part:

- (a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are

¹We 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.

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, except as provided by Section 552.108; . . .

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds 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[.]

The submitted information contains a completed report, an audit, information in a contract and a work order relating to the expenditure of public funds, and information estimating the need for or expenditure of public funds, all of which are expressly public under section 552.022. You do not claim that any of the submitted information is excepted under section 552.108 and may, therefore, only withhold this information if it is confidential under other law. Although you argue that the submitted information is excepted under section 552.111 of the Government Code, section 552.111 is a discretionary exception and, therefore, is not "other law" for purposes of section 552.022.² You also contend, however, that the submitted information is confidential 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

²Discretionary 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.

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 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*, 53 S.W.3d 328 (Tex. 2001). You indicate that crossing number 789434U is eligible for federal aid under section 130 of title 23 of the United States Code and is therefore a federal-aid highway within the meaning of section 409 of title 23 of the United States Code. Therefore, we conclude that the department must withhold the submitted report, audit, contract and work order, and estimate working papers under section 409 of title 23 of the United States Code.

We now address your section 552.111 claim for the information that is not subject to section 552.022. Section 552.111 excepts from disclosure “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 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. 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).

As we mentioned above, you state that crossing number 789434U is eligible for federal aid under section 130 of title 23 of the United States Code and is therefore a federal-aid highway within the meaning of section 409 of title 23 of the United States Code. The records you submitted to this office include communications with a third party that you state was under contract with the department to repair this railroad crossing. We note that section 552.111 protects communications with third parties with which the department shares a privity of interest or common deliberative process. Open Records Decision Nos. 464 (1987), 429 (1985); *see also Wu v. National Endowment of the Humanities*, 460 F.2d 1030 (5th Cir.), *cert. denied*, 410 U.S. 926 (1972). Accordingly, based on your representations and our review of the information in question, we find that the remaining information constitutes interagency and intra-agency memoranda and letters for purposes of section 552.111 of the Government Code. Furthermore, we find that section 409 of title 23 of the United States Code would protect the submitted information from discovery in civil litigation. Therefore, the remaining submitted information is excepted from disclosure under section 552.111 of the Government Code and may be withheld.

To summarize, the department may withhold the submitted information from the requestor.

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 Texas Building and Procurement 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code

§ 552.325. 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 "Denis C. McElroy". The signature is fluid and cursive, with the first name "Denis" being the most prominent.

Denis C. McElroy
Assistant Attorney General
Open Records Division

DCM/seg

Ref: ID# 164716

Enc. Submitted documents

c: Ms. Helen D. O'Connor
2900 Wesleyan, Suite 125
Houston, Texas 77027-5150
(w/o enclosures)