



October 11, 2002

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

OR2002-5759

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# 170536.

The Texas Department of Transportation (the "department") received a request for information relating to a railroad crossing south of Cleveland in Liberty County, Texas. The department claims that the requested 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 is subject to 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:

...

(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[.]

Gov't Code § 552.022(a)(3), (5). The department must release the submitted information that is subject to section 552.022(a)(3) unless it is expressly confidential under other law. Likewise, the submitted information that is subject to section 552.022(a)(5) must be released on completion of the estimate unless it is expressly confidential under other law. 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, section 552.111 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) (governmental body may waive section 552.111). Thus, the department may not withhold the submitted information that is subject to section 552.022 under section 552.111.

The department contends, however, that this information is made confidential by law 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 section 409 of title 23 of the United States Code constitutes other law that makes information expressly confidential for purposes of section 552.022 of the Government Code. *See In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001). The department states that a railway-highway crossing is always eligible for federal aid under section 130 of title 23 of the United States Code and thus is a federal-aid highway for purposes of section 409 of title 23. Based on this representation, we conclude that the information relating to the railroad crossing that is subject to section 552.022 is confidential by law under section 409 of title 23 of the United States Code. Therefore, the department must withhold that information.

Next, we address the department's claim under section 552.111 of the Government Code with respect to the rest of the submitted information. 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." Federal courts have stated that section 409 of title 23 of the United States Code 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).

The department asserts that the remaining information would be protected from discovery in civil litigation under section 409 and thus is excepted from disclosure under section 552.111 of the Government Code. Based on the department's representations and our review of the remaining information, we agree that this information falls within the scope of section 409 of title 23 of the United States Code. We note that this information includes communications with railroads and another governmental entity with regard to the railroad crossing in question. We agree that section 552.111 encompasses such communications. See Open Records Decision Nos. 631 at 2 (1995) (section 552.111 encompasses information created for governmental body by outside consultant acting at governmental body's request and performing task that is within governmental body's authority), 563 at 5-6 (1990) (private entity engaged in joint project with governmental body may be regarded as its consultant), 561 at 9 (1990) (section 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process), 462 at 14 (1987) (section 552.111 applies to memoranda prepared by governmental body's consultants). We therefore conclude that the department may withhold the rest of the submitted information under section 552.111 of the Government Code.

In summary, the department must withhold the submitted information that is subject to section 552.022 of the Government Code under section 409 of title 23 of the United States Code. The rest of the submitted information is excepted from disclosure under section 552.111 of the Government Code.

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).

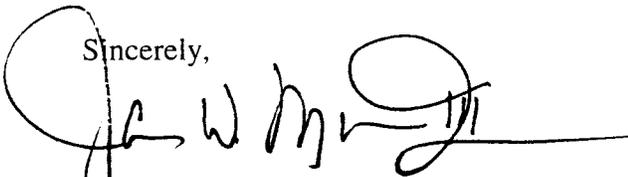
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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 'James W. Morris, III', with a long horizontal line extending to the right.

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

JWM/sdk

Ref: ID# 170536

Enc: Submitted documents

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