ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 8, 2004

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

OR2004-10415

Dear Ms. Alexander:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 217563.

The Texas Department of Transportation (the "department") received a request for certain information concerning "the intersection of Texas Highways 349 and 137." You claim that the requested information is excepted from disclosure under section 552.111 of the Government Code. We have considered the exception you claim and reviewed the submitted information.[1]

Initially, we note that the submitted information includes a completed report made of, for, or by the department. Section 552.022 of the Government Code provides that "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body" constitutes "public information . . . not excepted from required disclosure . . . unless . . . expressly confidential under other law" or excepted from disclosure under section 552.108 of the Government Code. Gov't Code § 552.022(a)(1).

You do not contend that section 552.108 applies in this instance and instead argue that the submitted information is excepted from disclosure under section 552.111 of the Government Code. However, section 552.111 is a discretionary exception and, therefore, is not other law for purposes of section 552.022. *See* Open Records Decision No. 473 (1987) (statutory

[1]We assume that the 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.

predecessor to section 552.111 may be waived); *see also* Open Records Decision No. 522 (1989) (discretionary exceptions in general). Thus, the completed report may not be withheld pursuant to this exception. 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 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 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 inform us that "SH 349 and SH 137 are a part of the National Highway System under 23 U.S.C. §103 and therefore is [sic] a federal-aid highway within the meaning of 23 U.S.C. §409." Therefore, we conclude that the document that is subject to section 552.022 is excepted from disclosure by section 409 of title 23 of the United States Code.

We now address your section 552.111 claim for the remaining information, which 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 inform us that the highways at issue are federal-aid highways within the meaning of section 409 of title 23 of the United States Code. 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.

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).

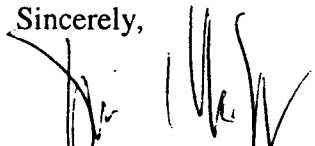
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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 Dep't of Pub. 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,



Denis C. McElroy
Assistant Attorney General
Open Records Division

DCM/jev

Ref: ID# 217563

Enc. Submitted documents

c: Ms. Donna Collins
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(w/o enclosures)