ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 29, 2005

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

OR2005-10669

Dear Ms. Alexander:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 237116.

The Texas Department of Transportation (the "department") received a request for information related to an accident "that occurred on September 20, 2004 at 4700 U.S. Hwy 75 South[.]" The request specifically includes

> The construction plans, maps or photographs of the active project at the time of the accident, September 20, 2004. All drawings, graphs, charts, photographs, video recordings [and] documents prepared, received, or generated since start of construction project in Grayson County, Texas.

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 representative sample of information.[1] We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

[1]We 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.

Initially, we note that some of the submitted information is subject to section 552.022 of the Government Code. This section 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, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). In this instance, the submitted information includes a completed report made of, for, or by the department. The department must release the completed report under section 552.022(a)(1) unless it is excepted from disclosure under section 552.108 or expressly confidential under other law.[2] Section 552.111 is a discretionary exception to disclosure that protects the governmental body's interests and may be waived. *See* Open Records Decision No. 470 at 7 (1987) (governmental body may waive Gov't Code § 552.111). As such, this section is not other law that makes information confidential for the purposes of section 552.022(a). Therefore, the department may not withhold any of the submitted information that is subject to section 552.022 under section 552.111.

You also contend, however, that the submitted information is confidential under section 409 of title 23 of the United States Code, which is "other law" for purposes of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001); *see also Pierce County v. Guillen*, 123 S.Ct. 720 (2003) (upholding constitutionality of section 409, relied on by county in denying request under state's Public Disclosure Act). Section 409 provides that

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

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[2]We note that the department does not claim section 552.108 as an exception to disclosure.

23 U.S.C. § 409. You characterize the information that the department seeks to withhold as "highway safety documents." Furthermore, you inform us that the highway referenced in the request is part of the National Highway System under section 103 of title 23 of the United States Code and is therefore a federal-aid highway within the meaning of section 409. Based on your representations, we conclude that the submitted information that is subject to section 552.022(a)(1) 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 your claim under section 552.111 of the Government Code with regard to the rest of the submitted information. This section excepts from required public 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 (7th Cir. 1992); *Robertson v. Union Pac. R.R. Co.*, 954 F.2d 1433, 1435 (8th Cir. 1992). You contend 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. Having considered your arguments, we find that the remaining information falls within the scope of section 409 of title 23 of the United States Code. We therefore conclude that the department may withhold the rest of the submitted information under section 552.111 of the Government Code.

In summary: (1) the department must withhold the submitted information that is subject to section 552.022(a)(1) of the Government Code under section 409 of title 23 of the United States Code; and (2) the department may withhold the rest of the submitted information 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).

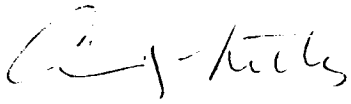
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 Office of the Attorney General 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/jpa

Ref: ID# 237116

Enc. Submitted documents

c: Mr. Robert T. Jarvis
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Sherman, Texas 75090
(w/o enclosures)