



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 13, 2006

Mr. Bill Ballard
Assistant County Attorney
County of Brazos
300 East 26th Street, Suite 325
Bryan, Texas 77803

OR2006-03726

Dear Mr. Ballard:

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# 245249.

Brazos County (the "county") received a request for "information on the Brazos County bridge located on Old Reliance Road approximately 5.1 miles east of the Earl Rudder Highway spanning the Wickson Creek[.]" You claim that the submitted 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. 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).

Section 552.111 of the Government Code 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." Gov't Code § 552.111. This exception encompasses information that is protected by civil discovery privileges. *See* Open Records Decision Nos. 647 at 3 (1996), 251 at 2-4 (1980). You assert that the requested information is excepted from disclosure under section 552.111 as information that would be privileged from civil discovery under section 409 of title 23 of the United States Code, which provides:

Notwithstanding 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.

23 U.S.C. § 409. Federal courts have determined 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.*, 965 F.2d 155, 160 (7th Cir. 1992); *Robertson v. Union Pac. R.R.*, 954 F.2d 1433, 1435 (8th Cir. 1992).

Section 144 of title 23 of the of the United States Code enacts the federal "Highway Bridge Replacement and Rehabilitation Program." 23 U.S.C. § 144; *see* 44 C.F.R. §§ 650.401-415 (prescribing policies and outlining procedures for administering the Highway Bridge Replacement and Rehabilitation Program in accordance with section 144). You state that "[b]ridges, including bridges not located on the National Highway System or the state highway system, are always eligible for federal aid under 23 U.S.C. § 144 and therefore are federal-aid highways within the meaning of 23 U.S.C. § 409." The requestor submitted to this office correspondence he received from the department stating that, given the satisfactory condition of the bridge at issue on a recent inspection, the bridge is not currently eligible for funding under section 144. However, we understand, based on your representations and the identical representations submitted to this office by the Texas Department of Transportation (the "department") in a related ruling request pertaining to the bridge at issue, that whether the bridge is *currently* eligible for federal aid is not dispositive of the applicability of section 409. Rather, we understand that because the bridge is generally eligible for federal aid under section 144, the bridge is considered a federal-aid highway within the meaning of section 409.

Next, we note that the information you submitted to this office consists entirely of communications between the county and the department, or its predecessor agency, regarding the bridge at issue. When determining if an interagency memorandum is excepted from disclosure under section 552.111, we must consider whether the agencies between which the memorandum is passed share a privity of interest or common deliberative process with regard to the policy matter at issue. *See Open Records Decision No. 561 at 9 (1990)*. You

state that the county and the department are “government partners under privity of contract” and explain that the department “works with Brazos County to improve bridge safety and identify candidates for the Federal Highway Bridge Replacement and Rehabilitation Program[.]” Based upon your representation that the submitted interagency memoranda and letters would be protected from discovery in civil litigation by section 409, we agree the 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, 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*, 342 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 Schless 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,



Ramsey A. Abarca
Assistant Attorney General
Open Records Division

RAA/krl

Ref: ID# 245249

Enc. Submitted documents

c: Mr. Demetrios Basdekas
7191 Old Reliance Road
Bryan, Texas 77808
(w/o enclosures)