ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 20, 2006

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

OR2006-12436

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#262488.

The Texas Department of Transportation (the "department") received a request for ten categories of information pertaining to an ongoing construction project; specifically (1) traffic control plans, including detail sheets, (2) the plan and profile sheets for the half mile north and half mile south where Bowlin Creek crosses United States Highway 59, (3) the title sheet, (4) detail plan sheets showing the layout of the bridge over Bowlin Creek, (5) the general notes and special specifications, (6) the inspector's diaries from May 31, 2006 to June 30, 2006, (7) any photographs taken of the construction project, (8) traffic control device inspection records from April 21, 2006 to July 30, 2006, (9) traffic counts of the Bowlin Creek portion of the construction site from April 21, 2006 to July 30, 2006, and (10) any documented complaints for the construction site between Timpson, Texas and Tenaha, Texas on U.S. Highway 59. You claim that the 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]

Initially, we note that the submitted representative sample of information contains only the traffic control device inspection records and photographs taken of the construction project. We therefore assume that the department has released any information that is responsive to the remainder of the request, to the extent that such information existed when the department received the request. If not, then the department must release any such information at this time. *See* Gov't Code §§ 552.301, .302; Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible).

The submitted information includes traffic control device inspection records which are subject to section 552.022 of the Government Code. Under section 552.022(a)(1) of the Government Code, a completed report, audit, evaluation, or investigation made of, for, or by a governmental body is expressly public unless it either is excepted under section 552.108 of the Government Code or is expressly confidential under other law. Gov't Code § 552.022(a)(1). You do not argue that the information is excepted under section 552.108 of the Government Code. Thus, the department may only withhold this information if it is confidential under other law. Section 552.111 of the Government Code is a discretionary exception and is therefore not "other law" for purposes of section 552.022 of the Government Code. *See* Open Records Decision No. 470 at 7 (1987) (statutory predecessor to section 552.111 may be waived).

However, the department also raises section 409 of title 23 of the United States Code, which provides as follows:

> 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.

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[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.

23 U.S.C. § 409. Federal courts have determined 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.*, 965 F.2d 155, 160 (7th Cir. 1992); *Robertson v. Union Pac. R.R.*, 954 F.2d 1433, 1435 (8th Cir. 1992). We agree that section 409 of title 23 of the United States Code is 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); *see also Pierce County v. Guillen*, 123 S.Ct. 720 (2003) (upholding constitutionality of section 409 of title 23 of the United States Code, relied upon by county in denying request under state's Public Disclosure Act).

You state that the traffic control device inspection records were "created for the purpose of identifying and evaluating hazards on public roads." You assert that the information at issue constitutes communications regarding the safety of the project, made by a contractor under contract with the department. You also inform us that US 59 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 of title 23 of the United States Code. Furthermore, the department indicates that section 409 of title 23 of the United States Code would protect the submitted information from discovery in civil litigation. Based on your representations and our review, we conclude that the department may withhold the traffic control device inspection reports pursuant to 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 of the Government Code. 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." 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 highway at issue is a federal-aid highway 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 at issue, we find that section 552.111 of the Government Code applies. Furthermore, we find that section 409 of title 23 of the United States Code would protect the information at issue 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.

In summary, to the extent items (1)-(6), (9), and (10) of the requestor's request for information existed at the time the department received the request, the department must release them to the requestor pursuant to section 552.301 of the Government Code. The department may withhold the traffic control device inspection reports pursuant to section 409 of title 23 of the United States Code. The remaining information may be withheld by the department pursuant to 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,

Holly R. Davis
Assistant Attorney General
Open Records Division

HRD/eb

Ref: ID# 262488

Enc. Submitted documents

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