



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 23, 2007

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

OR2007-02170

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# 275809.

The Texas Department of Transportation (the "department") received a request for eleven categories of information related to the southbound lane of State Highway 99 between Morton Road and Bellarie Road. You claim that the requested information is excepted from disclosure under sections 552.103, 552.107 and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.¹

Initially, we must address the applicability of section 552.007 of the Government Code to the requested information. We note that a portion of the information you seek to withhold in Exhibit C was previously released to the public. Section 552.007 provides that if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure unless its public release is expressly prohibited by law. *See Gov't Code 552.007; Open Records Decision No. 518 at 3 (1989); see also Open Records Decision No. 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure under the*

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.

Act, but it may not disclose information made confidential by law). You assert that the information at issue is excepted from disclosure under sections 552.103, 552.107, and 552.111. However, these are discretionary exceptions under the Act, and do not constitute law that makes information confidential or expressly prohibits its release for purposes of section 552.007. *See* Gov't Code § 552.007; *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision No. 663 at 5 (1999) (governmental body may waive sections 552.107 and 552.111). Accordingly, the department may not withhold this information under sections 552.103, 552.107 or 552.111 of the Government Code, but instead must release it to the requestor.

Next, we note that the information in Exhibit B pertains to a completed investigation by the department into a bicycle accident along State Highway 99.. Section 552.022 of the Government Code provides in relevant part:

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[.]

Gov't Code § 552.022(a)(1). Accordingly, we find that Exhibit B is expressly public under section 552.022(a)(1), and it may only be withheld if confidential under other law or excepted from disclosure under section 552.108. You seek to withhold Exhibit B under sections 552.103, 552.107, and 552.111 of the Government Code. As previously discussed, however, those sections may be waived. As such, sections 552.103, 552.107, and 552.111 are not other law that makes information confidential for the purposes of section 552.022. Thus, the information that is subject to section 552.022(a)(1) may not be withheld pursuant to these exceptions. However, section 409 of title 23 of the United States Code can serve as other law for the purposes of section 552.022 of the Government Code. Thus, we will address your arguments under this provision.

You contend that the information in Exhibit B is confidential under section 409 of title 23 of the United States Code. 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, relied upon by county in denying request under state's Public Disclosure Act). 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. 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. 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 state that the highway inspection records relate to State Highway 99, which is part of the National Highway System under section 103 of title 23 of the United States Code and therefore is a federal-aid highway within the meaning of section 409 of title 23 of the United States Code. You assert that section 409 of title 23 would protect this information from discovery in civil litigation. Based on your representations and our review of the information, we determine that the department must withhold Exhibit B under section 409 of title 23 of the United States Code.

Next, we address your claim under section 552.107 of the Government Code for the remaining information in Exhibit C. Section 552.107(1) protects information coming within the attorney-client privilege. Gov't Code § 552.107(1). When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has

been made. Lastly, the attorney-client privilege applies only to a *confidential* communication, *id.* 503(b)(1), meaning it was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5).

Whether a communication meets this definition depends on the *intent* of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You indicate that the remaining communication in Exhibit C constitutes a confidential communication between privileged parties that was made for the furtherance of the rendition of professional legal services. You also indicate that the communication was only shared with privileged department parties and that the department has not waived its privileged. Thus, we find that you may withhold the marked communication under section 552.107 of the Government Code.

In summary, you must withhold Exhibit B under section 409 of title 23 of the United States Code. You may withhold the marked communication in Exhibit C under section 552.107 of the Government Code. The remaining information must be released to the requestor.

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

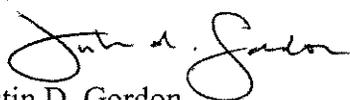
will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to 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,



Justin D. Gordon
Assistant Attorney General
Open Records Division

JDG/sdk

Ref: ID# 275809

Enc. Submitted documents

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