



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

May 30, 2007

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

OR2007-06785

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# 279864.

The Texas Department of Transportation (the “department”) received two requests for highway rail crossing information. The first is for “[a]ll documents and records pertaining to the highway-rail grade crossing located on Goyo Garcia County road (CR 2900) in Raymondville, Texas, specifically identifiable by U.S. Department of Transportation-AAR Grade Crossing ID No. 435795V . . . .” The second is for “[a]ll documents and records pertaining to the highway-rail grade crossing located on Jennings Road in Aguilares, Texas, specifically identifiable by U.S. Department of Transportation-AAR Grade Crossing ID No. 793617U . . . .” 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.<sup>1</sup>

Initially, we note that the requestor states in regard to both of his requests that he is “in the process of assisting Senator Carlos Uresti with an analysis of the . . . highway-rail grade

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<sup>1</sup>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.

crossing[s]” about which he seeks the information. Section 552.008(b) of the Government Code provides in part as follows:

[A] governmental body on request by an individual member, agency, or committee of the legislature shall provide public information, including confidential information, to the requesting individual member, agency, or committee of the legislature if the requesting member, agency or committee states that the public information is requested under [the Act] for legislative purposes.

Gov’t Code § 552.008(b). The section also provides that disclosure of excepted or confidential information to a legislator does not waive or affect the confidentiality of the information or the right to assert exceptions in the future regarding that information, and provides specific procedures relating to the confidential treatment of the information. *Id.* Thus, if the requestor is seeking the requested information on behalf of Senator Uresti for “legislative purposes,” the department must provide the information to the requestor, notwithstanding our conclusions that follow by which we allow or require the department to withhold portions of the requested information. *See id.*

Before we consider the exception you claim, we first note that the information includes copies of legislation, a statute, minute orders of the State Highway and Public Transportation Commission, and an administrative rule. Because laws and ordinances are binding on members of the public, they are matters of public record and may not be withheld from disclosure under the Act. Thus, the department must release the copies of legislation, the statute and the administrative rule. *See* Open Records Decision No. 551 at 2-3 (1990). Furthermore, the minute orders appear to have been adopted at a public meeting of the former State Highway and Public Transportation Commission and thus are official records of the public proceedings of a governmental body. As such, the minute orders, which we have marked, must also be released. *See* Open Records Decision No. 221 at 1 (1979) (“official records of the public proceedings of a governmental body are among the most open of records”).

Next, we find that portions of the information are subject to section 552.022 of the Government Code and have marked the documents accordingly. Section 552.022 enumerates categories of information that are not excepted from required disclosure unless they “are expressly confidential under other law.” Gov’t Code § 552.022. Under section 552.022(a)(1), a completed report, audit, evaluation, or investigation made of, for, or by a governmental body is public information, unless it is excepted from disclosure under section 552.108 or deemed confidential under other law. Under section 552.022(a)(3), information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body is public unless it is expressly confidential under other law. Under section 552.022(a)(5), all working papers, research material, and information used to estimate the need for or expenditure of public funds or taxes by a

governmental body on completion of the estimate are also public information unless they are expressly confidential under other law. *See id.* § § 552.022(a)(1), (3), (5). 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 therefore not “other law” for purposes of section 552.022. *See* Open Records Decision No. 470 at 7 (1987) (statutory predecessor to section 552.111 may be waived).

However, the department also contends the information is excepted from disclosure under 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.

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 (7<sup>th</sup> Cir. 1992); *Robertson v. Union Pac. R.R.*, 954 F.2d 1433, 1435 (8<sup>th</sup> Cir. 1992). We agree that section 409 of title 23 of the United States Code is other law for purposes of section 552.022 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).

You inform us that “[r]ailway-highway crossings are always eligible for federal aid under 23 U.S.C. § 130 and therefore are federal-aid highways within the meaning of 23 U.S.C. § 409.” Therefore, we conclude that the department must withhold the section 552.022 information pursuant to section 409 of title 23 of the United States Code.

You assert that the remaining information is excepted under section 552.111 of the Government Code. Section 552.111 excepts from disclosure “an interagency or intraagency memorandum or letter that would not available by law to a party in litigation with the agency.” We note that this section protects communications with third parties with which the department shares a privity of interest or common deliberative process. Open Records

Decision Nos. 464 (1987), 429 (1985); *see also Wu v. Nat'l Endowment of the Humanities*, 460 F.2d 1030 (5th Cir. 1972). You contend that the remaining information is excepted from disclosure under section 552.111 because it would be privileged from discovery under section 409 of title 23. Upon review, we find that the information at issue constitutes intraagency or interagency memoranda 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 this information from discovery in civil litigation. Therefore, we conclude that the department may withhold the remaining information under section 552.111.

In summary, the department must release the copies of legislation, statutes, administrative rules, and minute orders. Unless the requestor is seeking the requested information on behalf of Senator Uresti for legislative purposes, the department must withhold the submitted information that is subject to section 552.022 under section 409 of title 23 of the United States Code and may withhold the remaining information under section 552.111. If the requestor is seeking the requested information on behalf of Senator Uresti for legislative purposes, the department must release the information 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,



Kay Hastings  
Assistant Attorney General  
Open Records Division

KH/sdk

Ref: ID# 279864

Enc: Submitted documents

c: Mr. Marc Rosenthal  
Rosenthal & Watson  
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(w/o enclosures)