



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

February 2, 2009

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

OR2009-01327

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# 333804.

The Texas Department of Transportation (the "department") received a request for information relating to a railroad crossing in Baytown Texas. You state that the department is withholding some responsive information on the basis of previous open records letter rulings. You claim that the submitted information is excepted from disclosure under section 552.111 of the Government Code. We have considered your arguments and reviewed the submitted information.<sup>1</sup>

You state that some of the requested information was the subject of previous requests, as a result of which this office issued Open Records Letters Nos. 2007-10928 (2007) and 2008-06013 (2008). You inform us that there have been no change in the law, facts, and circumstances on which the previous rulings are based. We therefore agree that the department may continue to rely on Open Records Letters Nos. 2007-10928 and 2008-06013

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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.

with respect to the requested information that is the subject of those rulings. *See* Gov't Code § 552.301(a); Open Records Decision 673 at 6-7 (2001) (listing elements of first type of previous determination under Gov't Code § 552.301(a)).

Initially, we note that some of the information at issue is subject to section 552.022 of the Government Code. Section 552.022 provides, in relevant part, as follows:

(a) Without limiting the amount or kind of information that is public information under this chapter, 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;

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Gov't Code § 552.022(a)(1), (3). The submitted final inspection report is subject to section 552.022(a)(1), while the work order authorization is subject to section 552.022(a)(3). Therefore, the department may only withhold this information if it is confidential under "other law." Section 552.111 is a discretionary exception under the Act and does not constitute "other law" for purposes of section 552.022. *See* Open Records Decision Nos. 677 at 10 (2002) (attorney work product privilege under section 552.111 may be waived), 665 at 2 n.5 (discretionary exceptions generally), 470 at 7 (1987) (statutory predecessor to section 552.111 may be waived). Thus, the information subject to section 552.022 may not be withheld under this exception.

You also contend, however, that the information in question is confidential under section 409 of title 23 of the United States Code, which is "other law" for the 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.

23 U.S.C. § 409. You state that the submitted information concerns a railway-highway crossing that is eligible for federal aid under section 130 of title 23 of the United States Code and is therefore a federal-aid highway for the purposes of section 409 of title 23. You also state that the information that is subject to section 552.022 was generated for highway safety purposes. Based on your representations and our review of that information, we conclude that it is confidential under section 409 of title 23 of the United States Code and must be withheld from disclosure on that basis.

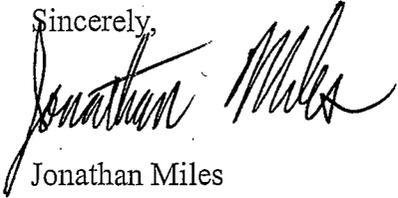
With respect to the remaining information, we address your claim under section 552.111 of the Government Code. Section 552.111 of the Government Code excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." Gov't Code § 552.111. 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.*, 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); *see also Pierce County v. Guillen*, 123 S.Ct. 720 (2003) (upholding constitutionality of 23 U.S.C. § 409, relied on by county in denying request under state's Public Disclosure Act). You contend that the remaining information would be privileged from discovery in civil litigation under section 409 and is therefore excepted from disclosure under section 552.111 of the Government Code. Based on your representations, we find that the information falls within the scope of section 49 of title 23 of the United States Code. We therefore conclude that the department may withhold the remaining information under section 552.111.

In summary, the department may continue to rely on Open Records Letters Nos. 2007-10928 and 2008-06013 for the requested information that is the subject of those rulings. The department must withhold the information subject to 552.022 under section 49 of title 23 of the United States Code. The remaining information may be withheld under section 552.111 of the Government Code.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at [http://www.oag.state.tx.us/open/index\\_ori.php](http://www.oag.state.tx.us/open/index_ori.php), or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,

A handwritten signature in cursive script that reads "Jonathan Miles". The signature is written in black ink and is positioned above the typed name.

Jonathan Miles  
Assistant Attorney General  
Open Records Division

JM/cc

Ref: ID# 333804

Enc. Submitted documents

c: Requestor  
(w/o enclosures)