



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 22, 2009

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

OR2009-05306

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# 345178.

The Texas Department of Transportation (the "department") received a request for daily work and traffic barricade reports during a specified time period. You claim 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 representative sample of information.¹

Initially, we note some of the submitted information is not responsive to this request because it falls outside of the time period specified in the request. This ruling does not address the public availability of non-responsive information, and the department is not required to release non-responsive information in response to this request. Accordingly, we will address your argument with regard to the responsive information.

We note the responsive information is subject to section 552.022 of the Government Code, which enumerates categories of information that are not excepted from required disclosure unless they "are expressly confidential under other law." This section provides in pertinent part as follows:

¹We 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.

(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, excepted as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). The responsive information consists of a completed report; therefore, the department may only withhold this information if it is confidential under other law or section 552.108 applies. Although you argue the submitted information is excepted under section 552.111 of the Government Code, this exception is a discretionary exception that protects a governmental body's interests and is, 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); *see also* Open Records Decision No. 522 at 4 (1989) (discretionary exceptions in general). Therefore, the department may not withhold the completed report under section 552.111.

However, the department also contends that the submitted information is excepted from disclosure 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, 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 stated section 409 excludes from evidence data compiled for purposes of highway 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).

You state the responsive traffic control devices inspection checklist was created for the purpose of identifying and evaluating hazards on public roads. You state this checklist relates to US 57, which 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 for the purposes of section 409 of title 23. You contend the information at issue would be privileged from discovery in civil litigation under section 409. Based on your representations, we conclude the department must withhold the responsive checklist in Exhibit B pursuant to section 409 of title 23 of the United States 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_orl.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,



Olivia A. Maceo
Assistant Attorney General
Open Records Division

OM/eeg

Ref: ID# 345178

Enc. Submitted documents

c: Requestor
(w/o enclosures)