



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

November 6, 2009

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

OR2009-15868

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# 361082.

The Texas Department of Transportation (the "department") received a request for all records regarding an accident at a specified railroad crossing on a certain date and all other records related to that railroad crossing. You state that the department does not have information responsive to the request for information relating to the specific accident. We note the Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 561 S.W.2d 266 (Tex. Civ. App. – San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990). You claim that the remaining 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>

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<sup>1</sup>We assume 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 those records contain substantially different types of information than that submitted to this office.

Initially, we note that portions of the submitted information are made expressly public under 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;

(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[.]

Gov't Code § 552.022(a)(1), (3), (5). The submitted information includes completed audit reports, executed contracts, and information used to estimate the need for an expenditure of public funds that are subject to section 552.022(a)(1), (a)(3), and (a)(5). Therefore, 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 to disclosure that protects a governmental body's interests and may be waived. *See* Open Records Decision No. 470 at 7 (1987) (governmental body may waive statutory predecessor to section 552.111); *see also* Open Records Decision No. 522 at 4 (1989) (discretionary exceptions in general). As such, section 552.111 is not "other law" that makes information confidential for the purposes of section 552.022. Accordingly, the department may not withhold the information that is subject to section 552.022 pursuant to section 552.111.

However, the department also contends the information subject to section 552.022 of the Government Code 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 148 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). 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, relied upon by county in denying request under state's Public Disclosure Act).

You state the information at issue consists of highway safety documents pertaining to a railway crossing. 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." Based upon your representations and our review of the information at issue, we conclude that the department may withhold the information subject to section 552.022 pursuant to section 409 of title 23 of the United States Code.

We now address your claim under section 552.111 for the information that is not subject to section 552.022 of the Government Code. Section 552.111 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. You claim 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 of the United States Code. You also state that some of the remaining information includes communications with a railroad. You state that the railroad in this case was under contract with the department regarding the crossing at issue and that safety information was exchanged regarding the contract. We find that the remaining information falls under section 552.111 of the Government Code. Furthermore, we find that section 409 of title 23 of the United States Code would protect the remaining information from discovery in civil litigation. Therefore, based on your

representations and our review, we conclude that the department may withhold the remaining information pursuant to section 552.111 of the Government Code.

In summary, we conclude that the department may withhold the information subject to section 552.022 of the Government Code pursuant to section 409 of title 23 of the United States Code. The remaining submitted 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\\_orl.php](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, toll free at (888) 672-6787.

Sincerely,



Kate Hartfield  
Assistant Attorney General  
Open Records Division

KH/eeg

Ref: ID# 361082

Enc. Submitted documents

c: Requestor  
(w/o enclosures)