



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 17, 2010

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

OR2010-02358

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# 370397.

The Texas Department of Transportation (the "department") received a request for a complete copy the documents in the department's file for the State Highway 6 Widening Project from May 1, 2008 through November 1, 2008. You state that you will release some of the requested information to the requestor. You claim that the submitted information is excepted from disclosure under section 552.111 of the Government Code and section 409 of title 23 of the United States Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

Initially, we note that Exhibit B contains Traffic Control Devices Inspection Checklists. This 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." Under section 552.022(a)(1), a completed report,

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.

audit, evaluation, or investigation made of, for, or by a governmental body is expressly public unless it either is excepted under section 552.108 of the Government Code or is expressly 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). Therefore, the submitted inspection checklists in Exhibit B may not be withheld under section 552.111.

However, the department also contends that this 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 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 indicate that the information in Exhibit B was created by the department for highway safety purposes. You also inform us that State Highway 6 and Farm-to-Market Road 159 are part of the National Highway System under section 103 of title 23 of the United States Code and, therefore, are federal-aid highways within the meaning of section 409. Furthermore, you state that section 409 of title 23 would protect the information at issue from discovery in civil litigation. Based upon your representations and our review of the information at issue, we conclude that the department may withhold the Traffic Control Devices Inspection Checklists found in Exhibit B pursuant to section 409 of title 23 of the United States Code.

We now address your claim under section 552.111 for the remaining information in Exhibits B, C, and D 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. This exception encompasses the deliberative process privilege. See Open Records Decision No. 615 at 2 (1993). The purpose of section 552.111 is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. See *Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, writ ref'd n.r.e.); Open Records Decision No. 538 at 1-2 (1990).

In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, and opinions reflecting the policymaking processes of the governmental body. See *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); see also *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.). An agency's policymaking functions do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. ORD 615 at 5-6. Additionally, section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist.*, 37 S.W.3d at 160; ORD 615 at 4-5.

This office has also concluded a preliminary draft of a policymaking document that is intended for release in final form is excepted from disclosure in its entirety under section 552.111 because such a draft necessarily represents the advice, recommendations, or opinions of the drafter as to the form and content of the final document. See Open Records Decision No. 559 at 2 (1990). Section 552.111 protects factual information in the draft that also will be included in the final version of the document. See *id.* at 2-3. Thus, section 552.111 encompasses the entire contents, including comments, underlining, deletions, and proofreading marks, of a preliminary draft of a policymaking document that will be released to the public in its final form. See *id.* at 2.

Section 552.111 can also encompass communications between a governmental body and a third party consultant. See Open Records Decision No. 631 (1995) (section 552.111 encompasses information created for governmental body outside consultant acting at governmental body's request and performing task that is within governmental body's authority). When determining if an interagency memorandum is excepted from disclosure under section 552.111, we must consider whether the agencies between which the memorandum is passed share a privity of interest or common deliberative process with regard to the policy matter at issue. See Open Records Decision No. 561 at 9 (1990). For

section 552.111 to apply, the governmental body must identify the third party and explain the nature of its relationship with the governmental body. Section 552.111 is not applicable to a communication between the governmental body and a third party unless the governmental body establishes it has a privity of interest or common deliberative process with the third party. *See* ORD 561 at 9.

You claim that the remaining information in Exhibit B 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. Based on your representation, we conclude that the department may withhold the remaining information in Exhibit B under section 552.111 of the Government Code. You also inform us that the information in Exhibits C and D reveals advice, opinions, and recommendations concerning proposed policies relating to the highway project and potential environmental effects. You indicate that a portion of the information in Exhibit C consists of a draft document regarding department policy that was created by an outside consultant on behalf of the department. Based on your representations and our review of the information at issue, we find you have established the deliberative process privilege is applicable to some of the information in Exhibits C and D. Therefore, the department may withhold this information, which we have marked under section 552.111 of the Government Code. We note, however, that the Federal Highway Administration operates in a regulatory posture in relation to the highway construction project at issue in the submitted documents. In this instance, you have not demonstrated how the department shares a privity of interest or common deliberative process with this agency. Therefore, the department has failed to establish the applicability of section 552.111 to the remaining information at issue in Exhibit C. Accordingly, the department may not withhold the remaining information under section 552.111 of the Government Code.

In summary, the department may withhold the information subject to section 552.022 of the Government Code found in Exhibit B pursuant to section 409 of title 23 of the United States Code. The information in Exhibits B, C, and D, which we have marked, may be withheld under section 552.111 of the Government Code.² The remaining information in Exhibit C must be released.

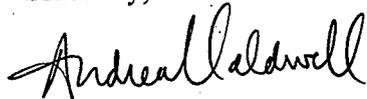
This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

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)

²As our ruling is dispositive, we need not address your remaining argument against disclosure.

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,



Andrea L. Caldwell
Assistant Attorney General
Open Records Division

ALC/eeg

Ref: ID# 370397

Enc. Submitted documents

c: Requestor
(w/o enclosures)