



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 28, 2010

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

OR2010-07778

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# 381023.

The Texas Department of Transportation (the "department") received a request for information concerning an investigation of a specified traffic fatality. You claim 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 your arguments and reviewed the submitted representative sample of information.¹

Initially, we note the submitted information includes a completed accident report made for or by the department that is subject to section 552.022 of the Government Code. Section 552.022 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, 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. Thus, the department may withhold the completed report only if it is confidential under other law.

¹We 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.

Section 552.111 of the Government Code is a discretionary exception and therefore is 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 contends the accident report is excepted from disclosure under section 409 of title 23 of the United States Code. We note that section 409 is "other law" for purposes of section 552.022(a). *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). Accordingly, we will consider your argument under federal law for the information subject to section 552.022, along with your arguments under section 552.111 for the remaining information not subject to section 552.022.

We note the accident report was completed pursuant to chapter 550 of the Transportation Code. *See* Transp. Code § 550.062 (accident report). Section 550.065(b) states that except as provided by subsection (c), accident reports are privileged and confidential. Section 550.065(c)(4) provides for the release of accident reports to a person who provides two of the following three pieces of information: (1) date of the accident; (2) name of any person involved in the accident; and (3) specific location of the accident. *Id.* § 550.065(c)(4). Under this provision, the department or another governmental entity is required to release a copy of an accident report to a person who provides the agency with two or more pieces of information specified by the statute. *Id.* In this instance, the requestor provided the department with the information necessary to obtain a copy of the accident report; therefore, the accident report is subject to release pursuant to section 550.065(c)(4) of the Transportation Code.

However, the department also contends the accident report 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 determined that 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. Co.*, 965 F.2d 155, 160 (7th Cir. 1992); *Robertson v. Union Pac. R.R. Co.*, 954 F.2d 1433, 1435 (8th Cir. 1992).

You inform us the submitted information was created for the purpose of identifying and evaluating hazards on public roads. You also assert that State Highway 6 is part of the National Highway System under section 409 of title 23 of the United States Code and therefore is a federal-aid highway. Finally, you state that this section would protect the information at issue from discovery in civil litigation. Therefore, section 409 of title 23 of the United States Code applies to the completed accident report and would permit the department to withhold it.

Thus, there is a conflict between the requestor's right of access to the completed accident report pursuant to section 550.065(c)(4) of the Transportation Code and the provisions of section 409 of title 23 of the United States Code. As federal law, section 409 of title 23 of the United States Code preempts any conflicting state provisions, including section 550.065 of the Transportation Code. *See English v. General Elec. Co.*, 496 U.S. 72, 79 (1990) (noting that state law is preempted to extent it actually conflicts with federal law); *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 369 (1986) (noting that federal agency acting within scope of its congressionally delegated authority may preempt state regulation). Thus, although the requestor would generally have a right of access to the submitted accident report under section 550.065(c)(4) of the Transportation Code, we conclude the department may withhold the submitted accident report pursuant to section 409 of title 23 of the United States Code.

We now address your argument under section 552.111 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. Section 552.111 encompasses information protected by civil discovery privileges. *See Open Records Decision Nos. 647 at 3 (1996), 251 at 2-4 (1980)*. 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. 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, the remaining submitted information may be withheld under section 552.111 of the Government Code.

In summary, the department may withhold the accident report form pursuant to section 409 of title 23 of the United States Code. The department may withhold the remaining information 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, 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,

A handwritten signature in black ink that reads "Paigelay". The signature is written in a cursive, flowing style.

Paige Lay
Assistant Attorney General
Open Records Division

PL/rl

Ref: ID# 381023

Enc. Submitted documents

cc: Requestor
(w/o enclosures)