



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

September 30, 2010

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

OR2010-14912

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# 395270.

The Texas Department of Transportation (the "department") received a request for information regarding a specified bridge project, including expense report, inspection reports, replacement studies, sufficiency rating data, and dates, times, and methods of certain measurements. You state you will release some information to the requestor. You claim the submitted information is excepted from disclosure under section 552.111 of the Government Code and protected by section 409 of title 23 of the United States Code. We have considered your arguments and reviewed the submitted representative sample of information.<sup>1</sup>

We note the submitted information contains completed appraisal reports subject to section 552.022 of the Government Code. Section 552.022(a)(1) provides for required public disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body[,]" unless the information is expressly confidential under other law or excepted from disclosure under section 552.108 of the Government Code. Gov't Code § 552.022(a)(1). You seek to withhold the information at issue under section 552.111 of the Government Code. However, section 552.111 is discretionary in nature and does not

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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.

constitute "other law" for purposes of section 552.022. *See* Open Records Decision Nos. 665 at 2 n.5 (discretionary exceptions generally), 564 (1990) (statutory predecessor to section 552.105 subject to waiver), 470 at 7 (1987) (statutory predecessor to section 552.111 subject to waiver). Thus, the department may not withhold the submitted appraisal reports under section 552.111 of the Government Code. However, the department also contends the appraisal reports are excepted from disclosure under section 409 of title 23 of the United States Code. We note 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 section 409 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.

Section 409 of title 23 of the United States Code provides in relevant part:

[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 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 stated 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 (7th Cir. 1992); *Robertson v. Union Pac. R.R.*, 954 F.2d 1433, 1435 (8th Cir. 1992); *see also* 123 S.Ct. 720 (2003).

You state "[b]ridges, including bridges located on the National Highway System or the state highway system or off-system on public roads are always eligible for federal aid under 23 U.S.C. § 144 and therefore are federal-aid highways within the meaning of 23 U.S.C. § 409." You contend the requested information would be privileged from discovery in civil litigation under section 409 of title 23 of the United States Code. Based on your representations and our review, we therefore conclude the department may withhold the bridge appraisal information under 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 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 the remaining information falls under section 552.111 of the Government Code. Furthermore, we find 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 bridge appraisal reports under section 409 of title 23 of the United States Code. The department may withhold the remaining submitted 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](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,



Mack T. Harrison  
Assistant Attorney General  
Open Records Division

MTH/em

Ref: ID# 395270

Enc. Submitted documents

c: Requestor  
(w/o enclosures)