



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 1, 2010

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

OR2010-14977

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# 395456.

The Texas Department of Transportation (the "department") received a request for fourteen categories of information pertaining to road construction on US 290 at a specified location.¹ You seek to withhold the requested information 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.²

We first note that some of the submitted information falls within the scope of section 552.022 of the Government Code. The submitted Traffic Control Devices Inspection Checklists and Traffic Signal Authorization Form are subject to section 552.022(a)(1), which 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). Although you seek to withhold the information that is subject to section 552.022 under section 552.111 of the Government

¹We note that the department sought and received clarification of this request. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information).

²We 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.

Code, that section is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See id.* § 552.007; Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 470 at 7 (1987) (statutory predecessor to section 552.111 subject to waiver). As such, section 552.111 is not other law that makes information confidential for the purposes of section 552.022. Therefore, the department may not withhold any of the information that is subject to section 552.022 under section 552.111.

You also contend, however, that the information subject to section 552.022 is confidential under section 409 of title 23 of the United States Code, which is "other law" for the purposes of section 552.022. *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). Section 409 provides that:

[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. You state that US 290 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 explain that the information encompassed by section 552.022 was created for highway safety purposes. Based on your representations and our review of the information at issue, we conclude that the Traffic Control Devices Inspection Checklists and Traffic Signal Authorization Form are confidential under section 409 of title 23 of the United States Code and must be withheld from the requestor on that basis.

Next, we address your claim for the remaining information 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. Federal courts have stated that section 409 of title 23 of the United States Code 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).

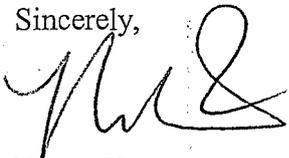
You explain that the department also collected and maintains the rest of the submitted information for highway safety purposes.³ You contend that the remaining information would be protected from discovery in civil litigation under section 409 and is therefore excepted from disclosure under section 552.111 of the Government Code. Based on your representations and our review of the information at issue, we conclude that the remaining information falls within the scope of section 409 of title 23 of the United States Code and may be withheld from the requestor under section 552.111.

In summary: (1) the Traffic Control Devices Inspection Checklists and Traffic Signal Authorization Form must be withheld under section 409 of title 23 of the United States Code; and (2) the rest of the 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, 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,



Nneka Kanu
Assistant Attorney General
Open Records Division

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³You inform us that some of the information in question includes communications with a party under contract with the department. We note that section 552.111 can encompass a governmental body's communications with other public and private entities. *See* Open Records Decision Nos. 631 at 2 (1995) (Gov't Code § 552.111 encompasses information created for governmental body by outside consultant acting at governmental body's request and performing task that is within governmental body's authority), 563 at 5-6 (1990) (private entity engaged in joint project with governmental body may be regarded as its consultant), 561 at 9 (1990) (statutory predecessor to section 552.111 encompassed communications with party with which governmental body has privity of interest or common deliberative process).

Ref: ID# 395456

Enc. Submitted documents

cc: Requestor
(w/o enclosures)