



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 14, 2010

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

OR2010-18693

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# 402892.

The Texas Department of Transportation (the "department") received a request for the specifications for qualification of a specified project and the document submitted to committee that qualified a specified intersection as a Proposition 14 project. A second request seeks data used to qualify the specified intersection for the project, data during a specified time period for fatality and non-fatality crashes at the intersection and other corresponding comparison data, and data showing the intersection has a crash rate in excess of the average statewide rate. A third request seeks the specifications for qualification and copies of all environmental, safety, and economic studies in regard to the Plantersville and Carlos projects. You state you have no information responsive to portions of the third request.¹ 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

¹The 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*, 562 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), 452 at 3 (1986), 362 at 2 (1983).

Code. We have considered your arguments and reviewed the submitted representative sample of information.²

Initially, we note the submitted information includes safety evaluation reports and information used to estimate the need for or expenditure of public funds or taxes, that are subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

(a) [T]he 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; [and]

...

(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), (5). The information subject to section 552.022(a)(1), which we have marked, must be released unless it is excepted from disclosure under section 552.108 of the Government Code or is expressly made confidential under other law. *See id.* § 552.022(a)(1). The information subject to section 552.022(a)(5), which we have marked, must be released unless it is expressly made confidential under other law. *See id.* § 552.022(a)(5). You seek to withhold the information subject to section 552.022 under section 552.111 of the Government Code. However, section 552.111 is discretionary in nature and does not constitute "other law" for purposes of section 552.022. *See Open Records Decision Nos. 470 at 7 (1987) (statutory predecessor to section 552.111 subject to waiver), 665 at 2 n.5 (discretionary exceptions generally).* Thus, the department may not withhold the marked information under section 552.111 of the Government Code. However, you also contend the information at issue is 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*, 537 U.S. 129 (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

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.

subsections 552.022(a)(1) and 552.022(a)(5). We will also consider your argument under section 552.111 for the information not subject to section 552.022.

You contend the information subject to section 552.022 is excepted from disclosure under section 409 of title 23 of the United States Code. Section 409 provides:

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 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 Pierce*, 537 U.S. 129 (2003) (upholding constitutionality of 23 U.S.C. § 409, relied on by county in denying request under state's Public Disclosure Act).

You state "the interchange at FM 1774 and SH 105 is part of the National Highway System under 23 U.S.C. § 103 and therefore is a federal-aid highway within the meaning of 23 U.S.C. § 409." You contend the information subject to section 552.022 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 conclude the information subject to section 552.022 is excepted under section 409 of title 23 of the United States Code.

We now address your argument under section 552.111 of the Government Code for the remaining information not subject to section 552.022. Section 552.111 excepts from disclosure "an interagency or intra-agency 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 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. Furthermore, you indicate the remaining information was created for highway safety purposes. Based on your

representations and review, we find the remaining information may be withheld under section 552.111 of the Government Code.

In summary, the information subject to section 552.022, which we have marked, is excepted under 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,



Claire V. Morris Sloan
Assistant Attorney General
Open Records Division

CVMS/tf

Ref: ID# 402892

Enc. Submitted documents

c: Requestors
(w/o enclosures)