



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

February 1, 2011

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

OR2011-01668

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# 407805.

The Texas Department of Transportation (the "department") received a request for information relating to a specified construction project on Interstate Highway 35 ("IH 35"), including traffic control plans; video or photographs of the construction site, signage, warnings, and implementation of the plan; and records, video recordings, reports, and electronic data relating to traffic flow and any investigations of traffic incidents during a specified time period. You claim the submitted information is excepted from disclosure under 552.111 of the Government Code and protected by section 409 of title 23 of the United States Code. We have considered the exception you claim and reviewed the submitted representative sample of information.<sup>1</sup>

We note the submitted information falls within the scope of section 552.022 of the Government Code. The submitted Traffic Control Devices Inspection Checklists are subject to section 552.022(a)(1), which provides for required public disclosure of "a completed

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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.

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 raise section 552.111 of the Government Code, this exception is discretionary in nature and thus may be waived. Accordingly, section 552.111 does not constitute other law for purposes of section 552.022. See Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (governmental body may waive section 552.111). Therefore, the department may not withhold the completed reports under section 552.111. However, the department also contends the 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 submitted information.

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 “IH 35 is part of the National Highway System under 23 U.S.C. § 103 and is therefore a federal-aid highway within the meaning of 23 U.S.C. § 409.” You state the submitted information was used to evaluate the safety of traffic control devices, and you assert this information is confidential under section 409 of title 23 of the United States Code. Based on your representations and our review, we conclude the department may withhold the submitted information under section 409 of title 23 of the United States 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# 407805.

Enc. Submitted documents

c: Requestor  
(w/o enclosures)