



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 14, 2011

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

OR2011-02194

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# 409099.

The Texas Department of Transportation (the "department") received a request for three specified contracts, specified engineering studies, and information pertaining to the relocation of a specified stop sign. You state you are making some of the requested information available 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.¹ We have also received and considered comments submitted by the requestor. *See Gov't Code § 552.304* (interested party may submit written comments regarding availability of requested information).

Initially, we address the requestor's contention that the department did not comply with the procedural requirements of the Act. The requestor asserts the department failed to comply with section 552.301 of the Government Code. Section 552.301(b) requires that a

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.

governmental body ask for a decision from this office and state which exceptions apply to the requested information by the tenth business day after receiving the request. *Id.* § 552.301(b). Pursuant to section 552.301(d), a governmental body must provide the requestor with (1) a written statement that the governmental body wishes to withhold the requested information and has asked for a decision from the attorney general, and (2) a copy of the governmental body's written communication to the attorney general within ten business days of receiving the request for information. *Id.* § 552.301(d). Section 552.301(e-1) requires a governmental body that submits written comments to the attorney general under subsection (e)(1)(A) to send a copy of those comments to the person who requested the information from the governmental body within fifteen business days of receiving the request for information. *Id.* § 552.301(e-1). Pursuant to section 552.302 of the Government Code, if a governmental body fails to comply with section 552.301, the requested information is presumed to be subject to required public disclosure and must be released, unless there is a compelling reason to withhold any of the information. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.— Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.— Austin 1990, no writ).

You inform us the department received the instant request for information on November 16, 2010. You state the department was closed November 25 and 26 for the Thanksgiving holiday. However, the department states, and the requestor acknowledges, the department requested clarification of parts of the request on December 1 and 2. *See Gov't Code* § 552.22 2(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information). You state the department received clarification from the requestor on December 2 and additional clarification on December 6. We have no indication that the department did not act in good faith in seeking clarification of the request. Therefore, based on your representations and documentation, we consider the department's ten- and fifteen-business-day periods under section 552.301 for requesting a decision to have begun on December 6, the date the department received the requestor's final response to the request for clarification. *See City of Dallas v. Abbott*, 304 S.W.3d 380, 384 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or over-broad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed). Therefore, we consider the department to have timely submitted its request for this decision and subsequent correspondence with this office, which we received on December 8. Additionally, the department's brief to this office contains a notation the requestor was copied on the brief on that date. Therefore, we conclude the department complied with the requirements of section 552.301 and will address its arguments against disclosure.

Next, we note the submitted information includes a completed accident report and a daily activity report made for or by the department that are 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.” *See* Gov’t Code § 552.022. 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 reports only if they are confidential under other law. 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 these documents are protected 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*, 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 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, as well as the daily activity report, are protected 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.*, 965 F.2d 155, 160 (7th Cir. 1992); *Robertson v. Union Pac. R.R.*, 954 F.2d 1433, 1435 (8th Cir. 1992).

You inform us the submitted information was collected and compiled for the purpose of identifying and evaluating the safety of public roads. You also assert that FM 1788 and SH 158 are part of the National Highway System under section 409 of title 23 of the United States Code and therefore are federal-aid highways. 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 information subject to section 552.022 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, as well as the daily activity 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 for the remaining information. 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 and daily activity report 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,



Paige Lay
Assistant Attorney General
Open Records Division

PL/vb

Ref: ID# 409099

Enc. Submitted documents

c: Requestor
(w/o enclosures)