



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 28, 2011

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

OR2011-02909

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# 414544.

The Texas Department of Transportation (the "department") received a request for information relating to a specified portion of FM 317 in Henderson County. You indicate some of the requested information will be released on payment of costs. You claim the submitted information is excepted from disclosure under section 552.111 of the Government Code and privileged under section 409 of title 23 of the United States Code. We have considered your arguments and reviewed the information you submitted.¹

We note some of 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 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).

¹This letter ruling assumes the submitted representative sample of information is truly representative of the requested information as a whole. This ruling neither reaches nor authorizes the department to withhold any information that is substantially different from the submitted information. See Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

You seek to withhold the information encompassed by section 552.022(a)(1) under section 552.111 of the Government Code, which 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 Gov't Code § 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(a)(1). Therefore, the department may not withhold any of the information encompassed by section 552.022(a)(1) under section 552.111.

You also contend the information encompassed by section 552.022(a)(1) 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 FM 317 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 purposes of section 409 of title 23. You explain the Traffic Control Devices Inspection Checklists were created for highway safety purposes. Based on your representations, we conclude the Traffic Control Devices Inspection Checklists are confidential under section 409 of title 23 of the United States Code and must be withheld from the requestor on that basis.

You claim the rest of the submitted information is excepted from disclosure under section 552.111 of the Government Code. Section 552.111 excepts "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).

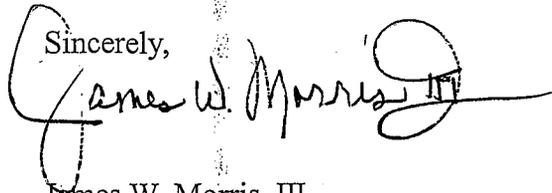
You state the rest of the submitted information is from the department's pavement management information system ("PMIS"). You explain the PMIS information also is used for highway safety purposes. You contend the PMIS information would be protected from discovery in civil litigation under section 409 and is therefore excepted from disclosure under section 552.111 of the Government Code. Based on your representations, we conclude the PMIS 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, the department (1) must withhold the Traffic Control Devices Inspection Checklists under section 409 of title 23 of the United States Code; and (2) may withhold the PMIS 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,



James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/em

Ref: ID# 414544

Enc: Submitted documents

c: Requestor
(w/o enclosures)