



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 20, 2011

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

OR2011-13586

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# 430593.

The Texas Department of Transportation (the "department") received two requests for information. The first request seeks twenty-three categories of information, including information related to FM 2766, Park Road 3232, and a specified bridge. The second request seeks eight categories of information, including additional information pertaining to FM 2766 and Park Road 3232. You state the department is releasing some of the requested information. You also state the department has not found information responsive to some categories of the 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 Code. We have considered your arguments and reviewed the submitted representative samples of information.² We have also considered comments submitted by

¹We note the 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 dism'd); 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).

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.

one of the requestors. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we note one of the requestors questions the timeliness of the request for a ruling the department submitted to this office in response to the first request for information. Section 552.301 of the Government Code describes the procedural obligations placed on a governmental body that receives a written request for information it wishes to withhold. Pursuant to section 552.301(b) of the Government Code, the governmental body must request a ruling from this office and state the exceptions that apply within ten-business-days after receiving the request. *See id.* § 552.301(b). The requestor states the first request for information was mailed to the department on June 29, 2011. The requestor also states he expected this request to be delivered to the department on either June 30, or July 1, 2011. Thus, the requestor disputes the department's statement that it received the first request for information on July 5, 2011. The determination of the date the department received this request is a question of fact. This office is unable to resolve disputes of fact in the open records ruling process. Accordingly, we must rely upon the facts alleged by the governmental body requesting our opinion, or upon those facts that are discernable from the documents submitted for our inspection. *See* Open Records Decision No. 552 at 4 (1990). Thus, we must accept the department's representation that it received this request on July 5, 2011. You also state, an provide documentation showing, the department requested clarification of categories one, two, three, and ten of the first request on July 8, 2011, and received clarification on July 18, 2011. *See* Gov't Code § 552.222 (providing that if request for information is unclear, governmental body may ask requestor to clarify request); *see also* *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (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). Accordingly, the department's ten-business-day deadline to request a ruling from this office in response to the clarified categories of the request was August 1, 2011, and the ten-business-day deadline for the categories the department did not seek to clarify was July 19, 2011. The department hand delivered its request for a ruling to this office on July 19, 2011. Therefore, we find the department complied with section 552.301(b) of the Government Code in requesting a ruling from this office in response to the first request for information.

Next, we note some of the submitted information consists of completed reports and information used to estimate the need for or expenditure of public funds or taxes. 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 completed reports, which we have marked, are subject to section 552.022(a)(1) and must be released unless they are excepted from disclosure under section 552.108 of the Government Code or are expressly made confidential under other law. *See id.* § 552.022(a)(1). The information used to estimate the need for or expenditure of public funds or taxes, which we have marked, is subject to section 552.022(a)(5) and must be released unless it is expressly made confidential under other law. *See id.* § 552.022(a)(5). Although you seek to withhold the submitted information under section 552.111 of the Government Code, this section is a discretionary exception that protects a governmental body's interest and is, therefore, not "other law" for purposes of section 552.022. *See Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions in general), 663 at 5 (1999) (waiver of discretionary exceptions), 470 at 6-7 (1987) (statutory predecessor to section 552.111 is discretionary exception).* Thus, the department may not withhold the information we have marked under section 552.022 under section 552.111 of the Government Code. However, you also contend the submitted information 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 section 552.022. 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.

You state FM 2766 and Park Road 3232 are part of the National Highway System under section 103 of title 23 of the United States Code, and are therefore federal-aid highways within the meaning of section 409. You also state “[b]ridges, including bridges located on the National Highway System or the state highway system or off-system on public roads are always eligible for federal aid under 23 U.S.C. § 144 and therefore are federal-aid highways 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, which is 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 our review, we find the remaining information, which we have marked, may be withheld under section 552.111 of the Government Code.

In summary, the information we have marked under section 552.022 of the Government Code is excepted under section 409 of title 23 of the United States Code. The department may withhold the remaining information, which we have marked, 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,



Kenneth Leland Conyer
Assistant Attorney General
Open Records Division

KLC/eb

Ref: ID# 430593

Enc. Submitted documents

c: Requestors
(w/o enclosures)