



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 20, 2011

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

OR2011-18738

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# 440344.

The Texas Department of Transportation (the "department") received a request for information related to a specified construction project on Interstate 30. You claim the submitted information is excepted from disclosure under section 552.111 of the Government Code and confidential under section 409 of title 23 of the United States Code. We have considered your arguments and reviewed the submitted information.¹ We also have considered the comments we received from the requestor. *See* Gov't Code § 552.304 (any person may submit written comments stating why information at issue in request for attorney general decision should or should not be released).

We initially note the requestor seeks access to 18 categories of information related to the specified construction project, but the submitted information consists of three "Traffic Control Devices Inspection Checklist[s]." Thus, although you state the department submitted a representative sample of the requested information, we find the submitted information is not representative of all the information to which the requestor seeks access. Please be advised this open records letter applies only to the types of information you have submitted for our review. Thus, this ruling does not authorize the withholding of any other requested records to the extent those records contain substantially different types of information than the records you submitted to this office. *See id.* § 552.302 (where request for attorney

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).

general decision does not comply with requirements of Gov't Code § 552.301, information at issue is presumed to be public). We therefore assume the department has released any other types of records that are responsive to the present request, to the extent such records existed when the department received the request. If not, then the department must release any such records immediately.² *See id.* §§ 552.221, .301, .302; Open Records Decision No. 664 (2000).

We next note the submitted traffic control devices inspection checklists fall within the scope of section 552.022(a)(1) of the Government Code. Section 552.022(a)(1) 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 the Act or other law or excepted from disclosure under section 552.108 of the Government Code. *See* Gov't Code § 552.022(a)(1). Although you seek to withhold the submitted information under section 552.111 of the Government Code, that section 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 purposes of section 552.022(a)(1). Therefore, the department may not withhold any of the submitted information under section 552.111 of the Government Code.

You also contend, however, the submitted information is confidential under section 409 of title 23 of the United States Code, which is “other law” that makes information confidential for purposes of section 552.022 of the Government Code. *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 152 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.

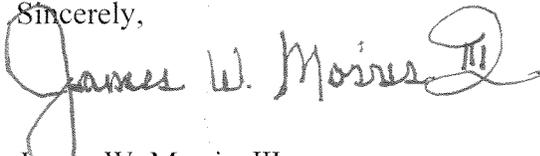
²We note the Act does not require a governmental body to release information that did not exist when it received a request or create responsive information. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

23 U.S.C. § 409. You state the submitted information pertains to a roadway that 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 the purposes of section 409 of title 23. You explain the submitted information was generated for highway safety purposes. Based on your representations, we conclude the submitted information is confidential under section 409 of title 23 of the United States Code and must be withheld from the requestor on that basis.

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,

A handwritten signature in black ink that reads "James W. Morris, III". The signature is written in a cursive style with a large initial "J" and a stylized "M".

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

JWM/bs

Ref: ID# 440344

Enc: Submitted documents

c: Requestor
(w/o enclosures)