



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 21, 2012

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

OR2012-07596

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# 454555.

The Texas Department of Transportation (the “department”) received a request for information regarding a specified segment of Highway 149 including: the maintenance schedule; documents regarding the decision to pave or re-pave the segment; documents regarding skid tests and friction tests; and planning documents related to the paving or re-paving of the segment in 2011.¹ You state some information has been or will be released to the requestor. You claim the remaining requested 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 the exception you claim and reviewed the submitted representative sample of information.²

Initially, we note exhibit C consists of a completed report and evaluation, which falls within the scope of section 552.022 of the Government Code. Section 552.022(a)(1) provides for required public disclosure of “a completed report, audit, evaluation, or investigation made

¹We note the department requested and received clarification of the request for information. *See* Gov’t Code § 552.222(b) (stating that if information requested is unclear to governmental body or if a large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used); *City of Dallas v. Abbott*, 304 S.W.3d 380 (Tex. 2010) (holding that when governmental entity, acting in good faith, requests clarification of unclear or overbroad request for public information, ten-business-day period to request attorney general opinion is measured from date the request is clarified or narrowed).

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 those submitted to this office.

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 exhibit C under section 552.111 of the Government Code, that section is a discretionary exception to disclosure and does not make information confidential under the Act. *See id.* § 552.007; Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 470 at 7 (1987) (statutory predecessor to section 552.111 subject to waiver). However, you also contend exhibit C is excepted from disclosure under section 409 of title 23 of the United States Code. We note section 409 is “other law” that makes information confidential 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 exhibit C. We will also consider your argument under section 552.111 for the information not subject to section 552.022(a)(1).

You contend exhibit C 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. at 129.

Exhibit C pertains to Highway 149. You inform us Highway 149 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 exhibit C was generated for highway safety purposes. Based upon your representations and our review, we conclude the department may withhold exhibit C pursuant to section 409 of title 23 of the United States Code.

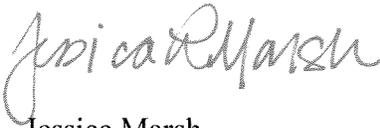
We now address your argument under section 552.111 of the Government Code for exhibit B. Section 552.111 excepts from disclosure “[a]n interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency[.]” Gov’t Code § 552.111. This exception encompasses information protected by civil discovery privileges. *See* Open Records Decision Nos. 647 at 3 (1996), 251 at 2-4 (1980). You state exhibit B is from the department’s pavement management information system (“PMIS”). You explain PMIS information is used for highway safety purposes. You contend exhibit B 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. Based on your representations and our review, we find exhibit B falls within the scope of section 409 of title 23 of the United States Code and may be withheld under section 552.111 of the Government Code.

In summary, the department may withhold exhibit C pursuant to section 409 of title 23 of the United States Code and exhibit B 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,



Jessica Marsh
Assistant Attorney General
Open Records Division

JM/bhf

Ref: ID# 454555

Enc. Submitted documents

c: Requestor
(w/o enclosures)