



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 28, 2012

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

OR2012-13571

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# 467981.

The Texas Department of Transportation (the "department") received a request for information pertaining to (1) traffic control devices and auto accidents at a specified intersection and (2) a specified project, including contracts between the department and a named entity.¹ You state some information will be released. You claim the submitted information is excepted from disclosure under sections 552.101 and 552.111 of the Government Code and section 409 of title 23 of the United States Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

¹You state, and provide documentation showing, the department sought and received clarification of the request. See Gov't Code § 552.222(b) (stating if information requested is unclear or large amount 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); see also *City of Dallas v. Abbott*, 304 S.W.3d 380 (Tex. 2010) (holding when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or overbroad 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).

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.

We note the submitted information includes a Traffic Control Devices Inspection Checklist that is subject to 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 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 information at issue 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 Gov’t Code § 552.111 subject to waiver). However, the department also contends this information 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 the information subject to section 552.022, along with your arguments under sections 552.101 and 552.111 for the information not subject to section 552.022.

You contend the Traffic Control Devices Inspection Checklist 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.

You inform us the roadways at issue in the submitted information are part of the National Highway System under section 103 of title 23 of the United States Code and are therefore

federal-aid highways for the purposes of section 409 of title 23. You explain the information at issue was generated for highway safety purposes. Based upon your representations and our review of the information subject to section 552.022, we conclude the department may withhold the Traffic Control Devices Inspection Checklist pursuant to section 409 of title 23 of the United States Code.

We next address your arguments against disclosure for the information not subject to section 552.022 of the Government Code. Section 552.101 of the Government Code excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This section encompasses information made confidential by other statutes. The submitted information contains CR-3 accident report forms that you claim are excepted from disclosure by section 550.065 of the Transportation Code. This section provides that, except as provided by subsection (c), accident reports are privileged and confidential. Transp. Code § 550.065(b). Section 550.065(c)(4) of the Transportation Code, however, requires 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). In this instance, the requestor has not provided the department with two of the three requisite pieces of information specified by the statute for each report at issue. Accordingly, the department must withhold the submitted CR-3 accident report forms under section 552.101 of the Government Code in conjunction with section 550.065(b) of the Transportation Code.

You raise section 552.111 of the Government Code for the remaining information. 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 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 may be withheld under section 552.111 of the Government Code.

In summary, the department may withhold the Traffic Control Devices Inspection Checklist pursuant to section 409 of title 23 of the United States Code. The department must withhold the submitted CR-3 accident reports forms under section 552.101 of the Government Code in conjunction with section 550.065(b) of the Transportation 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,

A handwritten signature in cursive script that reads "Misty H. Barham".

Misty H. Barham
Assistant Attorney General
Open Records Division

MHB/som

Ref: ID# 467981

Enc. Submitted documents

c: Requestor
(w/o enclosures)