



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

January 8, 2013

Ms. Sharon Alexander  
Associate General Counsel  
Texas Department of Transportation  
Dewitt C. Greer State Highway Building  
125 East 11<sup>th</sup> Street  
Austin, Texas 78701-2483

OR2013-00451

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# 477108.

The Texas Department of Transportation (the "department") received a request for information related to a traffic accident on Highway 287 in Hardeman County. You state some of the requested information either has been or will be released. You claim the submitted information is excepted from disclosure under section 552.111 of the Government Code. We have considered the exception you claim and reviewed the information you submitted.<sup>1</sup>

You note the requestor also seeks access to a crash barrier and a guardrail from the accident scene. You contend the Act does not require the department to comply with that request. The Act is applicable to "public information," which is defined as information collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business by a governmental body or for a governmental body if the governmental

---

<sup>1</sup>This 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).

body owns the information or has a right of access to it. *See* Gov't Code § 552.002. This office has ruled tangible physical items are not "information," as that term is contemplated under the Act. *See* Open Records Decision No. 581 (1990). Thus, the crash barrier and the guardrail are not public information for purposes of section 552.002 of the Government Code and need not be made available to the requestor. *See* Gov't Code § 552.021.

We note some of the submitted information does not pertain to the accident that is the subject of the present request for information and thus is not responsive to the request. This decision does not address the public availability of non-responsive information.

Section 552.111 of the Government Code excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency[.]" *Id.* § 552.111. You contend the responsive 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. Section 409 provides as follows:

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 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.

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 County v. Guillen*, 123 S.Ct. 720 (2003) (upholding constitutionality of 23 U.S.C. § 409, relied on by county in denying request under state's Public Disclosure Act).

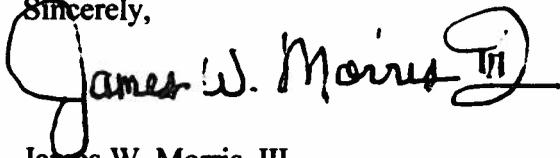
You state Highway 287 is part of the national highway system under section 103 of title 23 of the United States Code and as such is a federal-aid highway for purposes of section 409 of title 23. You explain the information at issue was collected and compiled for the purpose of evaluating the safety of the highway. You contend the information would be privileged 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 and our review, we conclude the department may withhold the responsive information under section 552.111.

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](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 "III" at the end.

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

JWM/bhf

Ref: ID# 477108

Enc: Submitted documents

c: Requestor  
(w/o enclosures)