



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 9, 2013

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

OR2013-07690

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# 487706.

The Texas Department of Transportation (the "department") received a request for five categories of information relating to the electronic transguide signs in the San Antonio area. You state that you are releasing some of the requested information. 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 exceptions you claim and reviewed the submitted representative sample of information.¹

We note that Exhibit B consists of Operational Status Assessments and Exhibit C consists of a Status Report, a Grade Report, and a Work Order, all of which fall 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 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*

¹We 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 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.

Gov't Code § 552.022(a)(1). Section 552.022(a)(3) provides for required public disclosure of "information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body," unless the information is expressly confidential under the Act or other law. *See* Gov't Code § 552.022(a)(3). Although you raise section 552.111 of the Government Code, this section does not make information confidential under the Act. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 470 (statutory predecessor to section 552.111 subject to waiver). Therefore, the department may not withhold the information at issue under section 552.111. 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 at issue.

You contend Exhibits B and C are 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.

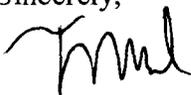
You inform this office the roadways utilizing the electronic transguide system at issue in Exhibits B and C are part of the National Highway System under section 103 of title 23 of the United States Code and are therefore federal-aid highways for the purposes of section 409 of title 23. You inform us that the information in Exhibit B was generated for the purposes

of allowing those with authority to determine the need to invest in the maintenance and upgrade of the electronic transguide system. You state this information was compiled or collected as part of the department's Highway Safety Improvement Program pursuant to section 148 of title 23. *See* 23 U.S.C. § 148. We note that Exhibit C consists of a Status Report, a Grade Report, and a Work Order, all of which concern the maintenance and repair of components of the electronic transguide system. You state that the electronic transguide system is used to provide safety enhancements by informing motorists of roadway conditions, hazards on the roadway ahead, and weather conditions. You further state that the Federal Highway Administration supports the use of dynamic message signs like those used in the electronic transguide system as traffic control devices.² Based upon your representations and our review, we conclude the information at issue was compiled or collected for the purpose of identifying, evaluating, or planning the safety enhancement of potential accident sites or hazardous roadway conditions. The department may withhold the information at issue pursuant to section 409 of title 23 of the United States 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,



Tim Neal
Assistant Attorney General
Open Records Division

TN/dls

²Pursuant to section 552.303 of the Government Code, this office asked the department to provide additional information regarding whether and to what extent the information at issue was generated for the purposes of highway safety. *See* Gov't Code § 552.303(c)-(d) (if attorney general determines that information in addition to that required by section 552.301 is necessary to render decision, written notice of that fact shall be given to governmental body and requestor, and governmental body shall submit necessary additional information to attorney general not later than seventh calendar day after date of receipt of notice).

Ref: ID# 487706

Enc. Submitted documents

c: Requestor
(w/o enclosures)