



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 18, 2013

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

OR2013-10263

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# 490556.

The Texas Department of Transportation (the "department") received two requests from the same requestor for fifteen categories of information pertaining to project "STP 2010(989)SB US82 in Grayson County," including information pertaining to accidents, for a specified time period.¹ You claim the requested information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.111 of the Government Code and section 409

¹We note the department asked for and received clarification regarding this request. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information); *see City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or over-broad 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).

of title 23 of the United States Code.² We have considered the exceptions you claim and reviewed the submitted representative sample of information.³

Initially, we note the submitted information contains CR-3 accident report forms that were completed pursuant to chapter 550 of the Transportation Code. *See* Transp. Code § 550.064 (officer's accident report). 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. Section 552.101 encompasses information protected by other statutes, such as section 550.065(b) of the Transportation Code. Section 550.065(b) states that except as provided by subsection (c) or subsection (e), accident reports are privileged and confidential. *See* Transp. Code § 550.065(b). Section 550.065(c)(4) provides for 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). You inform us that the requestor has not provided the department with two of the three requisite pieces of information specified by the statute. 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.

Next, we note the remaining information contains a Traffic Control Devices Inspection Checklist 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 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 raise sections 552.103 and 552.111 of the Government Code, these sections do not make information confidential under the Act. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); *see also* 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 Traffic Control Devices Inspection Checklist, which we have marked, under sections 552.103 or 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*

²You also raise section 552.101 of the Government Code in conjunction with section 552.107 on the basis of the attorney-client privilege. However, section 552.101 does not encompass the attorney-client privilege or other exceptions found in the Act. *See* Open Records Decision No. 676 at 1-3 (2002).

³We 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 that those records contain substantially different types of information than that submitted to this office.

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 Traffic Control Devices Inspection Checklist.

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 road at issue 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 Traffic Control Devices Inspection Checklist was generated for highway safety purposes. Based on your representations and our review, we conclude the department may withhold the Traffic Control Devices Inspection Checklist, which we have marked, pursuant to section 409 of title 23 of the United States Code.

Section 552.103 of the Government Code provides in relevant part as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date that the department received the request for information, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

To establish that litigation is reasonably anticipated, a governmental body must provide this office “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” Open Records Decision No. 452 at 4 (1986). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *Id.* In Open Records Decision No. 638 (1996), this office stated that a governmental body has met its burden of showing that litigation is reasonably anticipated when it received a notice of claim letter and the governmental body represents that the notice of claim letter is in compliance with the requirements of the Texas Tort Claims Act (“TTCA”), Civ. Prac. & Rem. Code, ch. 101, or an applicable municipal ordinance.

You state, and provide documentation showing, that prior to the department’s receipt of the requests for information, the department received two notice of claim letters alleging that the department’s negligence regarding the project at issue resulted in the death of a named individual. You represent that the notice of claim letters meet the requirements of the TTCA. You also state the remaining information pertains to the anticipated litigation. Based on your representations and our review of the information at issue, we conclude the department reasonably anticipated litigation on the date it received the present request for information and the remaining information relates to the anticipated litigation.

However, we note the opposing parties in the anticipated litigation may have seen or had access to some of the information at issue. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information relating to litigation through discovery procedures. *See* ORD 551 at 4-5. Thus, if all of the opposing parties have seen or had access to information relating to litigation, through discovery or otherwise, then there is no interest in withholding such information from public

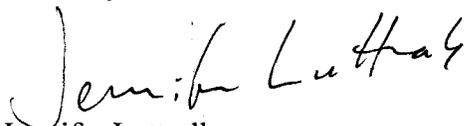
disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Accordingly, to the extent all of the opposing parties have seen or had access to the information at issue, it is not protected by section 552.103, and may not be withheld on that basis. To the extent all of the opposing parties have not seen or had access to the remaining information, the department may withhold the remaining information under section 552.103 of the Government Code. We also note the applicability of section 552.103 ends once the related litigation concludes.⁴ *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, 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. The department may withhold the Traffic Control Devices Inspection Checklist, which we have marked, pursuant to section 409 of title 23 of the United States Code. To the extent all of the opposing parties have not seen or had access to the remaining information, the department may withhold the remaining information under section 552.103 of the Government Code. To the extent all of the opposing parties have seen or had access to the remaining information, it must be released.

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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Jennifer Luttrall
Assistant Attorney General
Open Records Division

JL/som

⁴As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

Ref: ID# 490556

Enc. Submitted documents

c: Requestor
(w/o enclosures)