



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 8, 2013

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

OR2013-11531

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# 492393.

The Texas Department of Transportation (the "department") received a request for seven categories of information pertaining to a specified state project, including (1) contract documents; (2) inspection reports; (3) meeting minutes; (4) communications between the department and a named entity; (5) any notice that the signs, barricades, or other traffic control devices were not in compliance with the contract documents; (6) any notice that the work was not in compliance with the contract documents; and (7) any accident reports or other document that concern traffic accidents that occurred at or near a specified location. 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 your arguments and reviewed the submitted representative sample of information.

Initially, we note you have not submitted any information responsive to the portions of the request seeking meeting minutes or accident reports. Although you state the department submitted a representative sample of information, we find the submitted information is not representative of these types of information. Please be advised this open records letter applies only to the type of information you have submitted for our review. Therefore, this letter ruling does not authorize the withholding of any other requested records to the extent those records contain substantially different types of information than that submitted to this

office. *See* Gov't Code § 552.302 (where request for attorney general decision does not comply with requirements of section 552.301, information is presumed to be public). Thus, to the extent any information responsive to the remainder of the request existed when the present request was received, we assume it has been released. If such information has not been released, then it must be released at this time. *See id.* §§ 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible).

We note Exhibit B consists of 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 raise section 552.111 of the Government Code for this information, section 552.111 does not make information confidential under the Act. *See* Open Records Decision Nos. 677 at 8 (2002) (attorney work product privilege under section 552.111 may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the department may not withhold the information at issue under this section. 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.

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 this office the roadways at issue in Exhibit B 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, we conclude the department may withhold Exhibit B pursuant to section 409 of title 23 of the United States 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. Section 552.101 encompasses the doctrine of common-law privacy, which protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *Id.* at 681-82. Prior decisions of this office have determined personal financial information not related to a transaction between an individual and a governmental body generally meets the first prong of the common-law privacy test. *See generally* Open Records Decision No. 600 (1992). However, whether financial information is subject to a legitimate public interest and, therefore, not protected by common-law privacy must be determined on a case-by-case basis. *See* Open Records Decision No. 373 (1983).

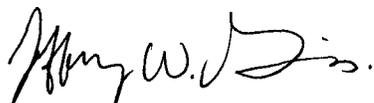
The submitted certified payroll records, submitted as Exhibit C, pertain solely to transactions between the project's contractor and its employees. The department informs this office federal law provides, as a requisite to the receipt of federal funding for construction projects exceeding two thousand dollars, that state transportation agencies must include certain provisions in the agencies' contracts with contractors. In this instance, you represent one such provision requires the department to receive and retain its contractors' payroll records so the Federal Highway Administration, the Department of Labor, the General Accounting Office, or other agency can audit those records to ensure the contractors' compliance with applicable federal wage regulations. *See* 23 C.F.R. § 635.118. You additionally inform this office the department has not itself used the payroll records for any public purpose, other than receiving and retaining them for review by a federal agency. Therefore, based on these facts, we conclude there is no legitimate public interest in release of the submitted certified payroll records at this time, and the department must withhold these records in their entirety under section 552.101 of the Government Code in conjunction with common-law privacy.

In summary, the department may withhold Exhibit B pursuant to section 409 of title 23 of the United States Code. The department must withhold Exhibit C under section 552.101 of the Government Code in conjunction with common-law privacy.

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,



Jeffrey W. Giles
Assistant Attorney General
Open Records Division

JWG/dls

Ref: ID# 492393

Enc. Submitted documents

c: Requestor
(w/o enclosures)