



June 24, 2002

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

OR2002-3414

Dear Ms. Mullenix:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 164712.

The Texas Department of Transportation ("TxDOT") received a request for nine categories of information relating to railroads and railroad crossings. You indicate that TxDOT will release some of the requested information. However, you claim that the remainder of the requested information is excepted from disclosure under sections 552.111, 552.136, and 552.137 of the Government Code. We have also received comments from the requestor. *See Gov't Code § 552.304.* We have considered all of the submitted arguments and reviewed the submitted representative sample of information.¹

We begin by addressing the requestor's argument that TxDOT failed to timely request a decision from this office. Section 552.301 of the Government Code provides, in part:

(a) A governmental body that receives a written request for information that it wishes to withhold from public disclosure and that it considers to be within one of the [act's] exceptions . . . must ask for a decision from the attorney general about whether the information is within that exception if there has not been a previous determination about whether the information falls within one of the exceptions.

¹We assume that 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.

(b) The governmental body must ask for the attorney general's decision and state the exceptions that apply within a reasonable time but not later than the 10th business day after the date of receiving the written request

Gov't Code § 552.301(a), (b). TxDOT indicates that it received the request for information on April 8, 2002. TxDOT subsequently submitted its for a ruling on April 19, 2002. The requestor contends that TxDOT's request for a ruling was not submitted within ten days of its receipt of his request for information. However, section 552.301 requires only that the request for a ruling be submitted "not later than the 10th *business* day after the date of receiving the written request." *Id.* § 552.301(b) (emphasis added). Here, TxDOT's request for a ruling was submitted within the ten-business day period afforded it under section 552.301. Therefore, TxDOT timely requested a decision, and the requested information is not presumed public under section 552.302 of the Government Code.

Next, we note that some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides in relevant part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body;

...

(5) all working papers, research material, and information used to estimate the need for or expenditure of public funds or taxes by a governmental body, on completion of the estimate

Gov't Code § 552.022(a)(3), (5). The submitted information contains information in a contract relating to the expenditure of public funds by TxDOT as well as information used to estimate the need for or expenditure of public funds by TxDOT. This information is subject to public disclosure unless it is confidential under other law. Section 552.111 of the Government Code is not other law for the purpose of section 552.022. *See* Open Records Decision No. 663 (1999) (governmental body may waive section 552.111). However, you also contend that the submitted information is confidential 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 [sic] 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. We agree that section 409 of title 23 of the United States Code is other law for purposes of section 552.022(a) of the Government Code. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Federal courts have stated that 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. Co.*, 965 F.2d 155, 160 (7th Cir. 1992); *Robertson v. Union Pac. R.R. Co.*, 954 F.2d 1433, 1435 (8th Cir. 1992). You indicate that the submitted information relates to railway-highway crossing projects that are eligible for federal aid. Therefore, we conclude that the department must withhold the information subject to section 552.022 under section 409 of title 23 of the United States Code.

With respect to the remainder of the submitted information, we address your argument under section 552.111 of the Government Code. Section 552.111 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.” This exception applies not only to internal memoranda, but also to memoranda prepared by consultants of a governmental body. Open Records Decision Nos. 462 at 14 (1987), 298 at 2 (1981). You characterize the information that the department seeks to withhold as intra-agency memoranda, and indicate that, while some of the communications were between TxDOT and railroad companies, the railroad companies were under contract with TxDOT to make repairs to railroad crossings. You further assert that section 409 of title 23 would protect this information from discovery in civil litigation. Based on your representations and our review of the submitted documents, we conclude that the information at issue consists of interagency and intra-agency communications that would be protected from discovery in litigation under section 409 of title 23 of the United States Code. Therefore, TxDOT may withhold the remaining information under section 552.111 of the Government Code.²

²Based on this finding, we need not reach the remainder of your arguments.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code

§ 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in cursive script that reads "Nathan E. Bowden".

Nathan E. Bowden
Assistant Attorney General
Open Records Division

NEB/sdk

Ref: ID# 164712

Enc: Submitted documents

c: Mr. Andrew L. Payne
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(w/o enclosures)