



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 17, 2003

Ms. Jennifer Soldano
Assistant General Counsel
Texas Department of Transportation
125 East 11th Street
Austin, Texas 78701-2483

OR2003-9116

Dear Ms. Soldano:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 192993.

The Texas Department of Transportation (the "department") received a request for information regarding a specific railroad crossing, DOT number 743691. You claim that the requested information is excepted from disclosure under section 552.111 of the Government Code. We have reviewed the representative sample of information you submitted and considered the exception you claim.¹

Initially, we note that the information contains minute orders and exhibits that were approved by the Texas Transportation Commission in open meetings. The minute orders and exhibits are official records of public proceedings which must be disclosed. Open Records Decision No. 221 at 1 (1979) ("official records of the public proceedings of a governmental body are among the most open of records"). Thus, you must release the minute orders and exhibits that we have marked.

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, therefore, 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.

We also note that portions of the remaining submitted information are subject to section 552.022 of the Government Code. Section 552.022 provides that 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 documents include information that must be released under section 552.022(a)(3), unless it is expressly confidential under other law. The submitted documents also include information that is subject to section 552.022(a)(5) which must be released on completion of the estimate, unless it is expressly confidential under other law. Although the department claims that this information is excepted from disclosure pursuant to section 552.111 of the Government Code, we note that section 552.111 is a discretionary exception to disclosure under the Public Information Act that protects the governmental body's interests and may be waived. *See* Open Records Decision Nos. 473 (1987) (governmental body may waive section 552.111), 522 at 4 (1989) (discretionary exceptions in general). As such, section 552.111 is not other law that makes information confidential for the purposes of section 552.022(a). Accordingly, we conclude that the department may not withhold this particular information under section 552.111 of the Government Code.

However, the department asserts that the information is made confidential by law under section 409 of title 23 of the United States Code. This statute provides:

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. 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). 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 (Tex. 2001); see also *Pierce County v. Guillen*, 123 S.Ct. 720 (2003) (upholding constitutionality of section 409, upon which county relied in denying request under state's Public Disclosure Act). You state that railway-highway crossings are always eligible for federal aid under section 130 of title 23 of the United States Code, and therefore, are federal-aid highways within the meaning of section 409 of title 23 of the United States Code. Therefore, after reviewing your arguments and the submitted documents, we conclude that the department must withhold the section 552.022 information pursuant to section 409 of title 23 of the United States Code.

We will now consider your section 552.111 claim with regards to the remaining information. 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." You contend that the remaining information is excepted from disclosure under section 552.111 because it would be privileged from discovery under section 409 of title 23. Upon review, we find that the remaining information constitutes intraagency memoranda for purposes of section 552.111 of the Government Code. Furthermore, we find that section 409 of title 23 of the United States Code would protect the remaining information from discovery in civil litigation. Therefore, we conclude that the remaining information is excepted from disclosure under section 552.111 and may be withheld by the department.

In summary, the department must release the minute orders and exhibits we have marked. The department must withhold the submitted information that is subject to section 552.022 under section 409 of title 23 of the United States Code. Finally, the department may withhold the remaining information under section 552.111.

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); *Texas 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,



Debbie K. Lee
Assistant Attorney General
Open Records Division

DKL/seg

Ref: ID# 192993

Enc. Submitted documents

c: Mr. Bob Grba
Law Department
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(w/o enclosures)