ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 2, 2005

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

OR2005-03746

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# 223153.

The Texas Department of Transportation (the "department") received a request for information pertaining to a specified railroad crossing. You claim that the requested information is excepted from disclosure under section 552.111 of the Government Code. Further, you claim that the submitted information is confidential under section 409 of title 23 of the United States Code. We have considered the exceptions you claim and reviewed the submitted representative sample of the requested information.[1]

Initially, we note that portions of the submitted information are made expressly public under section 552.022 of the Government Code. Section 552.022 provides, in relevant part:

[1]We 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.

> (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:
>
> > (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]
> >
> > . . .
> >
> > (3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Gov't Code § 552.022(a)(1), (3). Some of the submitted information is expressly public under subsections 552.022(a)(1) and 552.022(a)(3). Therefore, you may only withhold this information if it is confidential under other law. Although you argue that the submitted information is excepted under section 552.111 of the Government Code, section 552.111 is a discretionary exception and therefore is not "other law" for purposes of section 552.022.[2]

You also contend, however, 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. Federal courts have determined that section 409 excludes from evidence data compiled for purposes of highway and railroad crossing safety enhancement and

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[2]Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.*, Open Records Decision Nos. 473 (1987) (governmental body may waive section 552.111), 522 at 4 (1989) (discretionary exceptions in general). Discretionary exceptions, therefore, do not constitute "other law" that makes information confidential.

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, relied upon by county in denying request under state's Public Disclosure Act).

You inform us that "[r]ailway-highway crossings are always eligible for federal aid under 23 U.S.C. § 130 and therefore are federal-aid highways within the meaning of 23 U.S.C. § 409." Therefore, 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 regard to the remaining information, which is not subject to section 552.022. This section excepts from disclosure "an interagency or intraagency memorandum or letter that would not available by law to a party in litigation with the agency." We note that section 552.111 protects communications with third parties with which the department shares a privity of interest or common deliberative process. Open Records Decision Nos. 464 (1987), 429 (1985); *see also Wu v. National Endowment of the Humanities*, 460 F.2d 1030 (5th Cir.), *cert. denied*, 410 U.S. 926 (1972). 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 of the United States Code. 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 withhold the submitted information that is subject to section 552.022 under section 409 of title 23 of the United States Code. 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).

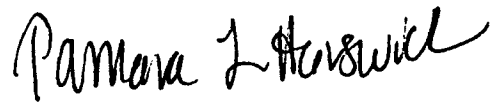
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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,



Tamara L. Harswick
Assistant Attorney General
Open Records Division

TLH/sdk

Ref: ID# 223153

Enc. Submitted documents

c: Ms. Tricia McNelly
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Belton, Texas 76513
(w/o enclosures)