



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 1, 2006

Ms. Sharon Alexander
Associate General Counsel
Texas Department of Transportation
125 E. 11th St.
Austin, Texas 78701

OR2006-01052

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# 240330.

The Texas Department of Transportation (the "department") received a request for details regarding a specific train incident. You claim that the submitted information is excepted from disclosure under section 552.111 of the Government Code. We have considered the exception you claim and reviewed the submitted information.¹

Section 552.111 of the Government Code 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." Section 552.111 encompasses information that is protected by civil discovery privileges. *See* Open Records Decision Nos. 647 at 3 (1996), 251 at 2-4 (1980). You contend that the requested information is excepted from disclosure under section 552.111 as information that would be privileged from civil discovery pursuant to section 20903 of title 49 of the United States Code. Section 20903 provides as follows:

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.

No part of an accident or incident report filed by a railroad carrier under section 20901 of this title or made by the Secretary of Transportation under section 20902 of the title may be used in a civil action for damages resulting from a matter mentioned in the report.

49 U.S.C. § 20903. You analogize this section to section 409 of title 23 of the United States Code, which bars information from civil discovery. Specifically, 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, 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. This office has previously ruled that information collected or compiled under section 409 may be withheld under section 552.111 of the Government Code. You argue that due to the similarity in language between section 409 and section 20903, information subject to the latter provision may also be withheld under section 552.111. We note, however, that section 409 specifically states that certain information shall “not be subject to discovery or admitted into evidence.” 23 U.S.C. § 409. Yet, section 20903 only states that certain information may not be “used in a civil action for damages”; it does not specifically state that the information is not subject to discovery. You argue, however, that the language of section 20903 which provides that the information may not be “used in a civil action” means that information is not subject to discovery. We disagree. Prior to its amendment in 1991, section 409 was worded similarly to section 20903; it stated that certain information shall “not be admitted into evidence in Federal or State court.” Several state courts found that this language only barred the information from being used as evidence, but it could still be discoverable. *See e.g., Light v. New York*, 560 N.Y.S.2d 962, 962 (Ct.Cl. 1990) (finding that the phrase “shall not be admitted” does not prohibit discovery of the reports and other documents; it only makes them inadmissible as evidence); *Indiana Dep’t of Transp. v. Overton*, 555 N.E.2d 510, 512 (Ind.App. 1990) (finding that although language “shall not be admitted” makes certain documents inadmissible and unavailable during trial, it does not declare documents privileged or require that they be kept confidential for discovery); *Martinolich v. Southern Pacific Transp. Co.*, 532 So.2d 435, 443 (La.App.1Cir.1988), *writ denied*, 535 So.2d 745 (La.1989), *cert. den.* 490 U.S. 1109, 109 S.Ct. 3164, 104 L.Ed.2d 1027 (1989) (finding that language of section 409 did not prohibit

discovery); *Pierce County v. Guillen*, 537 U.S. 129, 123 S.Ct. 720, 154 L.Ed.2d 610 (2003) (noting that Congress settled dispute concerning intent of section 409 language by expressly making statute applicable to pretrial discovery). Similarly, we find that the language in section 20903 does not clearly bar the information from discovery; it merely bars the information from being used as evidence. We also find that you have not otherwise demonstrated that the information at issue would not be available by law to a party in litigation with the department for the purposes of section 552.111 of the Government Code. Therefore, the department may not withhold the submitted information under section 552.111 of the Government Code. As you raise no other exceptions to disclosure, the submitted information must be released to the requestor.

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).

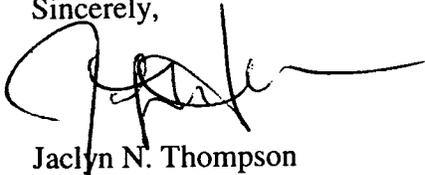
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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 Office of the Attorney General 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. 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 black ink, appearing to read 'Jaclyn N. Thompson', with a long horizontal flourish extending to the right.

Jaclyn N. Thompson
Assistant Attorney General
Open Records Division

JNT/krl

Ref: ID# 240330

Enc. Submitted documents

c: Cynthelia Simpson
160 N. Crestwood
De Soto, TX 75115
(w/o enclosures)