



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 7, 2006

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

OR2006-07212

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# 253302.

The Texas Department of Transportation (the "department") received a request for information used to evaluate the requestor's claim for an adjustment for work performed on Project No. MC 895-3-11. You indicate that the department will release responsive invoices and correspondence with CCE, Inc., but you claim that the remaining 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 representative sample of information.¹ We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (allowing interested party to submit comments indicating why requested information should or should not be released).

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.

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, as follows:

(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[.]

...

(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)(1), (3), (5). Some of the submitted documents, which we have marked, are subject to sections 552.022(a)(1), 552.022(a)(3), and 552.022(a)(5) of the Government Code. Therefore, the department may only withhold these documents if they are confidential under "other law."² Section 552.111 of the Government Code is a discretionary exception to disclosure that protects a governmental body's interests and may be waived.³ As such, section 552.111 is not "other law" that makes information confidential for the purposes of section 552.022. Accordingly, the department may not withhold the documents that are subject to section 552.022 pursuant to section 552.111.

You also contend, however, that some of the documents subject to section 552.022 of the Government Code are confidential under section 409 of title 23 of the United States Code.

²The department does not raise section 552.108 as an exception to disclosure.

³Discretionary 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* Open Records Decision No. 473 (1987) (governmental body may waive statutory predecessor to section 552.111); *see also* Open Records Decision No. 522 at 4 (1989) (discretionary exceptions in general). Discretionary exceptions therefore do not constitute "other law" that makes information confidential.

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 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 the documents in Exhibit B pertain to FM 1196 and "were created for the purpose of identifying and evaluating hazards[.]" You state that "FM 1196 is part of the National Highway System under 23 U.S.C. § 130 and therefore is a federal-aid highway within the meaning of 23 U.S.C. § 409." You further assert that section 409 of title 23 would protect the documents from discovery in civil litigation. Based upon your representations and our review of the information at issue, we conclude that the department may withhold the information subject to section 552.022 in Exhibit B pursuant to section 409 of title 23 of the United States Code. However, the remaining submitted information that is subject to section 552.022 must be released to the requestor.

We now turn to your section 552.111 of the Government Code claim with regard to the remaining information, which is not subject to section 552.022 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 encompasses the deliberative process privilege. *See Open Records Decision No. 615 at 2* (1993). The purpose of section 552.111 is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the

deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, no writ); Open Records Decision No. 538 at 1-2 (1990).

In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.). An agency's policymaking functions do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. ORD 615 at 5-6. Additionally, section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist.*, 37 S.W.3d at 160; ORD 615 at 4-5.

This office has also concluded that a preliminary draft of a document that is intended for public release in its final form necessarily represents the drafter's advice, opinion, and recommendation with regard to the form and content of the final document, so as to be excepted from disclosure under section 552.111. *See* Open Records Decision No. 559 at 2 (1990) (applying statutory predecessor). Section 552.111 protects factual information in the draft that also will be included in the final version of the document. *See id.* at 2-3. Thus, section 552.111 encompasses the entire contents, including comments, underlining, deletions, and proofreading marks, of a preliminary draft of a policymaking document that will be released to the public in its final form. *See id.* at 2.

When determining if an interagency memorandum is excepted from disclosure under section 552.111, we must also consider whether the agencies between which the memorandum is passed share a privity of interest or common deliberative process with regard to the policy matter at issue. *See* Open Records Decision No. 561 at 9 (1990). Section 552.111 applies not only to a governmental body's internal memoranda but also to memoranda prepared for a governmental body by its outside consultant. Open Records Decision Nos. 462 at 14 (1987), 298 at 2 (1981).

You contend that the remaining information in Exhibit B 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. Based upon your representation and our review of the information at issue, we conclude that the department may withhold the remaining information in Exhibit B under section 552.111. You also inform us that Exhibit C contains a preliminary draft of a report that reflects internal pre-decisional deliberations regarding the claim at issue. With respect to the remaining information in Exhibit D, you state that the department "handles contractor's claims in accordance with 43 TAC Section 9.2" and that

this information, which consists of draft reports and other internal preliminary planning documents, relates to the analysis by a departmental contractor claim committee of a claim brought pursuant to section 9.2. You further inform us that the final versions of the reports in Exhibits C and D have been released to the requestor. Based on your representations and our review of the information at issue, we find that the department may withhold Exhibit C and the information that we have marked in Exhibit D under section 552.111. However, we conclude you have not demonstrated that the remaining information in Exhibit D reflects advice, opinions, and recommendations regarding the policymaking processes of the department; therefore, the remaining information in Exhibit D is not excepted from disclosure under section 552.111.

In summary, we conclude that the documents subject to section 552.022 in Exhibit B may be withheld pursuant to section 409 of title 23 of the United States Code. The remaining information in Exhibit B, Exhibit C in its entirety, and the information we have marked in Exhibit D may be withheld under section 552.111 of the Government Code. The remaining information in Exhibit D 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,



Caroline E. Cho
Assistant Attorney General
Open Records Division

CEC/sdk

Ref: ID# 253302

Enc. Submitted documents

c: Mr. Mark Clifton
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(w/o enclosures)