



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 3, 2007

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

OR2007-05162

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# 278472.

The Texas Department of Transportation (the "department") received a request for information relating to a specified railroad crossing. You seek to withhold the requested information under section 552.111 of the Government Code and section 409 of title 23 of the United States Code. We have considered your arguments and have reviewed the information you submitted.¹ We note that some of the submitted information was created after the department received this request for information and thus is not responsive to the request.² This decision does not address the public availability of the non-responsive information, which we have marked, and that information need not be released.

We next note that some of the remaining information falls within the scope of section 552.022 of the Government Code. Section 552.022(a)(3) provides for the required public disclosure of "information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body," unless the information is

¹This letter ruling assumes that the submitted representative sample of information is truly representative of the requested information as a whole. This ruling neither reaches nor authorizes the department to withhold any information that is substantially different from the submitted information. See Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

²The Act does not require a governmental body to release information that did not exist when it received a request or create responsive information. See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App. – San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

expressly confidential under other law. Gov't Code § 552.022(a)(3). Section 552.022(a)(5) provides for the required public disclosure of "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," unless the information is expressly confidential under other law. *Id.* § 552.022(a)(5). Although you seek to withhold all of the information at issue under section 552.111 of the Government Code, that section is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See id.* § 552.007; Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 470 at 7 (1987) (statutory predecessor to Gov't Code § 552.111 subject to waiver). As such, section 552.111 is not other law that makes information confidential for the purposes of section 552.022. Therefore, the department may not withhold any of the submitted information that is subject to section 552.022 under section 552.111.

You also contend, however, that the information in question is confidential under section 409 of title 23 of the United States Code. This statute is "other law" for the purposes of section 552.022. *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 on by county in denying request under state's Public Disclosure Act). Section 409 provides that

[n]otwithstanding 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. You state that railway-highway crossings are always eligible for federal aid under section 130 of title 23 of the United States Code and are therefore federal-aid highways for purposes of section 409 of title 23. You indicate that the information that is subject to section 552.022 was created or compiled for highway safety purposes. Based on your representations and our review of that information, we conclude that it is confidential under section 409 of title 23 of the United States Code and must be withheld from disclosure on that basis.

With respect to the remaining information, we address your claim 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." Gov't Code § 552.111. Federal courts have stated that section 409 of

title 23 of the United States Code 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 contend that the remaining information would be protected from discovery in civil litigation under section 409 and is therefore excepted from disclosure under section 552.111 of the Government Code. We note that section 552.111 is applicable to the remaining information that consists of communications with other governmental and private entities. *See Open Records Decision Nos. 631 at 2 (1995) (Gov't Code § 552.111 encompasses information created for governmental body by outside consultant acting at governmental body's request and performing task that is within governmental body's authority), 563 at 5-6 (1990) (private entity engaged in joint project with governmental body may be regarded as its consultant), 561 at 9 (1990) (statutory predecessor to Gov't Code § 552.111 encompassed communications with party with which governmental body has privity of interest or common deliberative process).* Based on your arguments and our review of the remaining information, we find that the information falls within the scope of section 409 of title 23 of the United States Code. We therefore conclude that the department may withhold the remaining information under section 552.111.

In summary: (1) the department must withhold the information that is subject to section 552.022 of the Government Code under section 409 of title 23 of the United States Code; and (2) the department may withhold the remaining information under section 552.111 of the Government Code.

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

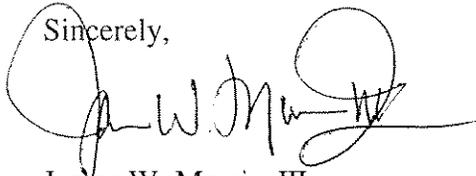
will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to 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 'James W. Morris, III', with a large, stylized initial 'J' and 'M'.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/jb

Ref: ID# 278472

Enc: Submitted documents

c: Mr. W. Patrick Garner
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(w/o enclosures)