



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

June 26, 2007

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

OR2007-08065

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# 281967.

The Texas Department of Transportation (the "department") received a request for eleven categories of information pertaining to a specified railroad crossing. You claim that the requested information is excepted from disclosure under sections 552.101, 552.111, and 552.130 of the Government Code, as well as section 409 of title 23 of the United States Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>1</sup>

We first note that the information in Exhibit B includes copies of legislation, a statute, and minute orders of the State Highway and Public Transportation Commission. Because laws and ordinances are binding on members of the public, they are matters of public record and may not be withheld from disclosure under the Act. Thus, the department must release the copies of the legislation and the statute. *See* Open Records Decision No. 551 at 2-3 (1990). Furthermore, the minute orders appear to have been adopted at a public meeting of the

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<sup>1</sup> 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.

former State Highway and Public Transportation Commission and thus are official records of the public proceedings of a governmental body. As such, the minute orders must also be released. *See* 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”).

Next, we find that portions of the information in Exhibit B are subject to section 552.022 of the Government Code. Section 552.022 enumerates categories of information that are not excepted from required disclosure unless they “are expressly confidential under other law.” Gov’t Code § 552.022. Under section 552.022(a)(1), a completed report, audit, evaluation, or investigation made of, for, or by a governmental body is public information, unless it is excepted from disclosure under section 552.108 or deemed confidential under other law. *Id.* § 552.022(a)(1). Thus, the department may only withhold this information if it is confidential under other law. Although you raise section 552.111 of the Government Code, this exception is a discretionary exception and therefore not “other law” for purposes of section 552.022. *See* Open Records Decision No. 470 at 7 (1987) (statutory predecessor to section 552.111 may be waived).

The department, however, also contends the information is excepted from disclosure under section 409 of title 23 of the United States Code, which 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 148 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.*, 965 F.2d 155, 160 (7th Cir. 1992); *Robertson v. Union Pac. R.R.*, 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 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 in Exhibit B pursuant to section 409 of title 23 of the United States Code.

You assert that the remaining information in Exhibit B is excepted 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.” We note that this section 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. Nat’l Endowment of the Humanities*, 460 F.2d 1030 (5th Cir. 1972). 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. Upon review, we find that the information at issue constitutes intraagency or interagency 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 this information from discovery in civil litigation. Therefore, we conclude that the department may withhold the remaining information in Exhibit B under section 552.111.

You claim that portions of the information in Exhibit C are subject to section 552.101 of the Government Code. Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. However, you have not directed our attention to any law, nor are we aware of any law, under which any portion of the information in Exhibit C is considered confidential for purposes of section 552.101. *See, e.g.,* Open Records Decision Nos. 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality), 611 at 1 (1992) (common-law privacy). Therefore, the department may not withhold any of the information in Exhibit C under section 552.101 of the Government Code.

You also assert that portions of the information in Exhibit C are excepted from disclosure under section 552.130 of the Government Code, which excepts from public disclosure information that relates to a driver’s license or motor vehicle title or registration issued by an agency of this state. Gov’t Code § 552.130. We note, however, that the purpose of section 552.130 is to protect the privacy interests of individuals. Because the right of privacy lapses at death, Texas motor vehicle record information that pertains to deceased individuals may not be withheld under section 552.130. *See Moore v. Charles B. Pierce Film Enters., Inc.*, 589 S.W.2d 489, 491 (Tex.App.—Texarkana 1979, *writ ref’d n.r.e.*); *see also* Attorney General Opinions JM-229 (1984); H-917 (1976); Open Records Decision No. 272 at 1 (1981). We have marked a license plate number that may be subject to section 552.130. If a living individual owns an interest in the vehicle, the department must withhold the information we have marked under section 552.130 of the Government Code.

In summary, the department must release the legislation, statute, and minute orders in Exhibit B. The department must withhold the information in Exhibit B, which is subject to section 552.022, pursuant to section 409 of title 23 of the United States Code. The department may withhold the remaining information in Exhibit B under section 552.111 of the Government Code. The Texas motor vehicle record information we have marked in Exhibit C must be withheld under section 552.130 of the Government Code, if a living person owns an interest in the vehicle. The remaining information must be released.

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).

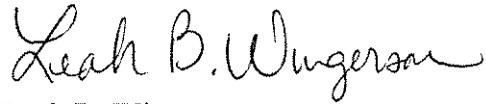
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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 cursive script that reads "Leah B. Wingerson".

Leah B. Wingerson  
Assistant Attorney General  
Open Records Division

LBW/sdk

Ref: ID# 281967

Enc. Submitted documents

c: Ms. Belinda Boling  
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(w/o enclosures)