



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 10, 2009

Ms. Sharon Alexander
Associate General Counsel
Texas Department of Transportation
Dewitt C. Greer State Highway Building
125 East 11th Street
Austin, Texas 78701-2483

OR2009-01761

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# 335557.

The Texas Department of Transportation ("TxDOT") received a request for all records for the Cedar Creek Relief No. 2 on FM 1836, near Prairieville, Texas. 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 representative sample of the requested information.¹

The submitted information includes completed reports made for or by TxDOT that 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." Under section 552.022(a)(1), a completed report, audit, evaluation, or investigation made of, for, or by a governmental body is expressly public unless it either is excepted under section 552.108 of the Government Code or is expressly

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.

confidential under other law. Thus, TxDOT may withhold the completed reports only if they are confidential under other law. Section 552.111 of the Government Code is a discretionary exception and therefore is 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). However, TxDOT also contends that the completed reports are 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 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.*, 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(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 explain that the submitted information pertains to a bridge that is located on a public road and is eligible for federal funding and, therefore, meets the definition of a federal-aid highway under section 409 of title 23 of the United States Code. *See generally* 23 U.S.C. § 144. Furthermore, you indicate that section 409 would protect the submitted information from discovery in civil litigation. Based on your representations and our review, we conclude that TxDOT may withhold the submitted completed reports pursuant to section 409 of title 23 of the United States Code.

Next, we consider TxDOT's section 552.111 argument for the remaining responsive information that is not subject to section 552.022. 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." Gov't Code § 552.111. Section 552.111 encompasses information that is protected by civil discovery privileges. *See*

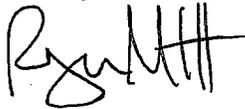
Open Records Decision Nos. 647 at 3 (1996), 251 at 2-4 (1980). You contend that the remaining information is excepted from disclosure under section 552.111 as information that would be privileged from civil discovery pursuant to section 409 of title 23 of the United States Code. You also note that some of the submitted information consists of communications with a contractor under contract with TxDOT on behalf of TxDOT. We agree that these communications fall under the scope of section 552.111. *See* Open Records Decision 631 at 2 (1995) (section 552.111 encompasses information created for governmental body by outside consultant acting at governmental body's request and performing task within governmental body's authority). Based on your representations and our review of the remaining information at issue, we conclude that TxDOT may withhold the submitted information that is not subject to section 552.022 under section 552.111.

In summary, TxDOT may withhold the submitted completed reports under section 409 of title 23 of the United States Code and may withhold the remainder of the submitted information under section 552.111 of the Government Code.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Ryan T. Mitchell
Assistant Attorney General
Open Records Division

RTM/eb

Ref: ID# 335557

Enc. Submitted documents

cc: Requestor
(w/o enclosures)