



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 4, 2009

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

OR2009-02831

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# 336294.

The Texas Department of Transportation (the "department") received a request for seven categories of information pertaining to a specified railroad crossing. You state that the department does not maintain all of the information requested.¹ You claim that the submitted information is excepted from disclosure under sections 552.101 and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.² We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (providing that any person may submit comments stating why information should or should not be released).

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't

¹The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received, create responsive information, or obtain information that is not held by or on behalf of the department. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dis'd); Open Records Decision No. 452 at 3 (1986).

²We 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.

Code § 552.101. This section encompasses information protected by other statutes. Exhibit C consists of an accident report form completed pursuant to chapter 550 of the Transportation Code. *See* Transp. Code § 550.064 (Texas Peace Officer's Accident Report form). Section 550.065(b) of the Transportation Code states that except as provided by subsection (c), accident reports are privileged and confidential. Section 550.065(c)(4) provides for the release of accident reports to a person who provides two of the following three pieces of information: (1) date of the accident; (2) name of any person involved in the accident; and (3) specific location of the accident. Transp. Code § 550.065(c)(4). Under this provision, the Texas Department of Transportation or another governmental entity is required to release a copy of an accident report to a person who provides the agency with two or more pieces of information specified by the statute. *Id.* In the situation at hand, the requestor has not provided the department with two of the three pieces of information. Thus, you must withhold the accident report, Exhibit C, under section 550.065(b) of the Transportation Code.

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 Exhibit B 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. 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. 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); *see also Pierce County v. Guillen*, 123 S.Ct. 720 (2003) (upholding constitutionality of 23 U.S.C. § 409, relied on by county in denying request under state's Public Disclosure Act).

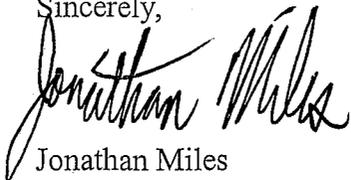
You indicate that the information in Exhibit B was created for the purpose of identifying and evaluating hazards on public roads. You state that all of the responsive information the department seeks to withhold pertains to both a federal highway intersection and a railway-highway intersection. Although the requestor asserts that the railway crossing at issue intersects a non federal-aid highway, you inform us that railway-highway crossings are eligible for federal aid under section 130 of title 23 of the United States Code and are therefore federal-aid highways within the meaning of section 409.³ You explain that section 409 of title 23 would protect Exhibit B from discovery in civil litigation. Therefore, based on your representations and our review, we conclude that the department may withhold Exhibit B pursuant to section 552.111 of the Government Code.

In summary, Exhibit C must be withheld under section 552.101 of the Government Code in conjunction with section 550.065 of the Transportation Code. Exhibit B may be withheld pursuant to 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,



Jonathan Miles
Assistant Attorney General
Open Records Division

JM/cc

³We note that the submitted information includes communications with another governmental body concerning the identification and evaluation of the hazards at issue. We note that section 552.111 can encompass a governmental body's communications with other public 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).

Ref: ID# 336294

Enc. Submitted documents

c: Requestor
(w/o enclosures)