



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 19, 2009

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

OR2009-06810

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# 343442.

The Texas Department of Transportation (the "department") received a request for information pertaining to a specified stretch of Highway 77. You state that a portion of the requested information has been released to the requestor. You claim that the submitted information is excepted from disclosure under sections 552.103 and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

Initially, you inform us that the department requested clarification regarding the portion of the request seeking all law enforcement reports pertaining to all accidents on any portion of Highway 77.² You do not state that the department has received a response as of the date of

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.

²*See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information).

its request for this decision. Accordingly, if the department has not received a response to its request for clarification, then the department has no obligation at this time to release any information that might be responsive to this portion of the request. But if the department receives clarification and wishes to withhold any of the information encompassed by the clarified request, then you must request another decision. *See* Gov't Code §§ 552.006, .301(a), .302.

We also note that a portion of Exhibit D is subject to section 552.022 of the Government Code. Section 552.022 provides in relevant part:

(a) 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[.]

Gov't Code § 552.022(a)(1). Exhibit D includes completed safety evaluation reports made of, for, or by the department. A completed report must be released under section 552.022(a)(1), unless the information is excepted from disclosure under section 552.108 or expressly confidential under other law. You claim that the safety evaluation reports in Exhibit D are excepted from disclosure under sections 552.103 and 552.111 of the Government Code. Sections 552.103 and 552.111 of the Government Code are discretionary exceptions that protect a governmental body's interests and may be waived. *See* Open Records Decision Nos. 665 at 2 n.5 (discretionary exceptions generally), 542 at 4 (1990) (statutory predecessor to section 552.103 subject to waiver), 470 at 7 (1987) (statutory predecessor to section 552.111 may be waived). As such, sections 552.103 and 552.111 of the Government Code are not "other law" that make information confidential for the purposes of section 552.022 of the Government Code.

However, the department also contends the information subject to section 552.022 of the Government Code 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 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).

The information at issue pertains to Highway 77. You inform us that Highway 77 is part of the National Highway System under 23 U.S.C. § 103 and, therefore, is a federal-aid highway within the meaning of 23 U.S.C. § 409. Based on your representations and our review of the information at issue, we conclude that the department may withhold the information subject to section 552.022 pursuant to section 409 of title 23 of the United States Code.

You claim the remaining submitted information is subject to section 552.103 of the Government Code, which provides in relevant part as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information relating to litigation through discovery procedures. *See Open Records Decision No. 551 at 4-5 (1990)*. A governmental body has the burden of providing relevant facts and documents to show that

the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date that the governmental body received the request for information, and (2) the information at issue is related to that litigation. *Thomas v. Cornyn*, 71 S.W.3d 473, 487 (Tex. App.—Austin 2002, no pet.); *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); ORD 551 at 4. A governmental body must meet both prongs of this test for information to be excepted from disclosure under section 552.103(a).

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). In Open Records Decision No. 638 (1996), this office stated that, when a governmental body receives a notice of claim letter, it can meet its burden of showing that litigation is reasonably anticipated by representing that the notice of claim letter is in compliance with the requirements of the Texas Tort Claims Act (“TTCA”), Civil Practice and Remedies Code, chapter 101, or an applicable municipal ordinance. If a governmental body does not make this representation, the claim letter is a factor that this office will consider in determining whether a governmental body has established that litigation is reasonably anticipated based on the totality of the circumstances.

You inform this office that before the present request was received by the department, the department received a letter from an attorney threatening civil litigation for negligence. We note that this letter references information subject to the instant request. You state that this letter meets the requirements of the TTCA. Based on your representations, we find that the department reasonably anticipated litigation on the date this request was received. We also find that the information at issue relates to the anticipated litigation. Accordingly, the department may generally withhold the remaining information under section 552.103.

However, once the information at issue has been obtained by all parties to the anticipated litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to the information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to all parties to the anticipated litigation is not excepted from disclosure under section 552.103(a) and must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has concluded or is no longer anticipated. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

In summary, the department may withhold the information subject to section 552.022(a)(1) pursuant to section 409 of title 23 of the United States Code. The remaining submitted information may be withheld under section 552.103.³

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,



Bob Davis
Assistant Attorney General
Open Records Division

RSD/cc

Ref: ID# 343442

Enc. Submitted documents

cc: Requestor
(w/o enclosures)

³As our ruling is dispositive, we need not address your remaining 552.111 argument against disclosure.