



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

June 1, 2009

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

OR2009-07456

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# 344474.

The Texas Department of Transportation (the "department") received a request for information pertaining to a specified stretch of Interstate 40. You state that a portion of the requested information has been released to the requestor. You claim 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 information.¹

We note that the traffic control devices inspection checklists are subject to section 552.022 of the Government Code, which 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 confidential under other law. Gov't

¹We assume 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 § 552.022(a)(1). Based on our review, we find that the submitted checklists are completed reports made of, for, or by the department. Thus section 552.022(a)(1) applies to these documents, and the department may only withhold this information if it is confidential under other law. Section 552.111 of the Government Code 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).

You also contend, however, that the checklists are confidential under section 409 of title 23 of the United States Code. 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). 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 [sic] 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).

You state that the checklists at issue “[were] created for the purpose of identifying and evaluating hazards on public roads.” You also state that “Interstate 40 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.” You assert that section 409 would protect the checklists from discovery in civil litigation. Based on your representations and our review, we agree the department must withhold the traffic control devices inspection checklists under section 409 of title 23 of the United States Code.

We now address your claim under section 552.111 for the submitted information that is not subject to section 552.022 of the Government 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 claim the information you marked consists of highway safety data pertaining to Interstate 40 that was collected by the department. Upon review, we agree that section 409 of title 23 of the United States Code would protect this information from discovery in civil litigation. Thus, we agree that the marked information falls under section 552.111 of the Government Code. Accordingly, the remaining information you have marked under section 409 of title 23 of the United States Code may be withheld under section 552.111 of the Government Code.

In summary, the traffic control device inspection checklists must be withheld in their entirety under section 409 of title 23 of the United States Code. The department may withhold the marked information under section 552.111 of the Government Code. As you raise no other exceptions to disclosure, the remaining information must be released.

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# 344474

Enc. Submitted documents

cc: Requestor
(w/o enclosures)