



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 7, 2009

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

OR2009-14113

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# 357754.

The Texas Department of Transportation (the "department") received five requests from different requestors for information pertaining to the Elm Creek Bridge on Interstate Highway 35 and surrounding area, as well as a specified automobile accident.¹ You claim that the requested information is excepted from disclosure under sections 552.103, 552.107, 552.111, and 552.137 of the Government Code.² We have considered the exceptions you claim and reviewed the submitted information.³

Initially, we note that a portion of the submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides in relevant part:

¹We note the department has asked the third requestor to narrow his request for information. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information).

²You also raise section 552.101 of the Government Code in conjunction with section 552.107 on the basis of the attorney-client privilege. However, section 552.101 does not encompass the attorney-client privilege or other exceptions found in the Act. *See* Open Records Decision No. 676 at 1-3 (2002).

³We 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.

(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). The information we have marked consists of completed 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 the marked information is 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 and the department may not withhold the information subject to section 552.022(a)(1) under these exceptions.

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 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. 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 Interstate Highway 35. You inform us that Interstate Highway 35 is part of the National Highway System under section 409 of title 23 of the United States Code and, therefore, is a federal-aid highway within the meaning of section 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, which we have marked, 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).

You state, that prior to the department's receipt of the requests, a lawsuit styled *Hinkle v. Crume*, Cause No. CV09-00311, was filed and is currently pending in the 235th Judicial

District Cooke County, Texas. You further state the submitted information is related to the pending litigation because it pertains to the claims in the lawsuit. Accordingly, we find that litigation was pending when the department received the requests for information and that the information at issue relates to the pending litigation. Therefore, section 552.103 is generally applicable to the remaining information.⁴

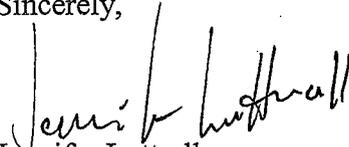
However, once the information at issue has been obtained by all parties to the pending litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to the information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to all parties to the pending 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. *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), which we have marked, pursuant to section 409 of title 23 of the United States Code. The remaining submitted information may be withheld under section 552.103 of the Government Code.⁵

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, toll free, at (888) 672-6787.

Sincerely,


Jennifer Luttrall
Assistant Attorney General
Open Records Division

JL/dls

⁴As our ruling is dispositive, we need not address your remaining claims against disclosure.

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Ref: ID# 357754

Enc. Submitted documents

c: Five Requestors
(w/o enclosures)