



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 16, 2011

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

OR2011-13444

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# 430487.

The Texas Department of Transportation (the "department") received a request for information pertaining to a specified frontage road project. You state the department is releasing some of the requested information. You claim the submitted information is excepted from disclosure under section 552.111 of the Government Code and section 409 of title 23 of the United States Code. We have considered your arguments and reviewed the submitted representative sample of information.¹

We first note that some of the submitted information falls within the scope of section 552.022 of the Government Code. The submitted Traffic Control Devices Inspection Checklists are subject to section 552.022(a)(1), which provides for required public disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body[,]" unless the information is expressly confidential under other law or excepted from disclosure under section 552.108 of the Government Code. Gov't Code § 552.022(a)(1). You seek to withhold the information at issue under section 552.111 of the Government

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.

Code. However, section 552.111 is discretionary in nature and does not constitute "other law" for purposes of section 552.022. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 470 at 7 (1987) (statutory predecessor to section 552.111 subject to waiver). Thus, the department may not withhold the submitted Traffic Control Devices Inspection Checklists under section 552.111 of the Government Code. However, the department also contends the checklists are excepted from disclosure under section 409 of title 23 of the United States Code. We note that section 409 is "other law" for purposes of section 552.022(a). *See In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001); *see also Pierce County v. Guillen*, 537 U.S. 129 (2003) (upholding constitutionality of section 409, relied on by county in denying request under state's Public Disclosure Act). Accordingly, we will consider your argument under section 409 for the information subject to section 552.022, along with your argument under section 552.111 for the remaining information not subject to section 552.022.

You contend the Traffic Control Devices Inspection Checklists are excepted from disclosure under section 409 of title 23 of the United States Code. Section 409 provides:

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 stated 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); *see also Pierce*, 537 U.S. 129 (2003) (upholding constitutionality of 23 U.S.C. § 409, relied on by county in denying request under state's Public Disclosure Act).

The information at issue pertains to I-30 and its frontage roads. You inform us that I-30 and its frontage roads are part of the National Highway System under section 130 of title 23 of the United States Code and is therefore a federal-aid highway for the purposes of section 409 of title 23. Based upon 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.

We now address your claim under section 552.111 for the information that is not subject to section 552.022 of the Government Code. Section 552.111 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.”² Gov’t Code § 552.111. You claim that the remaining information is excepted from disclosure under section 552.111 because it would be privileged from discovery under section 409 of title 23 of the United States Code. We find that the remaining information falls under section 552.111 of the Government Code. Furthermore, we find that section 409 of title 23 of the United States Code would protect the remaining information from discovery in civil litigation. Therefore, the remaining submitted information may be withheld under section 552.111 of the Government Code.

In summary, the department may withhold the information subject to section 552.022 of the Government Code pursuant to section 409 of title 23 of the United States Code. The remaining submitted information may be withheld 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, toll free, at (888) 672-6787.

Sincerely,



Paige Lay
Assistant Attorney General
Open Records Division

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²We 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# 430487

Enc. Submitted documents

cc: Requestor
(w/o enclosures)