



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 18, 2013

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

OR2013-22069

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# 509328.

The Texas Department of Transportation (the "department") received a request for the findings of all studies regarding wrong way driving accidents and maps of all wrong way driving locations. 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

Initially, you state some of the requested information was at issue in Open Records Letter Nos. 2012-08717 (2012) and 2012-04308 (2012). In Open Records Letter No. 2012-08717, we determined the department must continue to rely on Open Records Letter No. 2012-04308 as a previous determination and withhold the identical information in accordance with that ruling and may withhold the information at issue under section 552.111 of the Government Code. In Open Records Letter No. 2012-04308, we determined the department may withhold the information at issue under section 552.111 of the Government Code. As we have no

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 those records contain substantially different types of information than that submitted to this office.

indication the law, facts, and circumstances on which the prior rulings were based have changed, the department must continue to rely on the prior rulings as previous determinations and withhold the identical information in accordance with Open Records Letter Nos. 2012-08717 and 2012-04308. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes information is or is not excepted from disclosure). To the extent the information responsive to the instant request is not encompassed by the previous rulings, we will address your arguments.

Section 552.111 of the Government Code excepts from disclosure “[a]n 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 protected by civil discovery privileges. *See* Open Records Decision Nos. 647 at 3 (1996), 251 at 2-4 (1980). You claim the submitted 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. 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 County v. Guillen*, 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).

You indicate the submitted information was created for highway safety purposes. You state the subject roadways are part of the National Highway System under section 103 of title 23 of the United States Code and are therefore federal-aid highways for the purposes of

section 409 of title 23. You contend the submitted information would be privileged from discovery in civil litigation under section 409 and is, therefore, excepted from disclosure under section 552.111 of the Government Code. Based on your representations and our review, we conclude the department may withhold the submitted information under section 552.111 of the Government Code.

In summary, to the extent the requested information is the identical information that was previously ruled upon in Open Records Letter Nos. 2012-08717 and 2012-04308, the department must continue to rely upon those rulings and withhold the information in accordance with those rulings. To the extent the information was not previously ruled upon, the department may withhold the submitted information 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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



David L. Wheelus
Assistant Attorney General
Open Records Division

DLW/akg

Ref: ID# 509328

Enc. Submitted documents

c: Requestor
(w/o enclosures)