



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

July 2, 2015

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

OR2015-13318

Dear Ms. Parker:

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# 569761.

The Texas Department of Transportation (the "department") received a request for information regarding the plans for work at a specific crossing and documentation regarding the funding for any plans at that crossing. The department claims 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 the department's arguments and reviewed the submitted representative sample of information.¹

The department informs us some of the responsive information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2014-17547 (2014). In Open Records Letter No. 2014-17547, we determined the department may 1) withhold the information subject to section 552.022(a)(3) of the Government Code pursuant to section 409 of title 23 of the United States Code and, 2) withhold the remaining information under section 552.111 of the Government Code.

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.

We have no indication the law, facts, or circumstances on which the prior ruling was based have changed. Accordingly, the department must continue to rely on Open Records Letter No. 2014-17547 as a previous determination and withhold the identical information in accordance with that ruling. *See* Open Records Decision No. 673 at 6-7 (2001)(discussing criteria for first type of previous determination).

We note some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Gov't Code § 552.022(a)(3). The submitted information contains information in accounts, vouchers, and executed contracts subject to subsection 552.022(a)(3) which must be released unless it is made confidential under the Act or other law. *See id.* The department seeks to withhold the information at issue under section 552.111 of the Government Code. However, section 552.111 is discretionary in nature and does not make information confidential under the Act. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 470 at 7 (1987) (statutory predecessor to section 552.111 subject to waiver). Therefore, the department may not withhold the information subject to section 552.022 under section 552.111. However, the department also contends this information is excepted from disclosure under section 409 of title 23 of the United States Code. We note section 409 is "other law" that makes information confidential 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 the department's argument under section 409 for the information at issue. We will also consider the department's argument under section 552.111 of the Government Code for the information not subject to section 552.022.

Section 409 of title 23 of the United States Code 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. at 129.

The department states the submitted information consists of highway safety documents pertaining to the specified railway crossing. The department informs us “[r]ailway-highway crossings are always eligible for federal aid under 23 U.S.C. § 130 and therefore are federal-aid highways within the meaning of 23 U.S.C. § 409.” The department also states “[t]he information was collected to improve highway-rail grade crossing safety in Texas.” Based on the department’s representations and our review of the submitted information, we conclude the department may withhold the information subject to section 552.022(a)(3) pursuant to section 409 of title 23 of the United States Code.

Section 552.111 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. The department claims 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. The department states some of the remaining information includes communications with railroads. The department states the railroads in this case were under contract with the department regarding the crossing at issue and safety information was exchanged to that end. We find the remaining information falls under section 552.111 of the Government Code. Furthermore, we find section 409 of title 23 of the United States Code would protect the remaining information from discovery in civil litigation. Therefore, based on the department’s representations and our review, we conclude the department may withhold the remaining information pursuant to section 552.111 of the Government Code.

In summary, the department must continue to rely on Open Records Letter No. 2014-17547 as a previous determination and withhold the identical information in accordance with that ruling. The department may withhold the information subject to section 552.022(a)(3) of the

Government Code pursuant to section 409 of title 23 of the United States Code. The remaining 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.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,



Rahat Huq
Assistant Attorney General
Open Records Division

RSH/dls

Ref: ID# 569761

Enc. Submitted documents

c: Requestor
(w/o enclosures)