



November 20, 2002

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

OR2002-6642

Dear Ms. Mullenix:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 172469.

The Texas Department of Transportation (the “department”) received a written request for various categories of information pertaining to the “Milo Interchange Project.” You indicate that some of the responsive information will be released to the requestor. You contend, however, that the remaining information coming within the scope of the request is excepted from required disclosure pursuant to sections 552.101, 552.111, 552.116, and 552.117 of the Government Code.

We note at the outset that although you contend that the compilation of documents you submitted to this office as Exhibit C constitutes “audit work papers” that are excepted from required public disclosure pursuant to section 552.116 of the Government Code, you have not explained, nor is it apparent to this office, how this *compilation* of documents comes within the scope of any of the request items received by the department. Although the requestor seeks in request item 9 “the report conducted by state auditors on the Milo interchange project,” this request encompasses only the final audit report itself, not the audit’s supporting documentation. Because the requestor did not request the supporting documentation as such, we conclude that the compilation of documents submitted as Exhibit C is not responsive to the request. Consequently, we do not address at this time whether this compilation of documents is excepted from required public disclosure.

We next note that most of the request items are in the form of questions, rather than requests for specific documents. It is well-established that the Public Information Act (the “Act”) does not require a governmental body to prepare new information in response to a request. Open Records Decision No. 342 (1982). Nor is a governmental body required to prepare

information in the form requested by a member of the public. Open Records Decision No. 145 (1976); *see also* Open Records Decision No. 347 (1982). For example, in Open Records Decision No. 347, this office indicated that the Act does not require a governmental body to answer factual questions. The Act applies only to information already transcribed into tangible form.

On the other hand, a request for information made pursuant to the Act may not be disregarded simply because a citizen does not specify the exact documents desired. It is incumbent on a governmental body to make a good faith effort to relate documents it holds to information that is being requested under the Act. *See* Open Records Decision No. 87 (1975). Because you do not contend that any of the information sought in request items 1, 2, 3, 4, 6, 7, 8, 10, or 11 is excepted from required public disclosure, we conclude the department must release all information that is responsive to these request items, to the extent that such information existed in records maintained by the department at the time the department received the records request, and the records were not maintained as "audit working papers." *See* Gov't Code § 552.116(a) ("If information in an audit working paper is also maintained in another record, that other record is not excepted from" required public disclosure as an audit working paper under section 552.116).

We additionally note that you have not submitted to this office any records responsive to request item 12 (reports, tests, and inspections resulting from use of x-ray machine). Because you do not contend that the records responsive to this request are excepted from required public disclosure, we assume the department has released those records to the requestor. If it has not, it must do so at this time. *See* Gov't Code §§ 552.301, .302.; *see also* Open Records Decision No. 664 (2000) (noting that if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible under circumstances).

We now address the extent to which the "Traffic Control Devices Inspection Reports" (the "inspection reports") you submitted to this office as Exhibit B are subject to required public disclosure. You contend that the inspection reports are excepted from disclosure pursuant to section 552.111 of the Government Code, as well as section 409 of title 23 of the United States Code. We begin by noting that most of the inspection reports are expressly made public under section 552.022 of the Government Code. Section 552.022 provides, in relevant part:

- (a) Without limiting the amount or kind of information that is public information under this chapter, 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[.]

Most of the inspection reports consist of “completed reports” which are expressly made public under section 552.022(a)(1). Therefore, the department may withhold the completed reports only if they are made confidential under other law or are excepted from disclosure under section 552.108 of the Government Code.¹ Although you argue that these reports are excepted under section 552.111 of the Government Code, this provision is a discretionary exception and therefore is not “other law” for purposes of section 552.022.²

However, as noted above, you also contend that the inspection reports are confidential under section 409 of title 23 of the United States Code. 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. We agree that section 409 of title 23 of the United States Code consists of 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). We therefore conclude that the department may withhold the completed inspection reports under section 409 of title 23 of the United States Code. However, because you have submitted no other type of report that you contend is protected under section 409, our conclusion here is limited only to those completed reports you submitted as Exhibit B.

¹You have not raised section 552.108 for this information.

²Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.*, Open Records Decision Nos. 665 at 2 n.5 (2000) (governmental body may waive litigation exception, section 552.103), 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 592 at 8 (1991) (governmental body may waive section 552.104, information relating to competition or bidding), 549 at 6 (1990) (governmental body may waive informer’s privilege), 522 at 4 (1989) (discretionary exceptions in general). Discretionary exceptions therefore do not constitute “other law” that makes information confidential.

As to the remaining records contained in Exhibit B, you contend that the 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 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." Federal courts have stated 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). Based on your representations and our review of the submitted documents, we conclude that the remaining documents contained in Exhibit B would be protected from discovery in litigation under section 409 of title 23 of the United States Code. Therefore, the department may withhold the remaining information in Exhibit B pursuant to section 552.111 of the Government Code. However, because you have submitted no other type of report that you contend is protected under section 552.111, our conclusion here is limited only to those reports you submitted as Exhibit B.

Finally, you contend that a small portion of Exhibit D is excepted from public disclosure pursuant to section 552.117 of the Government Code. Exhibit D consists of a completed "Construction Audit" that is made public under section 552.022(a)(1) of the Government Code. However, because the department is required by law to withhold information coming within the protection of section 552.117, we will consider this claim.

Section 552.117(1) of the Government Code requires that the department withhold an employee's home address, home telephone number, social security number, and information that reveals whether the employee has family members, but only if the employee timely elected to keep this information confidential in accordance with section 552.024 of the Government Code. Whether a particular piece of information is protected by section 552.117(1) must be determined at the time the request for the information is made. *See Open Records Decision No. 530 at 5 (1989)*. Therefore, in order to withhold section 552.117(1) information from the public, a proper election must be made prior to the governmental body's receipt of the request for information.

In this instance, you have demonstrated that the employee whose information is at issue elected prior to the department's receipt of the records request to keep his section 552.117 information confidential in accordance with section 552.024. We therefore agree that the information you have marked in brackets in Exhibit D must be withheld pursuant to section 552.117(1). The remaining portions of Exhibit D must be released to the requestor.

In summary, the completed inspection reports you submitted to this office as Exhibit B must be withheld from the public pursuant to section 409 of title 23 of the United States Code. The remaining inspection reports in Exhibit B may be withheld pursuant to section 552.111

of the Government Code. The information you have marked in Exhibit D must be withheld pursuant to section 552.117 of the Government Code. The remaining requested information must be released to the requestor.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

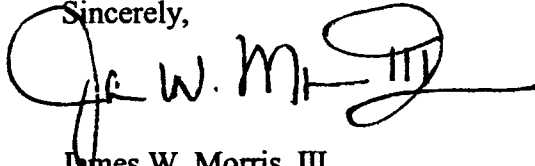
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "J. W. Morris, III". The signature is stylized with a large initial "J" and a long horizontal stroke at the end.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/RWP/lmt

Ref: ID# 172469

Enc: Submitted documents

c: Ms. Tricia Cortez
Laredo Morning Times
P. O. Box 2129
Laredo, Texas 78044
(w/o enclosures)