



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

August 11, 2017

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

OR2017-18323

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# 671009.

The Texas Department of Transportation (the "department") received a request for information pertaining to a specified construction project and a specified accident. You state the department will release some information. You claim the submitted information is excepted from disclosure under section 552.111 of the Government Code and privileged under section 409 of title 23 of the United States Code. We have considered the exception you claim and reviewed the submitted representative sample of information.<sup>1</sup>

Initially, we note some of the submitted information is subject to section 552.022 of the Government Code, which provides in pertinent part:

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<sup>1</sup>We 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) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or 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 [of the Government Code.]

Gov't Code § 552.022(a)(1). The submitted Traffic Control Devices Inspection Checklist is subject to section 552.022(a)(1) of the Government Code. You seek to withhold the submitted information under section 552.111 of the Government Code. However, this section 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) (governmental body may waive section 552.111). Therefore, the information at issue may not be withheld under section 552.111 of the Government Code. However, you also contend the Traffic Control Devices Inspection Checklist 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 your argument under section 409 for the Traffic Control Devices Inspection Checklist. We will also consider your argument under section 552.111 for the information not subject to section 552.022 of the Government Code.

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 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.

You state the roadway to which the Traffic Control Devices Inspection Checklist pertains is eligible for federal aid under section 103 of title 23 of the United States Code, and, thus, is a federal-aid highway for the purposes of section 409 of title 23. You also state the information at issue was generated for “the purpose of identifying and evaluating hazards on public roads,” a highway safety purpose. Based upon your representations and our review, we conclude the department may withhold the Traffic Control Devices Inspection Checklist pursuant to section 409 of title 23 of the United States Code.

We now address your argument under section 552.111 of the Government Code for the remaining information. 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.” Gov’t Code § 552.111. Section 552.111 encompasses information that is protected by civil discovery privileges. *See Open Records Decision Nos. 647 at 3 (1996), 251 at 2-4 (1980)*. You contend the information at issue 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. You state the roadway to which the information at issue pertains is eligible for federal aid under section 103 of title 23 of the United States Code, and, thus, is a federal-aid highway for the purposes of section 409 of title 23. You also state the information at issue was generated for highway safety purposes. Based upon your representations and our review, we conclude the department may withhold the remaining information under section 552.111 of the Government Code.

In summary, the department may withhold the Traffic Control Devices Inspection Checklist pursuant to section 409 of title 23 of the United States Code. The department may withhold the remaining information under section 552.111 of the Government Code.

You also ask this office to issue a previous determination permitting the department to withhold Traffic Control Devices Inspection pursuant to section 552.111 of the Government Code without seeking a ruling from this office. *See Gov’t Code § 552.301(a)* (allowing governmental body to withhold information subject to previous determination); *Open Records Decision No. 673 (2001)* (listing elements of second type of previous determination under section 552.301(a) of the Government Code). We decline to issue such a previous determination at this time. Accordingly, 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 records 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](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,

A handwritten signature in black ink that reads "Emily Kunst". The signature is written in a cursive style with a long horizontal stroke at the end of the name.

Emily Kunst  
Attorney  
Open Records Division

EK/eb

Ref: ID# 671009

Enc. Submitted documents

c: Requestor  
(w/o enclosures)