



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

August 31, 2017

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

OR2017-20001

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# 673896.

The Texas Department of Transportation (the "department") received a request for records relating to two specific Highway-Rail Grade Crossings and a crossbuck replacement project. 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 your arguments and reviewed the submitted representative samples of information.¹

Initially, we note the submitted information includes information subject to section 552.022 of the Government Code. Section 552.022 provides in part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are

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.

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

...

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

...

(5) all working papers, research material, and information used to estimate the need for or expenditure of public funds or taxes by a governmental body, on completion of the estimate[.]

Gov't Code § 552.022(a)(1), (3), (5). The submitted information includes a completed report subject to subsection 552.022(a)(1); information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by the department subject to subsection 552.022(a)(3); and information used to estimate the need for or expenditure of public funds or taxes by the department subject to subsection 552.022(a)(5). Although you seek to withhold the submitted information under section 552.111 of the Government Code, this section is a discretionary exception to disclosure and does not make information confidential under the Act. *See id.* § 552.007; Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 470 at 7 (1987) (statutory predecessor to Gov't Code § 552.111 subject to waiver). However, you also argue 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 your argument under section 409 for the submitted information. Additionally, we will address your arguments against disclosure of the remaining information.

You argue the submitted information is subject to 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. at 129.

You inform us the roadway at issue in the submitted information is part of the National Highway System under section 103 of title 23 of the United States Code and is therefore a federal-aid highway for the purposes of section 409 of title 23. You further inform us that the railway to highway crossings at issue are federal-aid highways for the purposes of section 130 of title 23 of the United States Code. You explain the information at issue was generated for highway safety purposes. Based upon your representations and our review of the submitted information, we conclude the department may withhold the submitted information subject to section 552.022 of the Government Code 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 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 that is protected by civil discovery privileges. *See Open Records Decision Nos. 647 at 3 (1996), 251 at 2-4 (198)*. You claim 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. Upon review, we find section 409 of title 23 of the United States Code would protect the information at issue from discovery in civil litigation. Therefore, based on 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 information subject to section 552.022 of the Government Code 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

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,



Patrick P. Mehaffy
Attorney
Open Records Division

PPM/eb

Ref: ID# 673896

Enc. Submitted documents

c: Requestor
(w/o enclosures)