



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

October 6, 2017

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

OR2017-22886

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# 679298.

The Texas Department of Transportation (the "department") received a request for the complete files during a specified time period for specified projects.¹ You state you will release some of the information. You provide documentation showing you notified the State Auditor's Office (the "SAO") of the request for information and of its right to submit arguments to this office as to why a portion of the submitted information should not be released. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). You also claim the submitted information is excepted from disclosure under sections 552.111 and 552.116 of the Government Code and

¹We note the department sought and received clarification of the information requested. *See* Gov't Code § 552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify request); *see also* *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or over-broad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed). We further note you sent the requestor an estimate of charges pursuant to section 552.2615 of the Government Code. *See* Gov't Code § 552.2615. The estimate of charges required the requestor to provide a deposit for payment of anticipated costs under section 552.263 of the Government Code. *See id.* § 552.263(a). You inform us the department received the required deposit on July 24, 2017. *See id.* § 552.263(e) (if governmental body requires deposit or bond for anticipated costs pursuant to section 552.263, request for information is considered to have been received on date governmental body receives bond or deposit).

privileged under section 409 of title 23 of the United States Code. We have considered your arguments and reviewed the submitted information.

Initially, we note a portion of the submitted information consists of Traffic Control Devices Inspection Checklists that are subject to section 552.022 of the Government Code. Section 552.022(a)(1) provides for required public disclosure of “a completed report, audit, evaluation, or investigation made of, for, or by a governmental body,” unless the information is expressly confidential under the Act or other law or excepted from disclosure under section 552.108 of the Government Code. *See id.* § 552.022(a)(1). Although you seek to withhold the information at issue under section 552.111 of the Government Code, section 552.111 is a discretionary exception to disclosure and does not make information confidential under the Act. *See Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 470 at 7 (1987) (statutory predecessor to section 552.111 subject to waiver).* Therefore, the department may not withhold the information at issue under section 552.111. However, you also contend the information at issue 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.

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 inform us the roadway at issue in Exhibit B 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 also state Exhibit B was generated for highway safety purposes. Based upon your representations and our review, we conclude the department may withhold the information in Exhibit B subject to 552.022(a)(1) 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 in Exhibit B. 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 in Exhibit B 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. Furthermore, you state the information at issue was created for highway safety purposes. Therefore, based on your representations and our review, we conclude the department may withhold the remaining information in Exhibit B under section 552.111 of the Government Code.

Section 552.116 of the Government Code provides the following:

(a) An audit working paper of an audit of the state auditor or the auditor of a state agency, an institution of higher education as defined by Section 61.003, Education Code, a county, a municipality, a school district, a hospital district, or a joint board operating under Section 22.074, Transportation Code, including any audit relating to the criminal history background check of a public school employee, is excepted from the requirements of Section 552.021. If information in an audit working paper is also maintained in another record, that other record is not excepted from the requirements of Section 552.021 by this section.

(b) In this section:

(1) “Audit” means an audit authorized or required by a statute of this state or the United States, the charter or an ordinance of a municipality, an order of the commissioners court of a county, the bylaws adopted by or other action of the governing board of a hospital district, a resolution or other action of a board of trustees of a school district, including an audit by the district relating to the criminal history background check of a public school employee, or a resolution or other action of a joint board described by Subsection (a) and includes an investigation.

(2) "Audit working paper" includes all information, documentary or otherwise, prepared or maintained in conducting an audit or preparing an audit report, including:

(A) intra-agency and interagency communications; and

(B) drafts of the audit report or portions of those drafts.

Gov't Code § 552.116. The department seeks to withhold Exhibit C under section 552.116 of the Government Code. However, the purpose of section 552.116 is to protect the interests of the auditor, not the auditee. Here, the SAO is the auditor, and the information at issue is maintained by the department, the auditee. As the auditee, the department may not assert section 552.116 to protect its own interests in withholding information from disclosure. We note this office has received no arguments from the SAO seeking to withhold the information at issue under section 552.116 of the Government Code. Accordingly, the department may not withhold Exhibit C under section 552.116 of the Government Code.

In summary, the department may withhold the information in Exhibit B subject to 552.022(a)(1) of the Government Code pursuant to section 409 of title 23 of the United States Code. The department may withhold the remaining information in Exhibit B under section 552.111 of the Government Code. The remaining information must be released.

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,



Emily Buchanan
Attorney
Open Records Division

EB/eb

Ref: ID# 679298

Enc. Submitted documents

c: Requestor
(w/o enclosures)