



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

November 28, 2017

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

OR2017-27054

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# 685504.

The Texas Department of Transportation (the "department") received a request for all in-service performance evaluations conducted by the department relating to a specified guardrail. 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 submitted arguments and reviewed the submitted representative sample of information.¹

Initially, 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:

...

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 those records contain substantially different types of information than that submitted to this office.

(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)(5). The submitted information includes a completed estimate that is subject to section 552.022(a)(5). Although you seek to withhold the information at issue under section 552.111, this section 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 this information, which we have marked, under section 552.111. However, you also contend 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 subject to section 552.022(a)(5) of the Government Code. We will also address the department's argument under section 552.111 for the remaining 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 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.*, 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 County*, 537 U.S. at 146.

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 explain the information at issue was

generated for highway safety purposes. Based upon your representations and our review, we conclude the department may withhold the information subject to section 552.022(a)(5) of the Government Code pursuant to section 409 of title 23 of the United States Code.

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 encompass information that is protected by civil discovery privileges. *See* Open Records Decision Nos. 647 at 3 (1996), 251 at 2-4 (1980). 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. You state the roadway to which the information at issue pertains is eligible for federal aid under section 409 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. 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. Thus, based on your representations and our review, we find 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(a)(5) 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,



Cole Hutchison
Assistant Attorney General
Open Records Division

CH/sb

Ref: ID# 685504

Enc. Submitted documents

c: Requestor
(w/o enclosures)