



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

January 16, 2019

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

OR2019-01459

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# 746507.

The Texas Department of Transportation (the "department") received a request for ten categories of information pertaining to a specified roadway during a specified time period as well as information regarding a specified department program. 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 your 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)(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* Gov't Code § 552.022(a)(1). The submitted information includes completed reports subject to section 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

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.

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 under section 552.111 of the Government Code. 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)(1) 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 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 submitted information is from the department’s Pavement Management Information System (“PMIS”). You explain the PMIS information is used to diagnose pavement problems, which constitute a hazardous roadway condition. You assert the department uses this type of information to evaluate safety hazards and plan safety improvements of potential accident sites. Additionally, you inform us the information at issue pertains to roadways that are part of the National Highway System under section 103 of title 23 of the United States Code and are, therefore, federal-aid highways for the purposes of section 409 of title 23. Based upon your representations and our review, we conclude the department may withhold the information subject to section 552.022(a)(1) of the Government Code pursuant to section 409 of title 23 of the United States Code.

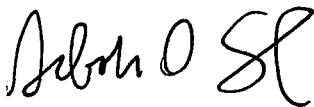
Section 552.111 of the Government Code excepts from disclosure “[a]n interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency[.]” Gov’t Code § 552.111. Section 552.111 encompass information that is protected by civil discovery privileges. *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. As noted above, you state the remaining information is from the department’s PMIS, used to diagnose pavement problems, which constitute a hazardous roadway condition. You assert the department uses this type of information to evaluate safety hazards and plan safety improvements of potential accident sites. Additionally, you inform us the information at issue pertains to roadways that are part of the National Highway System under section 103 of title 23 of the United States Code and are, therefore, federal-aid highways for the purposes of section 409 of title 23. 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)(1) 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,



Deborah Southerland
Attorney
Open Records Division

DS/eb

Ref: ID# 746507

Enc. Submitted documents

c: Requestor
(w/o enclosures)