



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

January 23, 2019

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

OR2019-01968

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# 747305.

The Texas Department of Transportation (the “department”) received a request for information pertaining to a specified construction project during a specified time period.¹ You state you will release some information. You claim the submitted information is excepted from disclosure under sections 552.101 and 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.²

Initially, we note some of the submitted information consists of a completed report subject to section 552.022(a)(1) 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

¹You state the department sought and received clarification of the request for information. *See* Gov’t Code § 552.222(b) (stating if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used); *City of Dallas v. Abbott*, 304 S.W.3d 380 (Tex. 2010) (holding when governmental entity, acting in good faith, requests clarification of unclear or overbroad request for public information, ten-business-day period to request attorney general opinion is measured from date request is clarified or narrowed).

²We 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.

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). 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 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 your argument under section 409 for the information at issue. Further, because section 552.101 of the Government Code makes information confidential under the Act, we will consider its applicability to 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 state 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, 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 information you marked pursuant to section 409 of title 23 of the United States Code.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This section encompasses information protected by other statutes, including federal law. You assert the information at issue was created by the department to assure compliance with the Davis-Bacon Act, which requires federal construction contractors to pay their workers the “prevailing wage.” *See* 40 U.S.C. §§ 3141-3148. You inform us the information at issue pertains to a federally-funded construction project. Section 5.6(a) of title 29 of the Code of Federal Regulations sets forth the enforcement provisions for the Davis-Bacon and Related Acts and provides in part:

(3) . . . Investigations shall be made of all contracts with such frequency as may be necessary to assure compliance. Such investigations shall include interviews with employees, which shall be taken in confidence, and examinations of payroll data and evidence of registration and certification with respect to apprenticeship and training plans. . . .

. . .

(5) It is the policy of the Department of Labor to protect the identity of its confidential sources and to prevent an unwarranted invasion of personal privacy. Accordingly, the identity of an employee who makes a written or oral statement as a complaint or in the course of an investigation, as well as portions of the statement which would reveal the employee’s identity, shall not be disclosed in any manner to anyone other than Federal officials without the prior consent of the employee. . . .

29 C.F.R. § 5.6(a)(3), (5). You inform us the department conducted an investigation on the specified construction project to assure compliance with the Davis-Bacon Act. You further state the submitted Labor Standards Review forms were filled out by department employees after conducting interviews with contractor employees about their work and you assert these forms are confidential under section 5.6(a) of title 29 of the Code of Federal Regulations. Upon review, we find a portion of the information at issue reveals the employees’ identities. You state the employees concerned have not consented to release of their information and the requestor is not a federal official. Therefore, the department must withhold the identifying information of employees, which we have marked, under section 552.101 in conjunction with section 5.6(a)(5) of title 29 of the Code of Federal Regulations.³ However, we find you have failed to demonstrate the remaining information is identifying of any particular employee. Therefore, the department may not withhold any of the remaining information under section 552.101 on this basis.

³As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

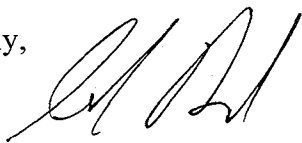
Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. This office has found personal financial information not relating to a financial transaction between an individual and a governmental body is excepted from required public disclosure under common-law privacy. *See, e.g.*, Open Records Decision Nos. 545 (1990) (common-law privacy protects mortgage payments, assets, bills, and credit history), 523 (1989) (common-law privacy protects credit reports, financial statements, and other personal financial information). Upon review, we find the remaining information the department seeks to withhold on this basis relates to individuals who have been de-identified and whose privacy interests are thus protected. Therefore, the department may not withhold any portion of the remaining information under section 552.101 in conjunction with common-law privacy.

In summary, the department may withhold the information you marked pursuant to section 409 of title 23 of the United States Code. The department must withhold the information we have marked under section 552.101 in conjunction with section 5.6(a)(5) of title 29 of the Code of Federal Regulations. The department must release the remaining information.

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,



Sidney M. Pounds
Assistant Attorney General
Open Records Division

SMP/eb

Ref: ID# 747305

Enc. Submitted documents

c: Requestor
(w/o enclosures)