



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

January 8, 2020

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

OR2020-00809

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# 805145

The Texas Department of Transportation ("the department") received a request for twenty-three categories of information related to a specified construction project. The department states it will release some information to the requestor. The department claims 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 the submitted arguments and reviewed the submitted representative sample of information.<sup>1</sup>

Initially, we note the information in Exhibit C is 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 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 department seeks to withhold the information at issue under section 552.111 of the Government Code. However, this section is a discretionary exception to disclosure and does not make information confidential under the Act. *See id.* § 552.007; *see also* 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

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<sup>1</sup>We 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.

waiver). However, the department also argues 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 in Exhibit C. We will also consider the department’s argument under section 552.101 against release of the information in Exhibit B.

The department argues the information subject to section 552.022 of the Government Code is protected by 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.

The department informs us the roadway at issue in Exhibit C 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. The department explains the information in Exhibit C was generated for highway safety purposes. Based upon these representations and our review, we conclude the department may withhold the information in Exhibit C 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 the doctrine of common-law privacy, which protects information if it is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person, and (2) is 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 to be intimate and embarrassing

by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. Prior decisions of this office have determined personal financial information not related to a transaction between an individual and a governmental body generally meets the first prong of the common-law privacy test. *See generally* Open Records Decision No. 600 (1992). However, whether financial information is subject to a legitimate public interest and, therefore, not protected by common-law privacy must be determined on a case-by-case basis. *See* Open Records Decision No. 373 (1983).

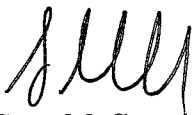
You state the submitted certified payroll records pertain solely to transactions between a highway project's contractors, subcontractors, and their employees. You inform this office federal law provides, as a requisite to the receipt of federal funding for the construction projects at issue, the department must receive and retain payroll records from its contractors and subcontractors so the Federal Highway Administration, the Department of Labor, the General Accounting Office, or other federal agencies can audit those records to ensure the contractors' and subcontractors' compliance with applicable federal wage regulations. *See* 23 C.F.R. § 635.118. Additionally, you assert the department has not itself used the payroll records for any public purpose, other than receiving and retaining them for review by a federal agency. Upon review, we find the information in Exhibit B satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Therefore, based upon these facts, we conclude there is no legitimate public interest in release of the information in Exhibit B at this time. Accordingly, the department must withhold Exhibit B under section 552.101 of the Government Code in conjunction with common-law privacy.

In summary, the department may withhold Exhibit C pursuant to section 409 of title 23 of the United States Code. The department must withhold Exhibit B under section 552.101 of the Government Code in conjunction with common-law privacy.

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 <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,



Sean McCormick  
Attorney  
Open Records Division

SMC/eb

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Enc. Submitted documents

c: Requestor  
(w/o enclosures)