



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

September 28, 2022

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

OR2022-29974

Dear Ms. Barner:

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# 975132 (R015842-071122).

The Texas Department of Transportation (the "department") received a request for information pertaining to the Highway-Rail Grade Crossing State Action Plan. You state the department released some of the requested information. You claim the submitted information is excepted from disclosure under section 552.111 of the Government Code. We have considered the exception you claim and reviewed the submitted representative sample of information.<sup>1</sup>

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). 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

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

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. However, the department also contends this information is excepted from disclosure under section 407 of title 23 of the United States Code. We note section 407 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 predecessor to section 407, relied on by county in denying request under state’s Public Disclosure Act). Accordingly, we will consider the department’s argument under section 407 for the information at issue. We will also consider the department’s argument under section 552.111 against release of the remaining information.

The department argues the information subject to section 552.022 of the Government Code is protected by section 407 of title 23 of the United States Code, which provides as follows:

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. § 407. Federal courts have stated the language of section 407 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 states the information at issue pertains to railway to highway crossings that are part of the National Highway System under section 130 of title 23 of the United States Code, and are, therefore, federal-aid highways for purposes of section 407. The department also states the information at issue was generated for highway safety purposes. Based upon these representations and our review, we conclude the department may withhold the information subject to section 552.022 of the Government Code pursuant to section 407 of title 23 of the United States Code.

Section 552.111 of the Government Code excepts from disclosure “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” 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 (1980). The department argues the remaining information at issue is excepted from disclosure under section 552.111 because it would be privileged from discovery under section 407 of title 23 of the United States Code. As noted above, you inform us the information at issue pertains to railway to highway crossings that are part of the National Highway System under section 130 of title 23 of the United States Code, and are, therefore, federal-aid highways for purposes of section 407. You also state the information at issue was generated for highway safety purposes. Upon review, we find section 407 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 407 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 <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,

Jennifer Copeland  
Assistant Attorney General  
Open Records Division

JC/jm

Ref: ID# 975132

Enc. Submitted documents

c: Requestor  
(w/o enclosures)