



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

November 3, 2022

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

OR2022-34202

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# 981778 (ORR No. R016603-080322).

The Texas Department of Transportation (the "department") received a request for certain information pertaining to a specified project.¹ You claim the submitted information is excepted from disclosure under section 552.111 of the Government Code and privileged under section 407 of title 23 of the United States Code. We have considered the submitted arguments and reviewed the submitted representative sample of information.²

¹ You state the department sought and received clarification of the information requested. *See* Gov't Code § 552.222 (if request for information is unclear, governmental body may ask requestor to clarify request); *see also City of Dallas v. Abbott*, 304 S.W.2d 380, 387 (Tex. 2010) (if governmental entity, acting in good faith, requests clarification of unclear or over-broad request, ten-day period to request attorney general ruling is measured from date request is clarified). In addition, after receiving the request, the department sent the requestor an estimate of charges pursuant to section 552.2615 of the Government Code. *See* Gov't Code § 552.2615. The estimate of charges required to requestor to provide a deposit for payment of anticipated costs under section 552.263 of the Government Code. *See id.* § 552.263(a). The department states it received the deposit on August 15, 2022. *See id.* § 552.263(e) (if governmental body requires deposit or bond for anticipated costs pursuant to section 552.263, request for information is considered to have been received on date that governmental body receives deposit or bond).

² 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.

Initially, we note some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022 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:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). The submitted information includes completed reports that are subject to section 552.022(a)(1). The department must release the completed reports pursuant to section 552.022(a)(1) unless they are excepted from disclosure under section 552.108 of the Government Code or are made confidential under the Act or other law. *See id.* Although the department seeks to withhold the information at issue under section 552.111 of the Government Code, this section is a discretionary exception to disclosure and does not make information confidential under the Act. *See id.* § 552.007; 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 waiver). However, the department also argues 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 of title 23 for the information subject to section 552.022. 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(a)(1) of the Government Code is protected by section 407 of title 23 of the United States Code. Section 407 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. § 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 informs us the bridge at issue in the submitted information is eligible for federal aid and is therefore a federal-aid highway for the purposes of section 407 of title 23. The department explains the information at issue was generated for highway safety purposes. Based upon these representations and our review of the information at issue, we conclude the department may withhold the information subject to section 552.022(a)(1) of the Government Code, which we marked, 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.” Gov’t Code § 552.111. 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 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. *See 23 U.S.C. § 407; see also Harrison*, 965 F.2d at 160; *Robertson*, 954 F.2d at 1435; *Pierce County*, 537 U.S. 129

Section 552.111 can also encompass communications between a governmental body and a third party, including a consultant or other party with a privity of interest. *See Open Records Decision No. 561 at 9 (1990)* (section 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process). For section 552.111 to apply, the governmental body must identify the third party and explain the nature of its relationship with the governmental body. Section 552.111 is not applicable to a communication between the governmental body and a third party unless the governmental body establishes it has a privity of interest or common deliberative process with the third party. *See ORD 561*.

As noted above, the department states the information pertains to a federal-aid highway for purposes of section 407 of title 23. The information includes communications with third parties with which the department states it has a privity of interest, and the department states the information is used for highway safety purposes. The department argues the information would be privileged from discovery in civil litigation under section 407 and is therefore excepted from disclosure under section 552.111 of the Government Code. Based upon these representations, we conclude 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, which we marked, 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,

Kimbell Kesling
Assistant Attorney General
Open Records Division

KK/mo

Ref: ID# 981778

Enc. Submitted documents

c: Requestor
(w/o enclosures)