



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 22, 2003

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

OR2003-9256

Dear Ms. Soldano:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 193181.

The Texas Department of Transportation (the "department") received a request for a copy of the department's Internal Security Manual. You assert that the requested manual is excepted from public disclosure under sections 552.101 and 552.139 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted information.

Initially, we note that the department failed to fully comply with the requirements of section 552.301 of the Government Code in seeking a ruling from this office. In accordance with section 552.301(b), a governmental body seeking a ruling from this office must assert the exceptions to disclosure that apply to the requested information no later than the tenth business day after receiving the written request. In addition, within fifteen business days of receiving the request, the governmental body must submit, among other things, arguments explaining why the stated exceptions apply. *See* Gov't Code § 552.301(e)(1)(A). In this instance, the department did not raise section 552.139 or submit arguments explaining the applicability of that exception within the statutory required time periods. We note, however, that section 552.139 is a mandatory exception to disclosure. Unlike discretionary exceptions to disclosure, mandatory exceptions cannot be waived by the governmental body's failure to comply with the procedural requirements of the Public Information Act. Thus, in addition

to your claims under section 552.101, this office will address the merits of the department's arguments under section 552.139.

Section 552.101 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. You argue that the manual is protected from disclosure under section 202.7(b)(1) of title 1 of the Texas Administrative Code. Section 202.7(b)(1) provides that:

Confidential information shall be accessible only to authorized users. Information containing any confidential data shall be identified, documented, and protected in its entirety.

1 T.A.C § 202.7(b)(1). As a general rule, statutory confidentiality requires express language making information confidential. Open Records Decision No. 478 (1987). By its plain language, section 202.7(b)(1) does not itself make information confidential. The provision only admonishes state agencies to take adequate precautions to protect confidential information from unauthorized disclosure. Thus, the department may not withhold the requested manual under section 202.7(b)(1). *See also Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976) (governmental agency may not bring information within scope of predecessor to Gov't Code § 552.101 by promulgation of rule; to imply such authority merely from general rule-making powers would be to allow agency to circumvent very purpose of Public Information Act).

You also argue that the requested manual is protected from disclosure by one of the newly-enacted provisions of the Texas Homeland Security Act. Specifically, you assert that the manual is confidential under section 418.182(a) of the Government Code, which provides as follows:

Sec. 418.182. CONFIDENTIALITY OF CERTAIN INFORMATION RELATING TO SECURITY SYSTEMS.

(a) Except as provided by Subsections (b) and (c), information, including access codes and passwords, in the possession of a governmental entity that relates to the specifications, operating procedures, or location of a security system used to protect public or private property from an act of terrorism or related criminal activity is confidential.

Act of June 2, 2003, 78th Leg., R.S., ch. 1312, § 3, 2003 Tex. Sess. Law Serv. 4814 (Vernon) (to be codified at Gov't Code § 418.182(a)). The fact that information may relate to a governmental body's security concerns does not make the information *per se* confidential under the Texas Homeland Security Act. *See* Open Records Decision No. 649 at 3 (1996) (language of confidentiality provision controls scope of its protection). Furthermore, the

mere recitation by a governmental body of a statute's key terms is not sufficient to demonstrate the applicability of a claimed provision. As with any exception to disclosure, a governmental body asserting one of the confidentiality provisions of the Texas Homeland Security Act must adequately explain how the responsive records fall within the scope of the claimed provision. *See* Gov't Code § 552.301(e)(1)(A).

In this instance, you do not explain, nor can we discern from our review, how the submitted information is used to protect public or private property from terrorism or criminal activity related to an act of terrorism. Thus, the department has failed to establish the applicability of section 418.182. Consequently, the department may not withhold the submitted manual under section 552.101 of the Government Code.

Finally, we address your assertions that the manual is excepted from disclosure under section 552.139 of the Government Code. Section 552.139 provides that:

(a) Information is excepted from the requirements of Section 552.021 if it is information that relates to computer network security or to the design, operation, or defense of a computer network.

(b) The following information is confidential:

(1) a computer network vulnerability report; and

(2) any other assessment of the extent to which data processing operations, a computer program, network, system, or software of a governmental body or of a contractor of a governmental body is vulnerable to unauthorized access or harm, including an assessment of the extent to which the governmental body's or contractor's electronically stored information is vulnerable to alteration, damage, or erasure.

Gov't Code § 552.139.¹ You assert that the release of the submitted manual "will make it extremely easy for a hacker or cracker to get into the department's system." We note, however, that the manual only describes the department's computer network security in the most general of terms. The document does not identify any procedures, computer hardware or software that are unique to the department's security protocol. Furthermore, the document does not assess any vulnerabilities in the department's computer network system. Finally, you state that this document is posted on the department's intranet. This office finds it difficult to believe that the department has made the "key" to its computer system accessible to all of its employees. Thus, based on the foregoing, we find that you have not

¹Act of May 21, 2003, 78th Leg., R.S., ch. 1275, § 2(76), 2003 Tex. Sess. Law Serv. 4814 (Vernon) (to be codified at Gov't Code § 552.139).

demonstrated that the requested manual is excepted from disclosure under section 552.139. The submitted manual must, therefore, be released.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

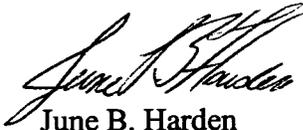
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge

this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



June B. Harden
Assistant Attorney General
Open Records Division

JBH/seg

Ref: ID# 193181

Enc: Submitted documents

c: Ms. Kristi Boul
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(w/o enclosures)