



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

February 4, 2004

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

OR2004-0820

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# 195501.

The Texas Department of Transportation (the "department") received a request for information relating to the indexing and structuring of the department's electronic data management system ("EDMS"). You claim that the requested information is excepted from disclosure under sections 552.101, 552.104, and 552.139 of the Government Code. We have considered the exceptions you claim and have reviewed the information you submitted.<sup>1</sup>

Section 552.101 of the Government Code excepts from required public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information that other statutes make confidential. You contend that the submitted information is protected from disclosure under section 202.7(b)(1) of title 1 of the Texas Administrative Code. Section 202.7(b)(1) provides as follows:

(b) Confidentiality of data and systems.

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<sup>1</sup>This letter ruling assumes that the submitted representative sample of information is truly representative of the responsive information as a whole. This ruling neither reaches nor authorizes the department to withhold any information that is substantially different from the submitted information. See Gov't Code § 552.301(e)(1)(D); Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

(1) 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 language that expressly makes information confidential. *See* Open Records Decision No. 478 at 2 (1987). By its plain language, section 202.7(b)(1) does not itself make information confidential. The provision merely admonishes state agencies to take adequate precautions to protect confidential information from unauthorized disclosure. Therefore, the department may not withhold the submitted information under section 552.101 of the Government Code in conjunction with section 202.7(b)(1) of title 1 of the Texas Administrative Code. *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 statutory 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 submitted information is protected from public disclosure by one of the newly-enacted provisions of the Texas Homeland Security Act. Specifically, you assert that the information 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). You do not explain, nor can we determine from our review of the information at issue, how this 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 information under section 552.101 of the Government Code.

Next, we address your claim that the information at issue 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.<sup>2</sup> You do not assert that the submitted information consists of a computer network vulnerability report or any other assessment of the extent to which any data processing operation, computer program, network, system, or software of a governmental body or its contractor is vulnerable to unauthorized access or harm. *See id.* § 552.139(b)(1)-(2). Accordingly, we understand you to assert that section 552.139(a) is applicable to the information at issue. You contend that the release of the submitted information “will make it extremely easy for a hacker or cracker to get into the department’s system.” You also contend that “[a]nyone who successfully got in to the system could sabotage Houston District’s records.” We note, however, that you have not explained how the release of the information at issue might result in the scenario that you describe. Furthermore, this office is not otherwise informed as to how the submitted information could be used to obtain unauthorized access to one of the department’s computer systems. We therefore conclude that you have not demonstrated that any of the submitted information is excepted from disclosure under section 552.139.

Lastly, we address your claim under section 552.104 of the Government Code. Section 552.104 excepts from public disclosure “information that, if released, would give advantage

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<sup>2</sup>Act 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).

to a competitor or bidder.” Section 552.104 protects a governmental body’s interests in competitive bidding situations. *See* Open Records Decision No. 592 (1991). Section 552.104 requires a showing of some actual or specific harm in a particular competitive situation; a general allegation that a competitor will gain an unfair advantage will not suffice. *See* Open Records Decision No. 541 at 4 (1990). Section 552.104 does not protect information relating to competitive bidding situations once a contract has been awarded and is in effect. *See* Open Records Decision Nos. 306 (1982), 184 (1978).

You inform us that the department is testing the EDMS system in Houston for possible statewide use and is in the process of hiring an EDMS consultant. You do not indicate, however, that the submitted EDMS information relates to a competitive bidding situation or that this information is otherwise connected with any ongoing competition for a public contract. Consequently, we find that you have not demonstrated that the release of the submitted information at this time would adversely affect the department’s financial interests in any particular competitive situation. *See* Open Records Decision Nos. 592 at 8 (1991), 541 at 5 (1990); *see also* Open Records Decision Nos. 583 (1990) (statutory predecessor to Gov’t Code § 552.104 did not restrict access to information because it might be commercially useful to requestor), 231 (1979) (statutory predecessor not applicable to feasibility study where no actual bidding process was under way). We therefore conclude that the department may not withhold any of the submitted information under section 552.104 of the Government Code. As you raise no other exception to the disclosure of this information, it must be released to the requestor in its entirety.

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

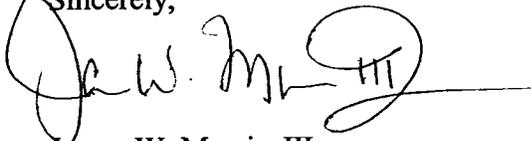
will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure 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,

A handwritten signature in black ink, appearing to read "J.W. Morris III", with a horizontal line extending to the right.

James W. Morris, III  
Assistant Attorney General  
Open Records Division

JWM/sdk

Ref: ID# 195501

Enc: Submitted documents

c: Mr. Charles C. Birkner  
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(w/o enclosures)