



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

February 24, 2004

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

OR2004-1338

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# 196643.

The Texas Department of Transportation (the "department") received a request for certain information about the state's bridges. Specifically, the requestor seeks each bridge's load restriction, restriction notice, latitude, longitude, and information indicating whether the bridge is open or closed. You claim that the requested information is excepted from disclosure under sections 552.101 and 552.111 of the Government Code. We have considered the department's claimed exceptions and have reviewed the submitted sample information.<sup>1</sup>

Initially, we must address the department's responsibilities under the Public Information Act. As you acknowledge, the department failed to seek an open records decision from this office within the statutory ten business day period. *See* Gov't Code § 552.301(a). The department's delay in this matter results in the presumption that the requested information is public. *See id.* § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex. App.—Austin 1990, no writ). In order to overcome the presumption that the requested

---

<sup>1</sup>We assume that the sample records submitted to this office are 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.

information is public, a governmental body must provide compelling reasons why the information should not be disclosed. *Hancock*, 797 S.W.2d at 381. Normally, a compelling interest is that some other source of law makes the information confidential or that third party interests are at stake. *See* Open Records Decision No. 150 at 2 (1977). You assert that the requested information is excepted from disclosure under sections 552.101 and 552.111. Section 552.111 is a discretionary exception that does not overcome the presumption of openness. *See* Open Records Decision No. 473 (1987) (governmental body may waive statutory predecessor to Gov't Code § 552.111); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Thus, the department has waived its claims under section 552.111. You also assert, however, that the requested information is confidential by law. We will, therefore, address these arguments.

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 claim that federal law prohibits release of the requested information. Section 409 of title 23 of the United States Code provides:

Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled 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 152 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.

We note that section 409 governs the discovery of information in court proceedings. The provision does not, however, make information expressly confidential for purposes of section 552.101 of the Government Code. *See* Open Records Decision Nos. 658 at 4 (1998) (statutory confidentiality must be express, and confidentiality requirement will not be implied from statutory structure), 478 at 2 (1987) (statutory confidentiality requires express language making certain information confidential or stating that information shall not be released to public); *see also* Attorney General Opinion JM-1048 (1989) (stating that Gov't Code ch. 552 differs in purpose from statutes and procedural rules providing for discovery in judicial proceedings); Open Records Decision No. 575 at 2 (1990) (stating explicitly that discovery privileges are not covered under statutory predecessor to Gov't Code § 552.101).

You also appear to argue that section 409 is "other law" that, in accordance with *In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001), makes information expressly confidential for purposes of section 552.022 of the Government Code. The information at issue is not subject

to section 552.022 of the Government Code. Consequently, we conclude that the department may not withhold any portion of the requested information under section 409 of title 23 of the United States Code.

Finally, you assert that the requested information is confidential under sections 418.177 and 418.181 of the Government Code. Section 418.177 provides:

Information is confidential if the information:

- (1) is collected, assembled, or maintained by or for a governmental entity for the purpose of preventing, detecting, or investigating an act of terrorism or related criminal activity; and
- (2) relates to an assessment by or for a governmental entity, or an assessment that is maintained by a governmental entity, of the risk or vulnerability of persons or property, including critical infrastructure, to an act of terrorism or related criminal activity.

In addition, section 418.181 provides:

Those documents or portions of documents in the possession of a governmental entity are confidential if they identify the technical details of particular vulnerabilities of critical infrastructure to an act of terrorism.

Gov't Code §§ 418.177, .181. Through the passage of House Bill 9, the Seventy-eighth Legislature added sections 418.177 and 418.181 to chapter 418 of the Government Code. These newly enacted provisions make certain information related to terrorism confidential. The fact, however, that information may relate to a governmental body's security concerns does not make the information *per se* confidential under these provisions. *See* Open Records Decision No. 649 at 3 (1996) (language of confidentiality provision controls scope of its protection). Furthermore, the mere recitation of these statutes' key terms is not sufficient to demonstrate their applicability. As with any exception to disclosure, a governmental body asserting sections 418.177 and 418.181 must adequately explain how the responsive records fall within the scope of these provisions. *See* Gov't Code § 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies).

You acknowledge that, for public safety reasons, all of the requested information is posted on the department's website. You assert only that providing the requested information in list form poses a "risk." You do not explain, however, nor can we discern, how the release of the requested information, which is already available to the public, would reveal technical details of particular vulnerabilities of the state's bridges to acts of terrorism. Furthermore, you do not provide any explanation for why the requested information is confidential under section 418.177. Accordingly, we conclude that the department has failed to demonstrate

that the requested information is confidential under section 418.177 or section 418.181. Thus, the requested information must 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).

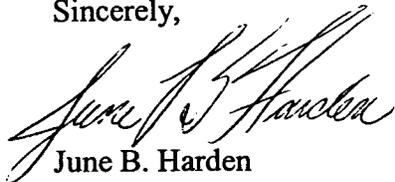
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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# 196643

Enc: Submitted documents

c: Mr. Mark Grubb  
HCSS  
6200 Savoy, Suite 1100  
Houston, Texas 77036  
(w/o enclosures)