



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 14, 2005

Ms. Holly C. Lytle
Assistant County Attorney
El Paso County
500 East San Antonio, Room 503
El Paso, Texas 79901

OR2005-01336

Dear Ms. Lytle:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 217800.

The El Paso County Elections Division (the "elections division") received a request for several categories of information pertaining to election records. You state that you have released some responsive information. You indicate that the elections division does not maintain some of the requested information.¹ You claim that the remaining requested information is excepted from disclosure pursuant to sections 552.101, 552.110, and 552.139 of the Government Code. You also believe that the submitted information implicates the proprietary interests of Diebold Election Systems ("Diebold"), a private third party, and you have notified it of the request for information and its opportunity to submit comments to this office. See Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits

¹ We note that the Public Information Act (the "Act") does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request for information. See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983). A governmental body must make a good faith effort to relate a request for information to any responsive information that is within its custody or control. See Open Records Decision No. 561 at 8-9 (1990).

governmental body to rely on interested third party to raise and explain applicability of exception to disclosure in certain circumstances). We have considered the claimed exceptions and reviewed the submitted representative sample of information.²

Initially, we note that an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. See Gov't Code § 552.305(d)(2)(B). As of the date of this letter, Diebold has not submitted to this office reasons explaining why its information should not be released. Therefore, Diebold has provided us with no basis to conclude that it has a protected proprietary interest in any of the submitted information. See, e.g., *id.*, § 552.110(b) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure); Open Records Decision Nos. 661 at 5-6 (1999) (stating that business enterprise that claims exception for commercial or financial information under section 552.110(b) must show by specific factual evidence that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990).

Next, we note that the submitted information contains Internet Protocol ("IP") addresses. In Open Records Decision No. 581 (1990), this office determined that certain computer information such as source codes, documentation information, and other computer programming that has no significance other than its use as a tool for the maintenance, manipulation, or protection of public property is not the kind of information that is made public under section 552.021 of the Act. Open Records Decision No. 581 (1990) (construing predecessor statute). The IP addresses at issue here function solely as a tool to maintain, manipulate, or protect public property and has no independent relevance. *Id.* at 6. An IP address is the type of information that was at issue in Open Records Decision No. 581. As such, this information is not public information as defined by section 552.002 of the Government Code, and, therefore, is not subject to the Act. Thus, the IP addresses we have marked in Attachments E and G need not be released in response to this request.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision" and encompasses information made confidential by other statutes. You raise section 66.058 of the Election Code. Section 66.058 requires the custodian of election records to securely

² This letter ruling assumes that the submitted representative sample of information is truly representative of the requested information as a whole. This ruling neither reaches nor authorizes the elections division to withhold any information that is substantially different from the submitted information. See Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

preserve voted ballots in a locked room in the locked ballot box in which they are delivered. *See* Elec. Code § 66.058(b). Furthermore, except as permitted by the Election Code, a ballot box containing voted ballots may not be opened during the preservation period. *See id.* Section 66.058 reads as follows:

(a) Except as otherwise provided by this code, the precinct election records shall be preserved by the authority to whom they are distributed for 60 days after election day.

(b) The voted ballots shall be preserved securely in a locked room in the locked ballot box in which they are delivered to the general custodian of election records. Except as permitted by this code, a ballot box containing voted ballots may not be opened during the preservation period.

(c) If during the preservation period an authorized entry is made into a ballot box containing voted ballots, when the purpose for the entry is fulfilled, the box shall be relocked, and the box and key returned to the custodian.

(d) A custodian of a ballot box containing voted ballots commits an offense if, during the preservation period prescribed by Subsection (a), the custodian:

(1) makes an unauthorized entry into the box; or

(2) fails to prevent another person from handling the box in an unauthorized manner or from making an unauthorized entry into the box.

(e) An offense under Subsection (d) is a Class A misdemeanor.

(f) The records in ballot box no. 4 may be preserved in that box or by any other method chosen by the custodian. If the records are removed from the box, they may not be commingled with any other election records kept by the custodian.

(g) The precinct election records in an election involving a federal office shall be preserved by the authority to whom they are distributed for at least 22 months after election day in accordance with federal law. The secretary of state shall instruct the affected authorities on the actions necessary for compliance with federal law.

Id. § 66.058. “Precinct election records” means the precinct election returns, voted ballots, and other records of an election that are assembled and distributed under chapter 66 of the

Election Code. *See id.* § 66.002. We believe that precinct returns, which you state is responsive to item two of the request, are within the meaning of “precinct election records.”

You inform us that the November 2, 2004 general election included federal offices on the ballot. In Open Records Decision No. 505 (1988), this office determined that, under section 66.058, the voted ballots from a primary election are exempt from public disclosure only during the prescribed retention period and that a request made during the retention period to inspect voted ballots must be treated as a request to inspect the ballots when the retention period expires. The decision also determined that, under section 66.058(g) the preservation period for ballots cast in an election involving a federal office is 22 months after election day and that during the preservation period, the voted ballots are protected from required disclosure under the predecessor to section 552.101. *See* Open Records Decision No. 505 at 2 (1988). Thus, the 22-month preservation period for federal election records is the time during which the records must be secured in a locked room in the locked ballot box with no unauthorized entry into the box.

The Election Code authorizes access to voted ballots during the preservation period for several purposes, including, for example, recounts, election contests, criminal investigations, and counts conducted pursuant to chapter 127 of the election Code. *Id.* at 2 n. 2. We have no information that the Election Code authorizes access to the records in this situation. Therefore, the election records that are responsive to item two of the request are confidential as long as the records are required to be preserved, 22 months after election day. After that period, these records are subject to public disclosure. *Id.* at 3.

You assert section 552.110 of the Government Code for the submitted information responsive to items three and four of the request.³ Section 552.110 protects the proprietary interests of private persons by excepting from disclosure two types of information: (1) trade secrets obtained from a person and privileged or confidential by statute or judicial decision and (2) commercial or financial information for which it is demonstrated, based on specific factual evidence, that disclosure would cause substantial competitive harm to the person from whom the information was obtained. *See* Gov't Code § 552.110. By its terms, section 552.110 only protects the interests of the person from whom the information was obtained. This provision does not protect the interests of the governmental body that receives proprietary information nor does it allow a governmental body to assert section 552.110 for information it creates. Accordingly, we find that the elections division has failed to establish the applicability of section 552.110, and therefore none of the submitted information responsive to items three or four of the request may be withheld under section 552.110.

³ Although you also raise section 552.101 for Diebold's proprietary information, section 552.110 of the Government Code is the proper exception to claim for this type of information. *See* Gov't Code § 552.110(a), (b). Therefore, we will address your arguments under section 552.110.

Finally, you assert that the remaining submitted information responsive to items three and four of the request is excepted from disclosure under section 552.139 of the Government Code. This section provides in pertinent part:

(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. Upon review of the remaining responsive information, we determine that you have not demonstrated that any of this information relates to computer network security or to the design, operation, or defense of a computer network as contemplated in section 552.139(a). Furthermore, you have not demonstrated that the remaining information consists of a computer network vulnerability assessment or report as contemplated in section 552.139(b). Consequently, the remaining submitted information is not excepted from disclosure under section 552.139.

In summary, the marked IP addresses are not public information as defined by section 552.002 of the Government Code, and they need not be released in response to this request. The elections division must withhold the election records responsive to item two of the request pursuant to section 552.101 in conjunction with section 66.058 of the Election Code until the end of the preservation period. The remaining responsive submitted information must be released to the requestor.

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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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); *Tex. 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,



Debbie K. Lee
Assistant Attorney General
Open Records Division

DKL/sdk

Ref: ID# 217800

Enc. Submitted documents

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