



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

April 10, 2008

Ms. Renee Mauzy  
General Counsel  
Department of Information Resources  
P.O. Box 13564  
Austin, Texas 78711-3564

OR2008-04845

Dear Ms. Mauzy:

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# 307090.

The Texas Department of Information Resources (the "department") received a request for all correspondence between the department and IBM between January 1, 2007 through January 15, 2008. You state that you are releasing most of the requested information. You claim that the submitted information is excepted from disclosure under sections 552.101 and 552.139 of the Government Code. You further inform us that the submitted information may implicate the proprietary interests of IBM. Accordingly, you have notified IBM of the request and of its right to submit arguments to this office. *See Gov't Code § 552.305(d); see also Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances).* We have received comments from IBM. We have also received comments from the Comptroller of Public Accounts (the "comptroller"). *See Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).* We have considered the submitted arguments and reviewed the submitted information.

Initially, we address the comments submitted by the comptroller. The comptroller claims that a portion of the submitted information is not subject to the Act. In Open Records Decision No. 581 (1990), this office determined that certain computer information that has no significance other than its use as a tool for the maintenance, manipulation, or protection of public property, such as source codes, documentation information, and other computer programming, is not the kind of information made public under section 552.021 of the Government Code. Based on the reasoning in this decision and our review of the information at issue, we agree that some of the submitted information does not constitute

public information under section 552.002 of the Government Code as it has no significance other than its use as a tool for the maintenance, manipulation or protection of public property. Accordingly, this information, which we have marked, is not subject to the Act and need not be released to the requestor. However, we determine that the remaining submitted information is subject to the Act. Therefore, we will address the arguments under sections 552.101 and 552.139 of the Government Code for this information.

The department and the comptroller both assert section 552.139 of the Government Code. Section 552.139 provides as follows:

(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, or 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. You state that releasing some of the requested information would create a vulnerability for State of Texas information technology assets and data of the comptroller if it was released to the public. Upon review, we determine that a portion of the information at issue, which we have marked, must be withheld under section 552.139. However, neither the department nor the comptroller have demonstrated that any of the remaining information at issue relates to computer network security or to the design, operation, or defense of a computer network as contemplated in section 552.139(a). Furthermore, neither the department nor the comptroller have demonstrated that this information consists of a computer network vulnerability assessment or report as contemplated in section 552.139(b). Consequently, none of the remaining information may be withheld under section 552.139 of the Government Code.

The department, IBM, and the comptroller also claim that the remaining information is confidential under section 552.101 of the Government Code. 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 exception encompasses information made confidential by statute. Section 2059.055 of the Government Code provides:

(b) Network security information is confidential under this section if the information is:

- (1) related to passwords, personal identification numbers, access codes, encryption, or other components of the security system of a state agency;
- (2) collected, assembled, or maintained by or for a governmental entity to prevent, detect, or investigate criminal activity; or
- (3) related to an assessment, made by or for a governmental entity or maintained by a governmental entity, of the vulnerability of a network to criminal activity.

Gov't Code § 2059.055(b). Upon review, we find that the department, IBM, and the comptroller have failed to establish that any portion of the remaining information at issue is related to the security system of a state agency, used to prevent, detect, or investigate criminal activity, or related to an assessment of the vulnerability of a network to criminal activity. Therefore, the department may not withhold any of the remaining information at issue under section 552.101 of the Government Code in conjunction with section 2059.055 of the Government Code.

You also state that portions of the remaining information are protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are protected by copyright. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of materials protected by copyright, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

In summary, the department need not release the information we have marked which is not subject to the Act. The department must withhold the information we have marked under section 552.139 of the Government Code. The remaining information must be released to the requestor, but any information protected by copyright may only be released in accordance with copyright law.

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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, 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 challenge 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 Office of the Attorney General 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. 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,



Chris Schulz  
Assistant Attorney General  
Open Records Division

CS/eb

Ref: ID# 307090

Enc. Submitted documents

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