



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 30, 2011

Ms. Ruth H. Soucy
Deputy General Counsel for Open Records
Texas Comptroller of Public Accounts
P.O. Box 13528
Austin, Texas 78711-3528

OR2011-09362

Dear Ms. Soucy:

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# 424227 (Comptroller ID# 7191780949).

The Texas Comptroller of Public Accounts (the "comptroller") received a request for nine categories of information relating to a data disclosure and legislation regarding information security. You state the comptroller does not possess some of the requested information.¹ You also state some of the requested information either has been or will be released. You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.106, 552.107, 552.108, 552.111, and 552.139 of the Government Code. You also believe some of the submitted information may implicate the interests of Gartner, Inc. ("Gartner"). You inform us the comptroller notified Gartner of this request for the information in question and of its right to submit arguments to this office as to why the information should not be released.² We have considered your arguments and reviewed the

¹We note the Act does not require a governmental body to release information that did not exist when it received a request or create responsive information. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

²*See* Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to Gov't Code § 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances).

representative samples of information you submitted.³ We also have considered the comments we received from the Office of the Attorney General (the "OAG").⁴

You state the comptroller has requested clarification of a portion of the present request for information but has not received a response from the requestor. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information). Therefore, this decision does not address the public availability of any information pertaining to the portion of the present request that is encompassed by the comptroller's request for clarification. Should the comptroller receive clarification and seek to withhold any information responsive to the clarified request, the comptroller should request another ruling. *See* Gov't Code §§ 552.301(a), .302.

We note some of the submitted information falls within the scope of section 552.022 of the Government Code. Section 552.022(a)(3) provides for required public disclosure of "information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]" unless the information is expressly made confidential under other law. Gov't Code § 552.022(a)(3). We have marked contracts and a voucher relating to the comptroller's expenditure of public funds that are subject to disclosure under section 552.022(a)(3). Although the comptroller and the OAG claim sections 552.103 and 552.108 of the Government Code for the information in the contracts and voucher, we note those sections are discretionary exceptions that protect a governmental body's interests and may be waived. *See id.* § 552.007; *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (Gov't Code § 552.103 may be waived); Open Records Decision Nos. 665 at 2 n.5 (2000), (discretionary exceptions generally), 177 at 3 (1977) (statutory predecessor to Gov't Code § 552.108 subject to waiver). As such, sections 552.103 and 552.108 are not other law that makes information confidential for purposes of section 552.022(a)(3). Therefore, the comptroller may not withhold any of the information in the contracts and voucher under sections 552.103 or 552.108 of the Government Code.

You believe certain information in the contracts may implicate Gartner's interests. We note section 552.110 of the Government Code is a confidentiality provision for purposes of section 552.022(a)(3). An interested third party is allowed ten business days from the date of its receipt of the governmental body's notice under section 552.305 of the Government

³This letter ruling assumes the submitted representative samples of requested information are truly representative of the requested information as a whole. This ruling neither reaches nor authorizes the comptroller 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). You indicate some of the submitted information is not at issue and was submitted as background documentation. This ruling does not address the public availability of that information.

⁴*See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Code to submit its reasons, if any, as to why information relating to the third party should not be released. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this decision, this office has received no correspondence from Gartner. Thus, as Gartner has not demonstrated any of the information in the submitted contracts is proprietary for purposes of the Act, the comptroller may not withhold any of the information at issue on the basis of any interest Gartner may have in the information. *See id.* § 552.110(a)-(b); Open Records Decision Nos. 552 at 5 (1990), 661 at 5-6 (1999). Therefore, the comptroller must release the marked contracts and voucher pursuant to section 552.022(a)(3) of the Government Code.

We note some of the information to be released is protected by copyright. A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *See* Open Records Decision No. 180 at 3 (1978); *see also* Open Records Decision No. 109 (1975). A custodian of public records also must comply with copyright law, however, and is not required to furnish copies of records that are copyrighted. *See* ORD 180 at 3. A member of the public who wishes to make copies of copyrighted materials 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.

Next, we address section 552.108 of the Government Code. Section 552.108(a)(1) excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]” Gov't Code § 552.108(a)(1). Generally, a governmental body must reasonably explain how and why section 552.108 is applicable to the information at issue. *See id.* § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). We note section 552.108 is applicable only to records created by an agency, or a portion of an agency, whose primary function is the investigation of crimes and enforcement of criminal laws. *See* Open Records Decision Nos. 493 (1988), 287 (1981). Section 552.108 is generally not applicable to records created by an agency whose chief function is essentially regulatory in nature. *See* Open Records Decision No. 199 (1978).

You state the comptroller is a law enforcement agency for purposes of administering the Tax Code. *See A&T Consultants, Inc. v. Sharp*, 904 S.W.2d 668, 678-79 (Tex. 1995). However, you have not explained how the information the comptroller seeks to withhold under section 552.108 pertains to the administration of the Tax Code. Thus, the comptroller has not established it is a law enforcement entity for purposes of section 552.108 in the context of the information at issue. We note section 552.108 also may be invoked by the proper custodian of information relating to an investigation or prosecution of criminal conduct. *See* Open Records Decision No. 474 at 4-5 (1987). Where a non-law enforcement agency possesses information relating to a pending case of a law enforcement agency, the custodian of the records may withhold the information under section 552.108 if it demonstrates the information is related to the pending case, and this office is provided with a representation from the law enforcement entity that it wishes to withhold the information. The OAG

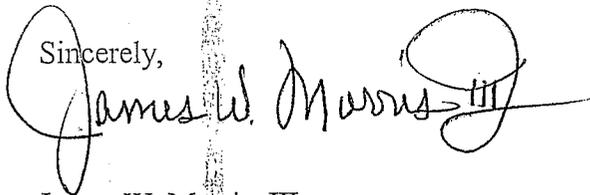
objects to release of the remaining information at issue under section 552.108(a)(1) and states release of the remaining information would interfere with a pending criminal investigation by the OAG's Law Enforcement Division. Based on the OAG's representations, we conclude the comptroller may withhold the rest of the submitted information under section 552.108(a)(1) of the Government Code. *See Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975) (court delineates law enforcement interests present in active cases), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976).

In summary, the comptroller (1) must release the marked contracts and voucher pursuant to section 552.022(a)(3) of the Government Code, but may only release copyrighted information in accordance with copyright law, and (2) may withhold the rest of the submitted information under section 552.108(a)(1) of the Government Code. As we are able to make these determinations, we need not address your other arguments against disclosure.

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

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



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

JWM/em

Ref: ID# 424227

Enc: Submitted documents

c: Requestor
(w/o enclosures)

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