



ATTORNEY GENERAL OF TEXAS  
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July 18, 2011

Mr. James G. Nolan  
Open Records Attorney  
Texas Comptroller of Public Accounts  
P.O. Box 13528  
Austin, Texas 78711-3528

OR2011-10182

Dear Mr. Nolan:

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# 424101 (Comptroller ID No. 7184050572).

The Texas Comptroller of Public Accounts (the "comptroller") received a request for specified contracts entered into by the comptroller since March 1, 2011.<sup>1</sup> You state some information will be released to the requestor. You claim some of the submitted information is excepted from disclosure pursuant to section 552.139 of the Government Code. Additionally, you state release of this information may implicate the proprietary interests of ACS State & Local Solutions, Inc. ("ACS"); Gartner, Inc. ("Gartner"); and the Texas Department of Information Resources ("DIR"). Accordingly, you state, and submit documentation showing, you notified the third parties of the request for information and of their right to submit arguments to this office as to why the submitted information should not be released. *See* Gov't Code § 552.305(d) (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances). We have received comments from Gartner and DIR. We have considered the submitted arguments and reviewed the submitted information.

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<sup>1</sup>You state the comptroller received clarification of the request for information. *See* Gov't Code § 552.222(b) (stating that if information requested is unclear to governmental body or if a large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used).

Initially, we note, and you acknowledge, the comptroller did not fully comply with section 552.301 of the Government Code. Subsection (b) of section 552.301 requires a governmental body requesting an open records ruling from this office to state the exceptions that apply not later than the tenth business day after the date of receiving the written request. Gov't Code § 552.301(b). The comptroller did not raise section 552.139 of the Government Code until after the ten-business-day deadline had passed. Generally, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ); *see also* Open Records Decision No. 630 (1994). The presumption that information is public under section 552.302 can generally be overcome by demonstrating the information is confidential by law or third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3, 325 at 2 (1982). Section 552.139 of the Government Code and the interests of third parties can provide compelling reasons to overcome this presumption; therefore, we will consider these arguments for the information at issue.

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) of the Government Code to submit its reasons, if any, as to why requested information relating to it should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from ACS. We, thus, have no basis for concluding that any portion of the submitted information constitutes proprietary information of ACS. *See id.* § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, 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. Accordingly, the comptroller may not withhold any of the submitted information based on the proprietary interests of ACS.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses information protected by other statutes. DIR raises section 552.101 in conjunction with section 2059.055 of the Government Code. The comptroller and DIR also state some information in DIR's contract is confidential under section 552.139 of the Government Code. We note section 552.139 encompasses restricted information made confidential by section 2059.055. *Id.* § 552.139(a). Thus, we will address the comptroller's and DIR's arguments under these provisions together. Section 552.139 of the Government Code provides:

- (a) Information is excepted from [required public disclosure] if it is information that relates to computer network security, to restricted

information under Section 2059.055 [of the Government Code], or to the design, operation, or defense of a computer network.

(b) The following information is confidential:

- (1) a computer network vulnerability report;
- (2) any other assessment of the extent to which data processing operations, a computer, a computer program, network, system, or system interface, 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 containing sensitive or critical information is vulnerable to alteration, damage, erasure, or inappropriate use[.]

*Id.* § 552.139(a), (b)(1)-(2). Section 2059.055 of the Government Code provides in pertinent part:

(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.

*Id.* § 2059.055(b). The comptroller and DIR state the marked information in the DIR contract relates to the comptroller's computer network security. The comptroller states the marked information reveals network security issues, including assessments of possible network weaknesses, network vulnerabilities, and security controls and protocols. The comptroller contends release of the marked information could facilitate unauthorized access to confidential data and compromise comptroller network security and "provide a roadmap for attackers to compromise [the comptroller's] defenses protecting confidential data." Based on your representations and our review, we find you have demonstrated some of the information, which we have marked, relates to computer network security, defense of the comptroller's computer network, or an assessment of the comptroller's computer network

vulnerabilities. Accordingly, the comptroller must withhold the information we have marked under section 552.139 of the Government Code. However, the comptroller and DIR have not demonstrated how the remaining information relates to computer network security, restricted information under section 2059.055, or to the design, operation, or defense of the comptroller's computer network as contemplated in section 552.139(a). Further, we find the comptroller and DIR have failed to explain how the remaining information consists of a computer network vulnerability report or assessment as contemplated by section 552.139(b). Accordingly, the comptroller may not withhold any of the remaining information under section 552.139 of the Government Code or section 552.101 of the Government Code in conjunction with section 2059.055 of the Government Code.

Gartner raises section 552.101 of the Government Code in conjunction with section 552 of title 5 of the United States Code, the federal Freedom of Information Act ("FOIA"). *See* 5 U.S.C. § 552. FOIA applies to an "agency," which is defined as "any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency[.]" *See id.* § 552a(a)(1) (referring to 5 U.S.C. § 552(f) for definition of "agency"). In this instance, the information at issue was created for and is maintained by the comptroller, which is a state, and not a federal, agency. This office and the courts have stated FOIA applies only to federal agencies and not to state or local agencies. *See Davidson v. Georgia*, 622 F.2d 895, 897 (5th Cir. 1980) (state governments not subject to FOIA); Attorney General Opinion MW-95 (1979) (neither FOIA nor federal Privacy Act applies to records held by state or local governmental bodies in Texas). Accordingly, the comptroller may not withhold Gartner's submitted information under section 552.101 in conjunction with FOIA.

We understand Gartner to claim information relating to its employees and subcontractors is confidential under common-law privacy. Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which protects information that (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *Id.* at 681-82. We note that education, prior employment, and personal information are not ordinarily private information subject to section 552.101. *See* Open Records Decision Nos. 554 (1990), 448 (1986). Upon review, we determine Gartner has failed to demonstrate any of the information at issue is intimate or embarrassing and of no legitimate public interest. Therefore, we find the comptroller may not withhold any portion of the information at issue under section 552.101 in conjunction with common-law privacy.

Gartner also argues portions of the submitted information are excepted under section 552.110(b) of the Government Code. Section 552.110(b) protects "[c]ommercial 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[.]” Gov’t Code § 552.110(b). This exception to disclosure requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. *Id.* § 552.110(b); Open Records Decision No. 661 (1999).

Upon review, we find Gartner has established the release of its customer information, which we have marked, would cause the company substantial competitive harm. Thus, the comptroller must withhold this information under section 552.110(b) of the Government Code. We find, however, Gartner has made only conclusory allegations that the release of any of the remaining information would result in substantial damage to the company’s competitive position. Thus, Gartner has not demonstrated that substantial competitive injury would result from the release of any of the remaining information. *See* ORD 661 (for information to be withheld under commercial or financial information prong of section 552.110, business must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue). Further, the terms of a contract with a governmental body are generally not excepted from public disclosure. *See* Gov’t Code § 552.022(a)(3) (contract involving receipt or expenditure of public funds expressly made public); Open Records Decision Nos. 541 at 8 (1990) (public has interest in knowing terms of contract with state agency), 319 at 3 (1982) (information relating to organization and personnel, professional references, market studies, and qualifications are not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Accordingly, the comptroller may not withhold any of the remaining information under section 552.110(b) of the Government Code.

We note some of the remaining information may be subject to section 552.117 of the Government Code, which excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024.<sup>2</sup> Act of May 24, 2011, 82<sup>nd</sup> Leg., R.S., S.B. 1638, § 2 (to be codified as an amendment to Gov’t Code § 552.117(a)). Section 552.117 also encompasses personal cellular telephone numbers, provided that a governmental body does not pay for the cellular telephone service. *See* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Accordingly, the comptroller must withhold the cellular telephone number we have marked under section 552.117(a)(1) to the extent the employee concerned timely elected under section 552.024 to keep his

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<sup>2</sup>The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

information confidential and the employee concerned paid for the cellular telephone service with his own funds.

We note a portion of the remaining information appears to be 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 copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; see Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, 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.

In summary, the comptroller must withhold the information we have marked under section 552.139 of the Government Code. The comptroller must withhold the information we have marked under section 552.110(b) of the Government Code. The comptroller must also withhold the cellular telephone numbers we have marked under section 552.117(a)(1) of the Government Code to the extent the employee concerned timely elected under section 552.024 of the Government Code to keep his information confidential and the employee concerned paid for the cellular telephone service with his own funds. The comptroller must release the remaining information, but any information that is protected by copyright may only be released in accordance with copyright law.

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](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,



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Open Records Division

JB/dls

Ref: ID# 424101

Enc. Submitted documents

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