



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 4, 2013

Ms. Sharon Alexander
Associate General Counsel
Texas Department of Transportation
125 East 11th Street
Austin, Texas 78701-2483

OR2013-15341

Dear Ms. Alexander:

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# 498292.

The Texas Department of Transportation (the "department") received a request for (1) all Gartner, Inc. ("Gartner") monthly status reports and final reports submitted to the department during a specified time period and (2) all QAT/Texas Project Delivery Framework cases and plans submitted to the Legislative Budget Board by the department during a particular period of time. You state you have released information responsive to part two of the request. You claim some of the remaining requested information is excepted from disclosure under sections 552.027, 552.111, and 552.139 of the Government Code.¹ Additionally, you state release of the remaining information may implicate the interests of Gartner. Accordingly, you have notified Gartner of the request for information and of the company's right to submit arguments to this office as to why the information should not be released. *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 considered

¹Although you also raise section 552.101 of the Government Code in conjunction with section 552.139, we note section 552.101 does not encompass other exceptions under the Act.

the exceptions you claim and reviewed the submitted information, portions of which consist of representative samples.²

You contend the department is not required to release the information in Exhibit E, consisting of reports submitted to the department by Gartner as reference material, because this information “may be” commercially available. Section 552.027 of the Government Code provides as follows:

(a) A governmental body is not required under this chapter to allow the inspection of or to provide a copy of information in a commercial book or publication purchased or acquired by the governmental body for research purposes if the book or publication is commercially available to the public.

(b) Although information in a book or publication may be made available to the public as a resource material, such as a library book, a governmental body is not required to make a copy of the information in response to a request for public information.

(c) A governmental body shall allow the inspection of information in a book or publication that is made part of, incorporated into, or referred to in a rule or policy of a governmental body.

Gov't Code § 552.027. Section 552.027 is designed to alleviate the burden of providing copies of commercially available books, publications, and resource materials maintained by governmental bodies, such as telephone directories, dictionaries, encyclopedias, statutes, and periodicals. You assert the information in Exhibit E “may be” available through commercial means. Upon review, we find you have failed to demonstrate the information at issue came from the type of commercial book or publication contemplated by section 552.027. *See id.* § 552.027(a). Therefore, the information at issue is not subject to section 552.027, and must be released unless it falls within an exception to disclosure. *Id.* §§ 552.006, .021, .301, .302.

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 requested information relating to it should be withheld from disclosure. *See id.* § 552.305(d)(2)(B). As of the date of this letter, this office has not received comments from Gartner explaining why the company's information should not be released to the requestor. Thus, we have no basis to conclude that the release of any portion of the submitted information would implicate the interests of Gartner. *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

²We assume the representative samples of 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 those records contain substantially different types of information than those submitted to this office.

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, we conclude the department may not withhold any of the submitted information on the basis of any interest Gartner may have in the information.

Next, we note Exhibits B and C are subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 522.108[.]

Gov't Code § 552.022(a)(1). Exhibits B and C consist of completed reports made of, for, or by the department that are subject to section 552.022. The department must release the completed reports pursuant to subsection 552.022(a)(1) unless they are excepted from disclosure under section 552.108 of the Government Code or expressly made confidential under the Act or other law.³ *See id.*

Although you raise section 552.111 of the Government Code for Exhibit C, this section is a discretionary exception to disclosure and does not make information confidential under the Act. *See Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 470 at 6-7 (1987) (deliberative process privilege under statutory predecessor to section 552.111 subject to waiver).* As such, section 552.111 does not make information confidential for the purposes of section 552.022. Therefore, the department may not withhold any of the information in Exhibit C under section 552.111 of the Government Code.

You claim Exhibit B, which is also subject to section 552.022, is protected from disclosure under section 552.139 of the Government Code. Because section 552.139 can make information confidential for purposes of section 552.022, we will consider your claim under this section for Exhibit B.

Section 552.139 provides, in part:

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

³We note the department does not claim section 552.108 as an exception to disclosure.

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; [and]
- (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[.]

Gov't Code § 552.139(a), (b)(1)-(2). Section 2059.055 of the Government Code provides in 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). You state Exhibit B is a security assessment report that contains the department's detailed network security information, including potential vulnerabilities of the department's network. Based on your representations and our review of the information, we agree the department must withhold Exhibit B under section 552.139 of the Government Code.

We note the remaining submitted 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 department must withhold Exhibit B under section 552.139 of the Government Code. The remaining information must be released; however, any information 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.texasattorneygeneral.gov/open_orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/dls

Ref: ID# 498292

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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