



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 23, 2009

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

OR2009-15098

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# 358967.

The Texas Department of Information Resources (the "department") received a request for the following information: 1) the date of the most recent backup of the Secretary of State's (the "SOS") server, prior to a recent failure of the server, and the general frequency that the server is supposed to be backed up; and 2) a specified letter sent from the department to IBM pertaining to the restoration and backup of specified Office of the Attorney General (the "OAG") databases.¹ You claim the requested information is excepted from disclosure under sections 552.101 and 552.139 of the Government Code. You further inform us that release of the requested information may implicate the proprietary interests of IBM, the SOS, and the OAG. Accordingly, you have notified IBM, the SOS, and the OAG of the request and of their 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 the SOS. We have considered the submitted arguments and reviewed the submitted information.

¹We note the requestor narrowed the first category of her request. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information).

Initially, we note that most of the submitted information is no longer encompassed by the narrowed request and is not responsive to this request for information. This ruling does not address the public availability of any information that is not responsive to the request, and the department is not required to release this information in response to the instant request.

Next, 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, we have not received any arguments from IBM or the OAG for withholding any of the information at issue. Therefore, we have no basis to conclude that the release of the information at issue would harm IBM's or the OAG's proprietary interests. *See id.* § 552.110(b); 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). Accordingly, the department may not withhold any of the submitted information on the basis of any proprietary interest IBM or the OAG may have in the information.

The department asserts that the requested letter sent to IBM is confidential under section 552.101 of the Government Code due to a confidentiality provision contained in a master services agreement between the department and IBM. 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. The department explains that the subject matter of the letter relates to issues that are to be resolved by IBM and the department using a confidential informal dispute resolution process, as specified in the master services agreement. However, the department has not directed our attention to any law, nor are we aware of any law, that makes the submitted letter confidential. *See, e.g.*, Open Records Decision Nos. 611 at 1 (1992) (common-law privacy), 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality). Additionally, we note that information is not confidential under the Act simply because the party that submitted the information anticipates or requests that it be kept confidential. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot overrule or repeal provisions of the Act by agreement or contract. *See* Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) ("[T]he obligations of a governmental body under [the Act] cannot be compromised simply by its decision to enter into a contract."), 203 at 1 (1978) (mere expectation of confidentiality by person supplying information does not satisfy requirements of statutory predecessor to section 552.110). Therefore, unless the submitted letter sent to IBM by the department falls within an exception to disclosure, it must be released, notwithstanding any expectation or agreement to the contrary. Therefore, the department may not withhold the submitted letter under section 552.101 of the Government Code.

The department and the SOS both raise section 552.139 of the Government Code. As recently amended by the 81st Legislature, section 552.139 provides as follows:

(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; 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.

(c) Notwithstanding the confidential nature of the information described in this section, the information may be disclosed to a bidder if the governmental body determines that providing the information is necessary for the bidder to provide an accurate bid. A disclosure under this subsection is not a voluntary disclosure for purposes of Section 552.007 [of the Government Code].

Gov't Code § 552.139. The department and the SOS assert that the requested information pertaining to the backup of the SOS's server relates to the security of the department's computer network. The SOS explains that the requested SOS server backup information relates to the SOS's computer system's defense and security. The department contends that knowledge of the date of the SOS server backup, prior to the recent failure of the server, and frequency of server backups could compromise the server and other systems, potentially causing the backups to fail. Additionally, the department argues that knowledge of the frequency of backups could be used "to gain unauthorized access to State data, including confidential or sensitive citizen information, held within the server and other computer systems." Based on these representations and our review of the information at issue, we conclude that the department must withhold the requested date of the SOS's server backup, prior to a recent failure of the server, and the general frequency of the server backup under section 552.139 of the Government Code.

The department also asserts that the requested letter from the department to IBM is excepted from disclosure under section 552.139(b)(2) of the Government Code. However, the department has not demonstrated that the letter at issue consists of a computer network

vulnerability assessment or report as contemplated by section 552.139(b). Consequently, none of the remaining information may be withheld under section 552.139 of the Government Code.

In summary, the department must withhold the requested date of the most recent backup of the SOS's server, prior to a recent failure of the server, and the general frequency that the server is supposed to be backed up under section 552.139 of the Government Code. The remaining responsive information must be released to the requestor.

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,



Amy L.S. Shipp
Assistant Attorney General
Open Records Division

ALS/rl

Ref: ID# 358967

Enc. Submitted documents

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(w/o enclosures)

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