



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

December 14, 1995

Mr. Gene Snelson
Staff Attorney
Legal Services Division
Texas Natural Resource Conservation Commission
P.O. Box 13087
Austin, Texas 78711-3087

OR95-1414

Dear Mr. Snelson:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your requests were assigned ID#s 34160 and 35564.

The Texas Natural Resource Conservation Commission (the "commission") received two requests for information. The first request is for all documents submitted to the commission by Baylor University ("Baylor") or the manufacturers of any on-site aerobic wastewater treatment systems tested at or by Baylor (or any other facility), and submitted to the commission for the purpose of seeking approval by the commission of such units for sale and installation in Texas. The second request is a later request for the same documents. In response to the first request, you claim that the requested information is excepted from disclosure under sections 552.101, 552.102, 552.104, and 552.110 of the Government Code. In response to the second request, you claim that the requested information is excepted from disclosure under sections 552.101 and 552.110 of the Government Code.

You state that at least one of the requested documents was marked "confidential" by the party who submitted it to the commission.¹ You therefore assert that the party submitting the information may claim an exception to disclosure for this material and two other responsive documents. Pursuant to section 552.305 of the Government Code,

¹We note that information is not excepted from disclosure merely because it is furnished with the expectation that it will be kept confidential. See, e.g., Open Records Decision No. 180 (1977).

this office informed McGrew Construction Company, Inc., Southern Manufacturing Company, Murphy Cormier, General Contractor, Inc., Texas Aerobic Sewage Treatment Service, Baylor, and Ecological Tanks, Inc. ("ETI") of their obligation to claim the exceptions to disclosure they believe apply to the requested information, together with their arguments as to why they believe the claimed exceptions apply. Only Baylor and ETI responded. Because the other companies did not claim any exception to the final reports on their systems, the commission may not withhold these final reports.

Baylor and ETI responded to the first request, claiming that pages 1 through 14 of and Appendix "B" to a final report should be withheld from disclosure under section 552.110, and Baylor claims that section 552.104 excepts from disclosure an application to the American National Standards Institute (the "ANSI application"). ETI and Baylor subsequently notified this office that they were withdrawing their claim of confidentiality as to the final report and intend to release that information to the requestor. Therefore, we need not consider their arguments concerning ETI's final report.

After making its claim of confidentiality for the ANSI application, Baylor requested that the commission return the ANSI application to Baylor. Baylor argues that because "there are no rules, regulations or statutory provisions, nor any judicial decrees, which obligate Baylor University to submit this information to [the commission], . . . Baylor University requests that the information simply be returned to Baylor University and that the confidentiality issue then be, accordingly, considered as moot." However, although Baylor submitted the ANSI application to the commission voluntarily, the application is still subject to the Open Records Act. Section 552.021 of the Government Code creates a presumption that information "collected, assembled, or maintained . . . by a governmental body" or for such a body if it "owns . . . or has a right of access to" the information, is available to the public.² See Open Records Decision No. 363 (1983) (concluding that information is public unless it falls within specific exception). The ANSI application falls within this definition because, at the time the request was received, the application was maintained by the commission. See Open Records Decision No. 530 (1989) (requestor's right of access to information construed as of time request made). Therefore, unless an exception to disclosure applies, the commission may not withhold the ANSI application.

Baylor claims that section 552.104 excepts the ANSI application from disclosure. Section 552.104 excepts information that, if released, would give advantage to a competitor or bidder. The purpose of this exception is to protect the interests of a governmental body in competitive bidding situations. See Open Records Decision No. 592 (1991). Section 552.104 is not designed to protect the interests of private parties that submit information to a governmental body. *Id.* at 8-9. As the exception was

²This provision is now found in section 552.002 of the Government Code, as amended in the recent legislative session. Act of May 29, 1995, 74th Leg., R.S., ch. 1035, § 2, 1995 Tex. Sess. Law Serv. 5127, 5127 (Vernon) (to be codified as Gov't Code § 552.002).

developed to protect a governmental body's interests, that body may waive section 552.104. *See id.* at 8. The commission did not claim that section 552.104 excepts the requested information from disclosure. As the only interest involved appears to be that of a private entity, Baylor, section 552.104 does not apply to protect its interest. Therefore, the commission may not withhold the ANSI application under section 552.104.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



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Open Records Division

SES/rho

Ref.: ID# 34160

Enclosures: Submitted documents

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