Office of the Attorney General · State of Texas
John Cornyn

September 8, 1999

Mr. William M. Buechler
Buechler & Associates, P.C.
814 San Jacinto Blvd., Suite 408
Austin, Texas 78701-2404

OR99-2496

Dear Mr. Buechler:

You represent the Crowley Independent School District (the "school district"). On behalf of the school district, you have asked 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# 127123.

The school district received an open records request for "[o]ne copy of the video program filmed at the Wedge Program presentation," as well as "every survey completed by members of the audience," following the "Wedge" and "Aim for Success" programs. In response to the request, you submit to this office for review the information at issue. You state that the school district will make available to the requestor the responsive survey information. You contend, however, that the submitted videotape "involves the property and privacy interests of a third party," and is, therefore, excepted from required public disclosure under sections 552.101, 552.104, and 552.110 of the Government Code. You also assert that the school district need not make the requested copy of the videotape, because release of the information implicates the copyright interests of a third party. We have considered the exceptions and arguments you have raised and reviewed the submitted information.

Initially, we address your assertion that the requested videotape is subject to copyright protection on behalf of the Health Education Learning Project ("HELP"). You have submitted a copy of a letter from HELP, and state that "[i]t is undisputed that HELP has asserted copyright protection over the videotape produced on May 27, 1999, at the Crowley Middle School." Based on the submitted information, it appears that HELP "presented a consolidated version of the 'WEDGE' program to parents." The school district obtained permission from HELP "to videotape the program to allow parents of sixth graders to view it at a later time." You represent that "the school district has been willing to allow an

examination of the tape on the school's premises," however, based on the third-party interests the school district has declined to make a copy of the videotape.

At the outset we note that a full analysis of the Federal Copyright Act (the "FCA"), title 17 of the United States Code, is beyond the scope of this ruling. The federal copyright law does not make information confidential, but rather gives the copyright holder the exclusive right to reproduce his work, subject to another person's right to make fair use of it. 17 U.S.C. §§ 106, 107. Assuming that HELP in fact holds a legal, enforceable copyright on the information at issue, we believe that any copying must be consistent with federal copyright law. *See* 17 U.S.C. § 101 *et seq.*; Attorney General Opinion JM-672 (1987) (custodian of public records must comply with copyright law and is not required to furnish copies of copyrighted records owned by third-parties).

We believe the Public Information Act and the FCA are compatible. Consequently, the FCA may not be used to deny access to the information sought by the requestor under the act. *See* Open Records Decision No. 660 (1999). Thus, assuming the requested materials are in fact copyrighted, under the Public Information Act, the school district must nevertheless allow the requestor access to inspect the information.[1] *See* Gov't Code § 552.221. However, since it is the requestor's responsibility to adhere to the federal copyright law, then the requestor assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.[2] *See* Open Records Decision No. 550 (1990).

We next consider the applicability of the claimed exceptions pursuant to section 552.101, 552.104 and 552.110 of the Government Code. We first consider whether section 552.101 excepts the submitted videotape. Section 552.101 excepts from required public disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. We have examined the submitted information and we are not aware of any law that makes the requested information confidential. Accordingly, we conclude the

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[1]A governmental body is not required to furnish copies of copyrighted records; the public may inspect and make copies of such records unassisted by the governmental body, but it assumes the duty and risk of compliance with copyright law. Open Records Decision No. 550 (1990). *See* Open Records Decision Nos. 660 (1999), 505 (1988) (federal law, not Public Information Act, governs right to reproduce copyrighted records).

[2]The FCA gives copyright protection to "original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, whether directly or with the aid of a machine or device." Furthermore, the FCA gives copyright owners the exclusive right to control the use of copyrighted works. *See* 17 U.S.C. § 106. This right is subject to exceptions, the most important of which may be the "fair use" of the works. *See id.* § 107.

school district may not withhold the submitted information based on section 552.101 of the Government Code.[3]

Section 552.104 is not applicable to protect the proprietary interests of a third party. *See* Open Records Decision No. 592 (1991). Section 552.104 protects the government's interest in purchasing by assuring that the bidding process will be truly competitive. *See* Open Records Decision Nos. 583 (1990), 554 (1990). Therefore, you may not withhold the requested information under section 552.104.

Section 552.110 protects the property interests of private persons by excepting from disclosure two categories of information: (1) "[a] trade secret"[4] and (2) "commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision." Pursuant to section 552.305, we notified HELP, whose proprietary interests may be implicated by this request for information, and provided them with an opportunity to claim that the information at issue is excepted from disclosure. *See* Gov't Code § 552.305; Open Records Decision No. 542 (1990). The notification states that if HELP does not respond within 14 days of receipt, this office will assume that they have no privacy or property interest in the requested information. Besides the letter from HELP to the school district, HELP did not respond to our notification. Therefore, we have no basis to conclude the videotape at issue is excepted from required public disclosure under section 552.110. Accordingly, under the facts presented, we do not believe that section 552.110 is implicated by the pending request for information.

Finally, we note that in its brief to the school district, HELP offers to provide "an identical brand blank videotape to compensate for the cost of the videotape used by the school district, and requests "the immediate return of the videotape" at issue. The information at issue appears to have been created or utilized by the school district in connection with the transaction of official business. *See* Gov't Code § 552.002(a)(2) (defining public information). Furthermore, "public information," as defined by section 552.002, must be produced for inspection or duplication or both, Gov't Code § 552.221, unless an applicable subchapter C exception applies to the information, *id.* §§ 552.101-.124; *see* Open Records Decision Nos. 565 (1990), 549 (1990), 470 (1987). We advise both the school district and HELP that the videotape at issue is a public record and the school district should follow the

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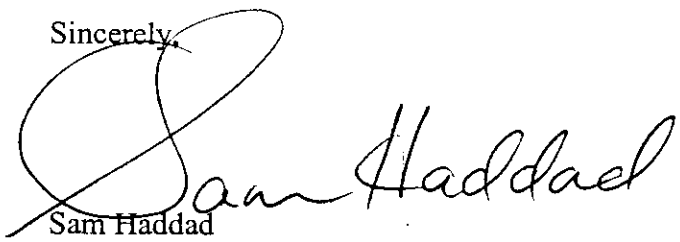
[3]We note that information is not confidential under the act simply because the party submitting it to a governmental body anticipates or requests that it be kept confidential. Open Records Decision No. 479 (1987). Furthermore, corporations do not have a protected common-law privacy interest. Open Records Decision Nos. 620 (1993), 192 (1978).

[4]This office cannot conclude that information is a trade secret unless the governmental body or company has provided evidence of the factors necessary to establish a trade secret claim. Open Records Decision No. 402 (1983).

requisite records retention policies. *See generally* Local Gov. Code § 203.041 *et seq.* (local government record retention schedules).

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 regarding any other records. If you have questions about this ruling, please contact our office.

Sincerely,



Sam Haddad
Assistant Attorney General
Open Records Division

SH/nc

Ref.: ID# 127123

Encl. Submitted videotape

cc: Ms. Jeanne Donovan
Texas Education Consumers Association
5208 Starry Ct.
Fort Worth, Texas 76123
(w/o enclosures)