



June 4, 2002

Ms. Lindy M. Tober
Assistant County Attorney
Atascosa County
914 Main Street, Suite 102
Jourdanton, Texas 78026

OR2002-3039

Dear Ms Tober:

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# 163140.

The Atascosa County Clerk's Office (the "county"), which you represent, received a request for an electronic copy, in "any digital form," of any recorded real property documents and indices that are maintained in digital form. The requestor states that the request "is not asking for programming or manipulation of the data, only that it be copied from the computer to some type of digital media." As to the recorded real property document information that exists in digital form, the county clerk has represented to the requestor that the county "has the capability of downloading images" of the documents and of copying that information "to a 1GB Jaz Disk."¹ As to the corresponding real property indices that exist in digital form, the county clerk has represented to the requestor that "the only way [the county] can [itself] provide 'copies' in digital form would be from a 'back-up' tape." You indicate that the county is claiming no exceptions to required public disclosure and is willing to provide the requested information in the manner contemplated. In the case of the real property documents, the county is willing to copy the information to disk. In the case of the

¹The requestor was provided an estimated cost for an electronic copy of the documents. We note that this decision does not address whether any of the charges in the estimate, or indeed any of the charges proposed by either the county or the county's vendor, would be permissible under the Act. Questions concerning charges under the Act should be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

corresponding index information, the county is willing to provide the requestor a duplicate copy of a back-up tape containing that information. The requestor has submitted comment to this office. *See* Gov't Code § 552.304. Among other things, she states that the county's contemplated manner of responding to the request is acceptable to the requestor.

You state, however, that Government Records Services Inc. ("GRS"), a private third party vendor performing services for the county, has informed you "that to manipulate the information to provide digital copies to the requestor, some proprietary information about [GRS's] software may be involved." Therefore, although the county has no objection to copying and providing the information to the requestor in the manner contemplated above, you have notified GRS of the open records request in accordance with section 552.305 of the Government Code.² GRS responded to your notice and makes various arguments to this office, including an assertion that the information is excepted from disclosure by section 552.110 of the Government Code. We have considered all of the submitted comments, arguments, and representations.

GRS provided this office an affidavit from a GRS employee. This affidavit explains that GRS provides the county "computer assisted recordation and access to filed documents through hardware and software owned by [GRS]." In connection with this service, the affidavit states that GRS leases hardware and software to the county, including one or more scanning machines for use by the county. In pertinent part, the affidavit then states:

These scanning machines and the associated software are and remain at all times the exclusive property of [GRS]. Employees [of the county] are authorized and licensed to use these scanning machines to input original filed land title documents, such as deeds, into the machine, whereby the image of those documents is converted to a digital format and transmitted electronically to the offices of [GRS]. There, again utilizing equipment and software owned by [GRS], our employees store the scanned information in the form of digital information bytes on computer disks. . . . In addition, [GRS] employees prepare, also in digital format, an index of the county's documents to which the newly scanned document information is added. Access to the document stored by [GRS] on its premises is gained through a computer workstation [at the county, which is leased from GRS]. A county employee or member of the public wishing to access the records is directed to this computer workstation and invited to retrieve the documents through the medium of a software program owned, maintained, and copyrighted by [GRS]. This computer program, called "20/20 Perfect Vision" was originally created in 1993 by [GRS] and has been frequently updated and revised. . . .

²*See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Public Information Act in certain circumstances).

It is this software which allows a user to recover the image of the document scanned into the system. Without this software, the digital information in question is essentially meaningless and unusable. This proprietary software of [GRS] is not sold or authorized for duplication by any user. Instead, its sole use is part of the integrated service [GRS] provides to [the county].

GRS acknowledges that the information responsive to the request, *i.e.*, the electronic data that comprises the real property documents and corresponding indices, “is not considered proprietary” by GRS. Indeed, there is no dispute that this information is the property of the county. Further, we conclude that the responsive information is a matter of public record and is not excepted from required public disclosure by any of the Act’s exceptions. *See* Local Gov’t Code § 191.006. GRS represents, however, that “the only known existing software which could access [the responsive information] and create the images or indexes requested would be the proprietary copyrighted software belonging to GRS.” The county does not dispute this assertion. Thus, in order for the county to copy the responsive information in the manner contemplated above, the county would have to use GRS’s proprietary software.³

GRS also states that “the production [of the requested information] in a ‘digital format’ would be inextricably linked with [GRS’s] proprietary software[.]” Uncertain of whether this means that the electronic copies the county contemplates making would contain software code that is proprietary to GRS, this office requested clarification. Specifically, this office asked GRS to explain the format into which its software would copy the responsive information if the county responded to the request in the manner contemplated. GRS responded that the format would differ according to the information at issue. With respect to the data that comprises the real property documents, GRS’s software would copy the data into “Tagged Image File Format” (“TIFF”). With respect to the data that comprises the corresponding indices, GRS’s software would copy the data into “American Standard Code for Information Interchange” (“ASCII”).

We must initially observe that neither of the file formats into which the information would be copied by the county is proprietary to GRS. Rather, both file formats are specifically designed to allow the transfer of information across different platforms, from one computer

³ In the affidavit of the GRS employee referenced above, GRS asserts that “the only alternative [to GRS making a copy of the requested information] would be to allow a requesting company to copy and use [GRS’s] copyrighted software.” We must disagree with this assertion. We have no indication that the only alternative to GRS making a copy would be for a requestor to do so. Rather, it is clear from the totality of the information provided this office — by both the county and GRS — that in addition to GRS, the county currently has the in-house capability of copying the requested information. Indeed, this decision addresses GRS’s arguments against the county doing so. We explicitly do not herein address whether a requestor, rather than the county, may use GRS’s software to produce a copy of the requested information.

program to another, and between different kinds of computers.⁴ We thus have no indication that the copies the county contemplates making in response to the present request would, in fact, contain any software code of GRS that is proprietary to GRS. We shall nevertheless herein address each of GRS arguments.

We first address GRS's section 552.110 assertion. Section 552.110 of the Government Code states:

- (a) A trade secret obtained from a person and privileged or confidential by statute or judicial decision is excepted from [required public disclosure].
- (b) Commercial 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 is excepted from [required public disclosure].

Gov't Code § 552.110. Section 552.110(a) protects from public disclosure information that is subject to trade secret protection. This office has held that if a governmental body takes no position on a trade secret claim under section 552.110, we must accept a private person's claim for exception as valid if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5-6 (1990). The county has taken no position with regard to GRS's trade secret claim. Thus, we must determine whether GRS has established a *prima facie* case for trade secret protection.

The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.1958); *see also* Open Records Decision No. 552 at 2 (1990). Section 757 provides that a trade secret is

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business A trade secret is a process or device for continuous use in the

⁴TIFF is defined as "[a] bitmap graphics file format that was developed by Aldus and Microsoft for storing scanned images [which] transfers well between different platforms." *See techdictionary.com*, at <http://www.techdictionary.com/index.html>. ASCII is defined as "[t]he world-wide standard for the code numbers used by computers to represent all the upper- and lower-case Latin letters, numbers, punctuation, and related data [It] is used by most computers and printers, and because of this, text-only files can be transferred easily between different kinds of computers." *See id.*

operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939). In determining whether a *prima facie* case of trade secret has been shown for particular information, this office considers the above definition, as well as the Restatement's list of six trade secret factors:

(1) the extent to which the information is known outside of [the company]; (2) the extent to which it is known by employees and others involved in [the company's] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

GRS has not explained how release of any of the information at issue implicates the above definition of a trade secret. Regarding the above six trade secret factors, GRS addresses only one: the amount of effort or money expended by GRS in developing GRS's software information. The submitted affidavit states that the development of GRS's proprietary software "took place over a nine-year period between 1993 and 2002 and at an estimated cost of fifteen million (\$15,000,000.00) to eighteen million dollars (\$18,000,000.00)."

GRS seems to be asserting that code from its software, to the extent it might be incidentally copied through the county's contemplated manner of responding to the request, cannot be released to the requestor because it is a trade secret. The affidavit from GRS, quoted above, states that GRS's software was provided by GRS to the county for its use as part of a product and/or service that GRS marketed to the county clerk. GRS evidently provides this software for use by all of GRS's Texas county clerk clients. GRS has provided no information as to how it maintains any secrecy in the software information. Section 757 of the Restatement of Torts points out that "[m]atters which are completely disclosed by the goods which one markets cannot be his secret." *Id.* GRS also has not explained how any of the information at issue meets the definition of a trade secret. For this reason, and because GRS has provided comment only with regard to one of the six trade secret factors referenced above, we find that GRS has not made a *prima facie* case for trade secret protection. Accordingly, we conclude that none of the information at issue is excepted from required disclosure by section 552.110(a).

We next consider section 552.110(b). As stated in the plain language of this branch of section 552.110, a governmental body or third party raising this exception must provide a specific factual or evidentiary showing, not conclusory or generalized allegations, that the information at issue constitutes "commercial or financial information" and that substantial competitive injury would likely result from its disclosure. Gov't Code § 552.110(b); *see also National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

This office has held that the words "commercial or financial information" as used in section 552.110(b) refer to information that relates to the financial or commercial condition of the person or entity that provided the information to the governmental body. Open Records Decision No. 550 at 5 (1990). We have no indication that any of the software code information at issue constitutes such "commercial or financial information." GRS has not explained how the public release of any such software code would reveal any information about the financial or commercial condition of GRS. We thus conclude that none of the information at issue is excepted from required disclosure by section 552.110(b).

GRS's next argument relates to protecting the integrity of its software and the public record information contained therein. GRS first posits that the county's contemplated manner of responding to the request "involves inserting the [requestor's] disk into the [GRS] owned hardware and creating an interface with the software provided by [GRS], and with the digitized records." GRS asserts that "there are real and significant risks that copying [in this manner] by [non-GRS] personnel is likely to result in contamination of the software and/or the underlying records." This could happen, GRS claims, in instances where the requestor's disk may "not have been fully cleaned of potential viruses or other contaminants" or if the copying is performed incorrectly. We think this argument is speculative. Moreover, it rests on the incorrect assumption that the county would have to use a disk provided by the requestor. The Act specifically provides that a "governmental body is not required to copy information onto a diskette or other material provided by the requestor but may use its own supplies." Gov't Code § 552.228(c). Thus, GRS's concerns about the integrity of its software and the information contained therein do not militate against the county providing the information in the manner contemplated.

GRS's remaining arguments relate to the use of GRS's software and hardware. By way of background, GRS explains:

In January 1999, [the county] was contacted by a title company . . . to obtain updates of the county records in digital form Because of the manner in which the digitized information was stored, (i.e. randomly on a digital storage medium), it would be necessary for [the county] to utilize the Perfect Vision 20/20 © software licensed to [the county] for use inside the clerk's office. In addition, since the standard software licensed to [the county] did not allow copying of computer-stored data [except to make paper copies, it] was necessary for [GRS] to prepare an additional program to work with and as part of the Perfect Vision 20/20 © to produce the records in the format

desired. Such a computer program was in fact written and was installed through the device known as the "jaz drive" to allow it to be booted up into the computer as a supplement to the existing software package.

The above thus explains that in the past, the hardware and software that the county leased from GRS did not provide the county clerk with the ability to herself make electronic copies. This changed when, in response to a January 1999 request made of the county by a title company for such copies, GRS provided hardware and software upgrades that enabled the county clerk to herself make such copies. GRS contends, however, that these changes were conditioned on a particular agreement with the county, which the county would violate by responding to the present request in the manner contemplated:

[. . .] The jaz disk actually supplied was only to be used for a single customer, in this case the title company in question, and would allow the document images to be provided to the title company, although not the computerized indices.

[. . .] [I]t has always been the practice of [GRS] to maintain ownership of the software and of any hardware supplied by [GRS]. In [the county] as elsewhere, the agreement with the [c]ounty was that the software was being supplied on that basis to be used only internally within the clerk's office. . . . [T]he only exception made was to allow a copy to be made of the more recently filed documents to accommodate the local situation and relationship between the county clerk and the title company. [GRS] never agreed that the [GRS] software, either the original Perfect Vision 20/20 © or the supplement thereto contained on the "jaz disk" would be used for any other purpose.

As a result, it is our belief that [GRS] retains the right to direct that its copyrighted software, including the supplementary version on the jaz disk, not be used for any purpose other than those contemplated, including mass production of copies of the records for commercial purposes.

[. . .] [P]ermitting [the county] to utilize [GRS's] software beyond its intended purpose and outside the terms of the contract between the parties, may put [GRS] at a competitive disadvantage by allowing potential competitors to gain access to records that allow them to make a commercial profit by attempting to compete against [GRS] in the same market. For instance, it is our understanding that the requesting party in this case . . . is engaged in county records processing in Anderson [C]ounty, Texas (county seat, Palestine). Presumably, [the requesting party] wishes to expand its business to other counties or to engage in some other business in competition with GRS, using the records copied with [GRS] software.

While [GRS] has indicated that it would, if requested by the counties, provide this service at a normal commercial fee, [GRS] does not feel that it is financially reasonable or equitable for [GRS] to allow the requestor to force the county clerk to make such copies at essentially no cost. This would give the requestor the benefit of the many years and millions of dollars invested by [GRS] in producing the software and in working with the county clerks, often for minimal profits, while building the relationship.

[. . .] [GRS insists that its software] be used for the specific purpose for which it was contracted. This is to allow [GRS] to protect the copyright interest in the Perfect Vision 20/20 © software, including the supplement contained on the jaz disk in question.

[. . .] [E]ven if the software in question has been sold to [the county, it] is still limited by the terms of the copyright to utilize that software only in connection with the specific record keeping functions contemplated at the time the system was installed, including the modification of the agreement referring to the individual title company.

[. . .] Although [GRS] certainly believe[s] that every customer of [the county] has a right to use [GRS's] software without discrimination for the intended purpose, there is no entitlement to anyone, including the requestor or the county clerk, to utilize the copying software for the purpose contemplated by the request.

A clause in a licensing agreement limiting use to noncommercial uses only is 'not the least unreasonable'. . . . In our case, there was certainly the intent and understanding that the software would only be used for limited purposes. Normal rules of contract construction are generally applied in construing copyright agreements. . . . Under the normal rules of contract construction, it is this understanding that governs the county's non-exclusive license.

We believe that [the county's] employment of [GRS's] software for a commercial user without permission would violate the copyright doctrine of "fair use." [. . .].

GRS thus represents that the county holds a nonexclusive license to use GRS's software, subject to the terms described above, which the county would violate were the county to respond to the present request in the manner contemplated. For this reason, GRS asserts, the conditions of section 552.228 of the Government Code for providing an electronic copy are not met in this instance. The county's contemplated manner of responding to the request, GRS also contends, would infringe on a GRS owned copyright interest. Before we address these arguments, we must first note that the county clerk submitted comment to this office specifically in response to the above assertions of GRS. She states:

I have been providing digital copies of images to two local title companies and the local appraisal district office for several years. When [GRS] installed the jaz drive on the system, there was no agreement between [the county] and [GRS] regarding the amount of information that could be downloaded, nor were there any discussion or agreement about providing information to only one requestor. . . . As a County Clerk, I am not in a position to ask a customer what they plan to do with any open record they might purchase. The images that are purchased by title companies are for commercial purposes. I have recently had a request from a land appraiser, and he will also use the images in his line of business, which will also be for profit. The fact that a requestor may be a "commercial user" would not prohibit me as County Clerk from providing the information. Naturally, I must treat all customers equally and fairly.

The county clerk thus represents that she never agreed to many of the limitations in the use of GRS's software that GRS has asserted are part of an existing nonexclusive licensing agreement with the county.

In light of the above, this office requested that the county submit a copy of any written contract between the county and GRS, including a copy of any written agreement regarding the county's use of GRS's software. The county and GRS both responded that no written agreement exists pertaining specifically to the county's use of GRS's software. The county and GRS also both explained that in regard to the services that GRS currently performs for the county, a written contract was never executed. However, the county did issue a Request for Proposal ("RFP"), GRS responded to the RFP with a proposal and a supplement, and the county commissioners court voted to accept GRS's proposal and to pay GRS an agreed per document price for its services. As some evidence of its agreement with GRS, the county thus submitted copies of the RFP, GRS's responses, minutes of the county commissioners court, and related documentation. Upon review, we must point out that these documents appear to indicate that GRS agreed to the following condition, which is stated in full on page 12 of the RFP, and restated below in relevant part:

Atascosa County agrees that it will protect any interest in . . . [c]opyrights to the extent allowed by law, but the contract documents executed herein shall provide that disclosures required by law shall be made by the [c]ounty to persons requesting the same under legal authority, including the public [r]ecords [s]tatutes of the State of Texas . . . or any like statutory authority. It shall be the responsibility of [GRS] to [p]rotect the interest of the owner of any . . . [c]opyright in such manner that disclosures required to be made by [the county] shall not infringe on such . . . [c]opyright. [GRS] warrants that items to be furnished do not infringe any . . . copyright, and agrees to hold the [c]ounty harmless in the event of any infringement or claim thereof.

According to the language of the above, GRS agreed that it would assume the responsibility for protecting any copyright interests that may be implicated by the county complying with the Act. This would appear to include the county's contemplated manner of responding to the present request. The above further indicates that GRS apparently agreed to hold the county harmless in the event of a copyright infringement claim. However, due to the conflicting information provided this office in connection with this decision, we cannot say with any certainty that the above provision is in fact part of the agreement between GRS and the county, nor can we conclude that the above provision would be enforceable against GRS in the present context.

In light of all of the above, the county and GRS have obviously each made factual representations to this office that are disputed by the other. This office cannot resolve disputes of fact in the open records ruling process. Therefore, in situations such as this, we must rely on the representations of the governmental body requesting our opinion. Open Records Decision Nos. 554 (1990), 552 (1990). Under this standard, we, thus, have no basis for concluding that the county's contemplated manner of responding to the present request would, in fact, breach any existing agreement between GRS and the county.

However, we are also aware that even in the absence of a writing, under appropriate circumstances, a nonexclusive licensing agreement for particular use of a copyrighted work can be created by conduct of the parties. *See, e.g., Oddo v. Ries*, 743 F.2d 630, 634, (9th Cir. 1984) (party by conduct impliedly granted non-exclusive license). In order for this office to fully address GRS's arguments, we shall proceed on the assumption, *arguendo*, that a nonexclusive licensing agreement in fact exists between GRS and the county as to the county's use of GRS's software, and that this agreement includes the types of use restrictions that GRS describes.

As noted above, GRS makes two related claims regarding the county's use of its software. First, GRS asserts that by virtue of the terms of the nonexclusive licensing agreement, the condition precedent of section 552.228(b)(3) would not be met if the county were to respond to the request in the manner contemplated. Second, GRS asserts that the county would infringe on a GRS copyright. Because both of these claims involve the proper construction of section 552.228 of the Government Code, we address these claims together. Section 552.228(b) of the Government Code states:

(b) If public information exists in an electronic or magnetic medium, the requestor may request a copy either on paper or in an electronic medium, such as on diskette or on magnetic tape. A governmental body shall provide a copy in the requested medium if:

(1) the governmental body has the technological ability to produce a copy of the requested information in the requested medium;

- (2) the governmental body is not required to purchase any software or hardware to accommodate the request; and
- (3) provision of a copy of the information in the requested medium will not violate the terms of any copyright agreement between the governmental body and a third party.

Gov't Code § 552.228(b). As a result of the hardware and software upgrades that were installed in response to the January 1999 request, described above, it is apparent that the first two of the above three stated conditions precedent are met. That is, the county currently "has the technological ability to produce a copy of the requested information in the requested medium" and "is not required to purchase any software or hardware to accommodate the request." Section 552.228(b) thus provides that the county "shall provide" digital copies to the present requestor if doing so "will not violate the terms of any copyright agreement" between the county and GRS.. We see the issue presented by GRS's arguments as that of whether the words "copyright agreement" as used in this provision would include agreements that are not enforceable under the federal copyright statute, but rather might be enforceable under other law, such as state law pertaining to the enforcement of contracts. As explained below, we think that it does not.

To properly construe the language of section 552.228(b)(3), a brief overview of the structure and operation of copyright law is required. The Federal copyright statute, 17 U.S.C. §§ 101 *et. seq.*, with certain limitations that are contained in the statute, grants exclusively to a copyright owner a specified "bundle of rights" in copyrighted works. These are the rights of reproduction, adaptation, publication, performance, and display. *See id.* § 106. Each of these five enumerated rights may be subdivided indefinitely, and each subdivision of an exclusive right may be owned and enforced separately. *Id.* However, it is important to note that for any work that is protected under the federal copyright statute, the enforcement of all legal or equitable rights to the work that are equivalent to any of the statute's five enumerated rights *is governed exclusively by the statute.* *Id.* § 301. Thus, for example, a state law purporting to protect a computer program from unauthorized copying has been found to grant a right that is equivalent to the exclusive right of reproduction under the federal copyright statute. *See Rosciszewski v. Arete Associates, Inc.*, 1 F.3d 225, (4th Cir. 1993). The federal copyright statute therefore preempted any cause of action under the state law, at least to the extent that such a cause of action would be based on the exclusive right of reproduction in the federal statute. *Id.* The copyright owner's sole remedy in such a situation, *under copyright law*, would thus be to bring a cause of action under the federal copyright statute and show a violation of that statute.

In addition to the protections afforded under the federal copyright statute, one who owns a copyright in a particular work may also be able to enforce certain rights, *under contract or other law*, with respect to the use of that work. So long as the enforcement of the contract or other law regarding the use of the work provides for rights that *are not* equivalent to any of the federal copyright statute's five enumerated rights, the enforcement would not be

preempted by the federal copyright statute. *See, e.g., Pro CD v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996) (enforcement of “shrinkwrap license” under state contract law, relating to use of computer program, did not create rights equivalent to exclusive rights within general scope of copyright, and therefore was not preempted by federal copyright statute). However, it is important to note that with respect to such enforcement, the applicable law would not be the federal copyright statute. Instead, the enforcement would be under the state law pertaining to contracts, or other applicable law.

Thus, the only existing remedy under current law *for an alleged copyright infringement* is a cause of action under the federal copyright statute. A cause of action to protect rights that are not equivalent to the “bundle of rights” in the federal copyright statute would not be brought under that statute. Such a cause of action, indeed, would not constitute a cause of action *for copyright infringement*. Rather, the claim would be brought, for example, under state law as an alleged breach of contract.

Because section 552.228(b)(3) refers to a *copyright* agreement, as opposed to some other type of agreement or contract between the governmental body and a third party, and because the sole remedy for enforcement of the copyright statute is a cause of action under that statute, we believe that the condition imposed by the language of section 552.228(b)(3) requires only that the governmental body’s contemplated manner of providing the requested information would not violate the federal copyright statute.

Indeed, to construe section 552.228(b)(3) as applying to agreements other than copyright agreements would lead to absurd results. Were we to accept the construction of section 552.228(b)(3) that GRS apparently advocates, the terms of GRS’s licensing agreement with the county, as characterized by GRS, would create an irreconcilable conflict with other requirements under the Act. As the county clerk intimates, GRS’s terms would require her to consider whether a particular requestor will make certain uses of requested information, despite the fact that the Act otherwise prohibits her from inquiring into the purpose for which requested information will be used. Gov’t Code § 552.222(b); *see also id.* § 552.204(1) (officer for public information is not responsible for the use made of the information by the requestor). GRS’s terms would also cause the county clerk to violate the requirement that the county clerk “treat all requests for information uniformly without regard to the position or occupation of the requestor [or] the person on whose behalf the request is made.” *Id.* § 552.223. In fact, we find it notable that the current versions of these other provisions of the Act — sections 552.222 and 552.223 of the Government Code — were added to the Act *by the very same legislation that added the current section 552.228(b) to the Act*. *See* Act of May 29, 1995, 74th Leg., R.S., ch. 1035, § 15, 1995 Tex. Gen. Laws, 5127, 5134. It would be absurd to conclude that the legislature, in adopting section 552.228(b)(3), intended it to be construed in a way that would cause a governmental body to violate other provisions contained in the very same legislation.

Unlike the apparent meaning GRS would assign to section 552.228(b)(3), our construction of the provision fully supports the well-settled proposition that a governmental body cannot,

by agreement, overrule or repeal provisions of the Act. *See, e.g.*, Attorney General Opinion No. JM-672 at 2 (1987). Under our construction, a provision of the Act would only be overruled in instances where the federal copyright statute preempts the Act. Thus, the provision would not be overruled by agreement, but rather in accordance with the U.S. Constitution's supremacy clause.

GRS frames its arguments as actually asserting two separate bases for the section 552.228(b)(3) requirement not being met if the county were to respond to the request in the manner contemplated. First, GRS asserts that the county would infringe on GRS's copyright in its software and thereby violate the federal copyright statute. We shall address this assertion below. The second basis claimed by GRS is that the county would breach the terms of a nonexclusive licensing agreement between the county and GRS as to the use of GRS's software. As explained above, to the extent any enforcement action by GRS under such a licensing agreement is equivalent to exclusive rights within the general scope of copyright, the federal copyright statute would preempt the agreement. In that case, GRS's second basis would be no different from the first. That is, the relevant inquiry would be whether the county's contemplated manner of responding to the request would violate the federal copyright statute. To the extent any enforcement by GRS under such a licensing agreement *would not be* equivalent to exclusive rights within general scope of copyright, as explained above, the agreement would not constitute a "copyright agreement" under section 552.228(b)(3). This is because its enforcement would be under law other than the federal copyright law. Thus, despite the two separate bases contained in GRS's arguments in regard to section 552.228(b)(3), we need only determine whether the county would violate the federal copyright statute by responding to the request in the manner contemplated.

It is well-settled that a custodian of public records must comply with the federal copyright law. *See, e.g.*, Attorney General Opinion JM-672 at 2-3 (1987). As explained above, we believe that the language of section 552.228(b)(3) is merely a legislative enactment of this requirement — specific to the context of a governmental body responding to requests for information in an electronic or magnetic medium. As to whether the county's contemplated manner of responding to the present request would violate federal copyright law, the information provided this office indicates that it would not. As noted early in this decision, the information that is actually responsive to the request is not copyrighted, it belongs to the county, and it is not excepted from disclosure by any exception under the Act. Also as earlier noted, it appears that any software code that the county would copy to the tape or disk along with the responsive information, and that the county would thereby release to the requestor, is not indicated to be software code that is proprietary to GRS. Rather, such software code relates to file formats that were developed by others specifically for the purpose of facilitating the exchange of data across software platforms and from one type of computer to another. At least with respect to the "bundle of rights" under the federal copyright statute, the county's use of GRS's software to respond to the present request would not differ in any significant way from the county's ordinary use of the software for the county clerk to perform her record-keeping duties under law. We thus conclude, based on the information provided this office, that the county's contemplated manner of responding

to the request would not violate the federal copyright statute. *Cf. ProCD v. Zeidenberg*, 908 F.Supp. 640 (W.D. Wis. 1996) (reversed on other grounds) (computer software user did not infringe copyrighted computer software that contained un-copyrighted compilation of data by copying software onto his computer's hard drive in order to download and access the un-copyrighted data; under federal copyright statute, user was entitled to personal use exception to restrictions on copying protected computer software). In light of this conclusion, we further conclude, pursuant to section 552.228(b) of the Government Code, that the county "shall provide" the requested information to the requestor.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

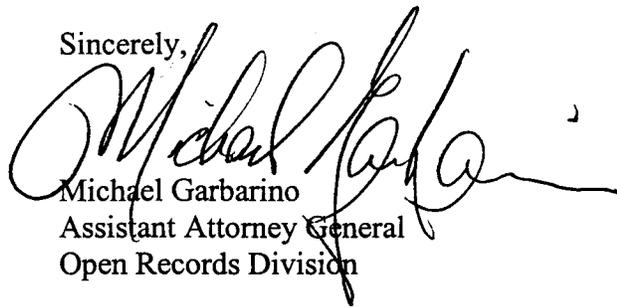
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or

complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Michael Garbarino
Assistant Attorney General
Open Records Division

MG/seg

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