



July 30, 2002

Ms. Lisa B. Silvia  
Paralegal  
Fort Worth Independent School District  
100 North University Drive  
Fort Worth, Texas 76107

OR2002-4168

Dear Ms. Silvia:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 166351.

The Fort Worth Independent School District (the “district”) received a request for “all Aetna\ING marketing material” and “all 457 Plan Proposals” that have been submitted to the district.<sup>1</sup> Although you claim that the requested information is excepted from disclosure, you have not submitted a representative sample of the requested “Aetna\ING marketing material” for our review. We therefore assume that you have released this information to the extent that it exists. If you have not released it, you must do so at this time. *See Gov’t Code §§ 552.301(a), .302.* You have submitted a sample of the proposals submitted to the district and claim that these documents are excepted from disclosure under sections 552.110, 552.128, and 552.131 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>2</sup>

You make a global argument that the requested information should be excepted from disclosure because its release would have a chilling effect on the district’s ability to attract bids in the future. We believe, however, that the Public Information Act (the “Act”) already provides adequate protection for the bidding process. A governmental body or third party that wishes to withhold from disclosure information relating to a bid proposal must

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<sup>1</sup>As you did not submit a copy of the request letter for our review, this language is quoted from your letter to the requestor dated May 22, 2002.

<sup>2</sup>We assume that the representative sample of records submitted to this office is 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 that those records contain substantially different types of information than that submitted to this office.

demonstrate that such information is excepted under one of the Act's exceptions. *See, e.g.,* Gov't Code §§ 552.104, 552.110. We will therefore consider whether the district has demonstrated the applicability of any of the exceptions to disclosure contained in the Act.

Initially, we must address the district's obligations under section 552.301 of the Government Code. Under section 552.301(b) a governmental body that wishes to withhold information from disclosure must request a ruling from this office not later than the tenth business day after the date of receiving the written request. Within fifteen business days of receiving the request, the governmental body must submit to this office (1) written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. Gov't Code § 552.301(e)(1)(A)-(D). You have provided neither a signed statement nor any other evidence establishing the date you received this request. Accordingly, we have no way of knowing whether the district complied with the deadline of either subsection (a) or (e). Furthermore, although you state that a copy of the request for information is included as Enclosure 1, that enclosure is, in fact, a copy of your letter to the requestor responding to his request. Based on the foregoing, we conclude that the district failed to comply with section 552.301.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). Because sections 552.110, 552.128, and 552.131 can provide compelling reasons, we will address their applicability. *See* Open Records Decision No. 150 (1977) (presumption of openness overcome by a showing that the information is made confidential by another source of law or affects third party interests).

When a third party's proprietary rights are implicated, section 552.305(d) of the Government Code requires a governmental body to notify the party of the request for an attorney general decision. *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). As of the date of this letter, no entity has submitted to this office reasons explaining why any of the requested documents should not be released. Therefore, we have no basis to conclude that any of the responsive information is excepted from disclosure under section 552.110 of the Government Code. *See* Gov't Code § 552.110(b) (to prevent disclosure of commercial or financial information, third party must show by specific factual or evidentiary material, not conclusory or generalized

allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure); Open Records Decision Nos. 552 at 5 (1990) (third party must establish prima facie case that information is trade secret), 542 at 3 (1990).

You also claim that section 552.128 is applicable to the requested information. Section 552.128 of the Government Code provides as follows:

(a) Information submitted by a potential vendor or contractor to a governmental body in connection with an application for certification as a historically underutilized or disadvantaged business under a local, state, or federal certification program is excepted from [required public disclosure], except as provided by this section.

(b) Notwithstanding Section 552.007 and except as provided by Subsection (c), the information may be disclosed only:

(1) to a state or local governmental entity in this state, and the state or local governmental entity may use the information only:

(A) for purposes related to verifying an applicant's status as a historically underutilized or disadvantaged business; or

(B) for the purpose of conducting a study of a public purchasing program established under state law for historically underutilized or disadvantaged businesses; or

(2) with the express written permission of the applicant or the applicant's agent.

(c) Information submitted by a vendor or contractor or a potential vendor or contractor to a governmental body in connection with a specific proposed contractual relationship, a specific contract, or an application to be placed on a bidders list, including information that may also have been submitted in connection with an application for certification as a historically underutilized or disadvantaged business, is subject to required disclosure, excepted from required disclosure, or confidential in accordance with other law.

Gov't Code § 552.128. You do not represent, nor does it appear from reviewing the submitted information, that this information was provided to the district by potential contractors or vendors in order to become certified as historically underutilized or disadvantaged businesses under a certification program. Instead, a review of the submitted information indicates that it was supplied by a bidder seeking to supply services to the district. Under these circumstances, we do not find that section 552.128 applies to any of the requested information, and none of it may be withheld on that basis.

You further assert that the requested information is excepted from disclosure under section 552.131 of the Government Code, which provides:

(a) Information is excepted from the requirements of Section 552.021 if the information relates to economic development negotiations involving a governmental body and a business prospect that the governmental body seeks to have locate, stay, or expand in or near the territory of the governmental body and the information relates to:

(1) a trade secret of the business prospect; or

(2) 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.

(b) Unless and until an agreement is made with the business prospect, information about a financial or other incentive being offered to the business prospect by the governmental body or by another person is excepted from the requirements of Section 552.021.

(c) After an agreement is made with the business prospect, this section does not except from the requirements of Section 552.021 information about a financial or other incentive being offered to the business prospect:

(1) by the governmental body; or

(2) by another person, if the financial or other incentive may directly or indirectly result in the expenditure of public funds by a governmental body or a reduction in revenue received by a governmental body from any source.

Gov't Code, § 552.131. We have received no evidence from you or any third party that any of the requested documents contain proprietary trade secret or commercial financial information. *See* Gov't Code § 552.305(d) (governmental body must notify third party whose proprietary information may be subject to exception under section 552.131). Furthermore, you have not demonstrated that the district is negotiating to have a third party "locate, stay, or expand in or near the territory of" the district, nor have you provided any other information to explain the applicability of this exception to the information at issue. *See* Gov't Code § 552.131(a). We therefore have no basis to conclude that section 552.131 is applicable to the requested information, and it may not be withheld on that basis. *See id.* § 552.301(e)(1)(A) (Act requires governmental body to explain applicability of claimed exception).

You also contend that some of the materials at issue may 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. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* 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. *See* Open Records Decision No. 550 (1990). To the extent the requested information is protected by copyright, you must comply with applicable copyright laws in allowing access to it.

In addition, we note that the submitted information contains an e-mail address. Section 552.137 of the Government Code provides that “[a]n e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Public Information Act].” Therefore, unless the relevant individuals have affirmatively consented to the release of their e-mail addresses, the district must withhold any e-mail addresses of individual members of the public that are contained in the requested information. We note, however, that section 552.137 does not apply to a business’s general e-mail address or to a government employee’s work e-mail address.

In summary, the district must withhold e-mail addresses of members of the public, unless those persons have consented to the addresses’ release. The remainder of the requested information must be released, subject to copyright laws where applicable.

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

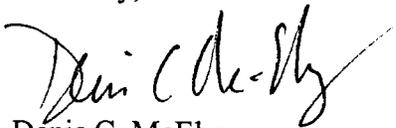
provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to 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,



Denis C. McElroy  
Assistant Attorney General  
Open Records Division

DCM/seg

Ref: ID# 166351

Enc. Submitted documents and Copy of Enclosure 1

c: Mr. Chris Gann  
Capital Security Financial Services  
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(w/o enclosures)