



September 12, 2002

Ms. Carolyn Hanahan
Feldman & Rogers
5718 Westheimer, Suite 1200
Houston, Texas 77057

OR2002-5124

Dear Ms. Hanahan:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 168519.

The Clear Creek Independent School District (the "district"), which you represent, received two requests for a variety of information regarding a specific request for proposals. We note that the district only submitted four proposals for our review. Thus we presume that to the extent the other requested information exists, it has been released to the requestors. *See* Gov't Code §§ 552.301, 302 (providing, among other things, that if governmental body does not submit to attorney general copy or representative sample of requested information, that information is presumed public). As for the submitted proposals, you claim that they are excepted from disclosure under sections 552.101 and 552.107 of the Government Code. You also state that release of the proposals may implicate the proprietary interests of the four submitters: Linebarger Goggan Blair, Peña & Sampson, LLP, Perdue, Brandon, Fielder, Collins & Mott, L.L.P., McCreary, Veselka, Bragg & Allen, P.C., and The Law Office of Daniel J. Snooks. Pursuant to section 552.305 of the Government Code, you state that you have notified the four submitters of this request for information and of their right to submit arguments to this office explaining why the requested information should not be released. *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).

We note at the outset that the district failed to argue the applicability of sections 552.101 and 552.107. Pursuant to section 552.301(b), a governmental body must submit written comments to the attorney general explaining the applicability of its claimed exceptions to disclosure. Unlike section 552.110, which specifically protects the interests of third parties, section 552.107 is a discretionary exception that protects the interests of a governmental body; thus the exception must be argued by the asserting governmental body. Failure to properly raise and argue a discretionary exception like section 552.107 results in the exception being waived. *See* Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, Gov't Code §552.107(1)), 522 at 4 (1989) (discretionary exceptions in general). Accordingly, we conclude that the district has waived its section 552.107 claim.

On the other section 552.101, which protects confidential information, is a mandatory exception that is not necessarily waived by the governmental body's failure to comply with the procedural requirements of section 552.301. *See Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex. App.--Austin 1990, no writ) (concluding that only applicability of compelling reasons can overcome Gov't Code § 552.301 procedural defect). In this instance, however, we are not aware of, nor has any interested party referred us to, a law that makes the submitted proposals confidential. Accordingly, the proposals may not be withheld under section 552.101.

Pursuant to section 552.305(d), an interested third party has ten business days after the date of its receipt of the governmental body's notice 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, none of the four submitters has provided reasons explaining why the submitted information should not be released. Therefore, we have no basis to conclude that the release of the proposals would implicate the submitters' proprietary interests. *See* Gov't Code § 552.110(b) (to prevent disclosure of commercial or financial information, 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) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990).

We note, however, that the submitted proposals contain e-mail addresses that are excepted from disclosure under section 552.137. Section 552.137 requires a governmental body to withhold an e-mail address of a member of the public that is provided for the purpose of communicating electronically with the governmental body, unless the member of the public has affirmatively consented to its release. Consequently, unless the individuals to whom these addresses belong have consented to release, the district must withhold these e-mail addresses from disclosure. With the exception of the marked e-mail addresses, the district must release the submitted proposals.

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).

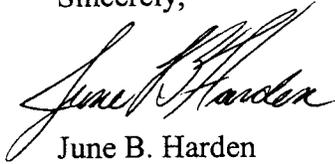
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

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,



June B. Harden
Assistant Attorney General
Open Records Division

JBH/seg

Ref: ID# 168519

Enc: Submitted documents

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