



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 23, 2003

Ms. Cynthia Villa
Vice President for Finance and Administration
University of Texas at El Paso
500 West University Avenue
El Paso, Texas 79968-0502

OR2003-6678

Dear Ms. Villa:

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# 188080.

The University of Texas at El Paso (the "University") received a request for copies of the complete proposal submitted by Texas National Protection Services ("Texas National") and the corresponding purchase order issued to Texas National. Although you indicate that the information, or portions thereof, may be excepted from disclosure pursuant to sections 552.101, 552.110, 552.113, and 552.131 of the Government Code, you make no arguments in support of these exceptions and state that "[t]he University takes no position with respect to the request[.]" However, in accordance with section 552.305(d) of the Government Code, the University notified Texas National, an interested third party, of the University's receipt of the request and of Texas National's right to submit arguments to this office as to why information relating to Texas National should not be released to the requestor. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under Act in certain circumstances). We have received such correspondence from Texas National. Additionally, we acknowledge our receipt of comments from the requestor, as permitted by the Act. *See* Gov't Code § 552.304 (permitting interested third party to submit comments explaining why information should or should not be released). We reviewed the information you submitted and considered the arguments of Texas National and the requestor.

Initially, we address the University's obligations under section 552.301 of the Government Code. Pursuant to section 552.301(b), a governmental body must ask the attorney general for a decision as to whether requested information must be disclosed not later than the tenth business day after the date of receiving the written request for information. *See Gov't Code § 552.301(b)*. In addition, section 552.301(e) provides that a governmental body that requests an attorney general decision under section 552.301(a) must, within a reasonable time, but not later than the fifteenth business day after the date of receiving the written request, submit to the attorney general: (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 as to the date on which the written request for information was received by the governmental body or evidence sufficient to establish that date; and (4) a copy of the specific information requested or representative samples of it, if a voluminous amount of the information was requested, labeled to indicate which exceptions apply to which parts of the information. *See Gov't Code § 552.301(e)*.

You state that the University received the written request for information on June 16, 2003. Thus, the University should have submitted a request for an attorney general decision no later than June 30, 2003 and forwarded all other required documentation to this office by July 8, 2003. However, you did not submit your letter requesting a decision from our office and your supporting documentation until July 16, 2003. Consequently, we conclude that the University failed to comply with the procedural requirements of section 552.301 in requesting this decision.

According 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 information is public and must be released. A governmental body must release information presumed public under section 552.302, unless it demonstrates a compelling reason to withhold the information. *See 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). Normally, a compelling interest exists when some other source of law makes the information confidential or third party interests are at stake. *See Open Records Decision No. 150 at 2* (1977). Because Texas National indicates that the information at issue, or portions thereof, may be excepted from disclosure pursuant to section 552.110 of the Government Code, which can provide a compelling reason to overcome the presumption of openness, we will address Texas National's claim.

First, Texas National informs us that its proposal contains proprietary information of another entity which is governed by a confidentiality agreement. However, we note that information is not confidential under chapter 552 of the Government Code simply because the party submitting the information anticipates or requests that it be kept confidential. *See Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). In other words, a governmental body cannot, through an agreement or

contract, overrule or repeal provisions of chapter 552. See Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) ("[T]he obligations of a governmental body under [the predecessor to chapter 552] cannot be compromised simply by its decision to enter into a contract."), 203 at 1 (1978) (mere expectation of confidentiality by person supplying information does not satisfy requirements of statutory predecessor to Gov't Code § 552.110). Consequently, unless the information at issue comes within an exception to disclosure, the University must release it, regardless of any expectation or agreement to the contrary.

Next, we understand Texas National to argue that portions of the information the University submitted to this office constitute commercial or financial information, the release of which would cause Texas National substantial competitive harm under section 552.110(b) of the Government Code. Section 552.110(b) protects "[c]ommercial 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[.]" Gov't Code § 552.110(b) (emphasis added). This exception to disclosure requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. See Gov't Code § 552.110(b); Open Records Decision No. 639 at 4 (1996) (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); see also *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974); Open Records Decision No. 661 (1999).

After reviewing Texas National's arguments and the submitted information, we find Texas National merely makes conclusory and generalized allegations. Thus, we find that Texas National has failed to adequately demonstrate that any portion of the submitted information constitutes commercial and financial information, the release of which would cause Texas National substantial competitive harm for purposes of section 552.110(b). Therefore, we conclude that the University may not withhold any of the submitted information under section 552.110(b) of the Government Code. Accordingly, as we have no other arguments before us for withholding the requested information, the University must release the submitted information to the requestor.

However, we note that the submitted information contains copyrighted materials. 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).

In summary, the University must release the submitted information to the requestor. In doing so, the University must comply with copyright law.

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).

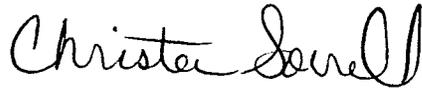
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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 Dep't of Pub. 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,



Christen Sorrell
Assistant Attorney General
Open Records Division

CHS/seg

Ref: ID# 188080

Enc: Submitted documents

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