



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 5, 2004

Ms. Leticia E. Flores
State Auditor's Office
1501 N. Congress Avenue
Suite 4.224
Austin, Texas 78701

OR2004-3649

Dear Ms. Flores:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 200189.

The Texas State Auditor's Office (the "SAO") received a request for "copies of the investigation of fraud concerning Central Texas College and SourceOne. This request includes all notes, interviews, and reports made during the investigation." You argue that the requested information is excepted from disclosure under section 552.116 of the Government Code. We have considered your arguments and reviewed the submitted information.

First, we must address the procedural requirements of the Public Information Act, chapter 552 of the Government Code. Subsections 552.301(a) and (b) of the Government Code provide:

(a) A governmental body that receives a written request for information that it wishes to withhold from public disclosure and that it considers to be within one of the [act's] exceptions . . . must ask for a decision from the attorney general about whether the information is within that exception if there has not been a previous determination about whether the information falls within one of the exceptions.

(b) The governmental body must ask for the attorney general's decision and state the exceptions that apply within a reasonable time but not later than the 10th business day after the date of receiving the written request.

You state that the SAO received the request on December 18, 2003. The SAO did not request a decision from this office until February 6, 2004. Further, SAO does not claim that this office has issued a previous determination under section 552.116 with regard to the information at issue. Consequently, the SAO failed to request a decision within the ten business day period mandated by section 552.301(a) of the Government Code.

Pursuant to section 552.301(e), a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) general 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. The department did not, however, submit such information to this office within 15 business days of receiving the request. Thus, the SAO failed to comply with section 552.301(e) of the Government Code in seeking a ruling from this office.

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 information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *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). This office has held that a compelling reason exists to withhold information when the information is confidential by another source of law. *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). Section 552.116 is a discretionary exception and does not provide a compelling reason for overcoming the presumption that the information is subject to public disclosure. *See* Open Records Decision No. 473 at 2 (1987) (discretionary exceptions under the Public Information Act can be waived). Therefore, we find that the SAO may not withhold any portion of the information at issue under section 552.116. As you raise no other exceptions to disclosure, and as we are unaware of any law that would make any

portion of the submitted information confidential,¹ we find that the SAO must release the submitted information to the requestor in its entirety, subject to the following.

We note that a portion of the submitted information is copyrighted. 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 summarize, the SAO may not withhold any of the submitted information under section 552.116 of the Government Code, and it must be released to the requestor in its entirety in accordance with copyright laws.

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.

¹In this regard, we note that the submitted information includes documents that were the subject of a previous ruling from this office to Central Texas College (the "college"), Open Records Letter Ruling No. 2003-5278 (2003). In that ruling, we found that certain information pertaining to five companies must be released by the college to the requestor, with the exception of certain e-mail addresses, and subject to copyright laws, because these companies had provided us no basis to conclude that their information is excepted from disclosure. *See, e.g.*, 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 similarly have no arguments before us from any of the companies whose information is also at issue in this ruling that would allow us to conclude that such information is excepted from disclosure. *See* Gov't Code § 552.305(d) (if release of person's proprietary information may be subject to exception under Section 552.101, 552.110, 552.113, or 552.131, governmental body that requests an attorney general decision under section 552.301 shall make good faith attempt to notify that person of request for attorney general decision). With regard to the e-mail addresses previously ruled upon by this office, we note that these addresses were redacted from the copies of the documents provided to this office in response to the instant request. As we understand SAO received these documents from the college in redacted form, we do not consider whether these e-mail addresses are subject to disclosure.

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 A. Pearle
Assistant Attorney General
Open Records Division

MAP/jh

Ref: ID# 200189

Enc. Submitted documents

c: Ms. Samantha Silvas
1412 South Robinson Drive
Waco, Texas 76706
(w/o enclosures)