



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 15, 2005

Mr. Elton E. Stuckly, Jr.
President
Texas State Technical College Waco
3801 Campus Drive
Waco, Texas 76705

OR2005-11284

Dear Mr. Stuckly:

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# 237206.

Texas State Technical College Waco (the "college") received a request for a lease agreement between the college and the U.S. Army (the "Army") and information relating to the agreement. You have submitted the responsive information. You state that the college has no objection to the release of this information. You believe, however, that the information may implicate the interests of the Army. You notified the Army of this request for information and of its right to submit arguments to this office as to why the information should not be released.¹ After receiving correspondence from the Army, this office requested further argument. *See* Gov't Code § 552.303. The Army has submitted a brief in which it claims exceptions to disclosure under sections 552.101, 552.105, and 552.108 of the Government Code. We have considered all of the Army's arguments and have reviewed the submitted information.

We initially note that some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides for the required public disclosure of "information in an account, voucher, or contract relating to the receipt or expenditure of

¹*See* Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to Gov't Code § 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances).

public or other funds by a governmental body,” unless the information is expressly confidential under other law. Gov’t Code § 552.022(a)(3). Thus, the college must release the submitted lease contract under section 552.022(a)(3), unless it contains information that is expressly confidential under other law. Although the Army seeks to have the contract withheld under sections 552.105 and 552.108 of the Government Code, these are discretionary exceptions to disclosure that protect a governmental body’s interests and may be waived. *See* Gov’t Code § 552.007; Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions), 564 at 2 (1990) (statutory predecessor to Gov’t Code § 552.105 protected governmental body’s planning and negotiating position with respect to particular transactions), 177 at 3 (1977) (statutory predecessor to Gov’t Code § 552.108 subject to waiver). As such, sections 552.105 and 552.108 are not other law that makes information confidential for the purposes of section 552.022. Therefore, the college may not withhold any of the information contained in the lease contract under section 552.105 and section 552.108. However, we will consider whether any of the remaining information may be withheld under these exceptions. We also will consider the Army’s claim that the lease contract and related materials must be withheld from disclosure under section 552.101 of the Government Code.

Section 552.101 excepts from public disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This exception encompasses information that other statutes make confidential. The Army asserts that the submitted information is confidential under section 552.101 because it would be subject to exemptions to public disclosure under the federal Freedom of Information Act (“FOIA”). *See* 5 U.S.C. § 552. We note, however, that FOIA is applicable to information held by an agency of the federal government. The information at issue here is held by the college, an agency of the State of Texas. The fact that information held by a federal agency would be exempt from disclosure under FOIA does not necessarily protect that same information from public disclosure under Texas open records law when a Texas agency has possession of the information. *See* Attorney General Opinion MW-95 (1979) (FOIA exceptions apply to federal agencies, not to state agencies); Open Records Decision Nos. 496 (1988), 124 (1976). Thus, the college may not withhold the submitted information under section 552.101 simply because a federal agency would withhold the information under FOIA. *See also* Open Records Decision No. 561 at 7 n3 (1990) (noting that federal authorities may apply confidentiality principles found in FOIA differently from way in which such principles are applied under Texas open records law).

Nevertheless, this office has held that section 552.101 requires a local governmental entity that has obtained information from a federal agency to respect confidentiality imposed on the information by federal law. *See* Open Records Decision No. 561 (1990). That decision involved a request for certain information that the City of Pearland had obtained from the United States Department of Justice (the “DOJ”). This office was informed that the DOJ had denied the same requestor access to the same information. The federal agency considered the information to be confidential as a matter of federal law. We concluded that when information in the possession of a federal agency is deemed confidential by federal law, such

confidentiality is not destroyed by the sharing of the information with a governmental body in Texas. *See* Open Records Decision No. 561 at 7 (1990).²

In this instance, the submitted information relates to a lease transaction between the college and the Army. In connection with that transaction, the Army appears to have shared some of the submitted information with the college. Thus, based on the Army's assertion that it considers the information at issue to be confidential under FOIA, we believe that any information that the Army shared with the college remains confidential in the possession of the college. We therefore conclude that the college must withhold that information, which we have marked, under section 552.101 of the Government Code.

Section 552.101 also encompasses the common law right to privacy. Common law privacy protects information that is highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and of no legitimate public interest. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). In Open Records Decision No. 169 (1977), this office concluded that under certain "special circumstances," privacy under section 552.101 will protect information that ordinarily would be subject to public disclosure. *Id.* at 6-7. Such "special circumstances" encompass a very narrow set of situations. *Id.* at 6. They do not include a desire for privacy or "a generalized and speculative fear of harassment or retribution." *Id.* On the other hand, they do include situations in which release of the information would likely cause someone to face "an imminent threat of physical danger." *Id.*

We determine whether a request for information presents such "special circumstances" on a case-by-case basis. *Id.* at 7. In this instance, the Army asserts that the submitted information could be used to "disrupt or neutralize security support provided to [the President of the United States]." Based on this representation and our review of the submitted information, we have marked information that the college must withhold, on the basis of special circumstances, under section 552.101 of the Government Code in conjunction with common law privacy.

Next, we must consider the Army's other claims for the information that is not subject to section 552.022. Section 552.105 excepts from disclosure information that relates to:

- (1) the location of real or personal property for a public purpose prior to public announcement of the project; or
- (2) appraisals or purchase price of real or personal property for a public purpose prior to the formal award of contracts for the property.

²Likewise, this office has often said that a transfer of confidential information between agencies of state government does not destroy the confidentiality of the information. *See* Attorney General Opinions H-917 (1976), H-836 (1974), Open Records Decision Nos. 561 (1990), 414 (1984), 388 (1983), 272 (1981), 183 (1978).

Gov't Code § 552.105. Section 552.105 protects a governmental body's planning and negotiating interests with regard to particular transactions. *See* Open Records Decision Nos. 564 (1990), 357 (1982), 310 (1982). In this instance, any interests in the remaining information under section 552.105 would be those of the college. Therefore, because the college does not claim this exception, it may not withhold any of the submitted information under section 552.105 of the Government Code.

Under section 552.108 of the Government Code, the Army asserts that the submitted information "is an internal record of a law enforcement agency . . . maintained for internal use in matters relating to law enforcement." We therefore understand the Army to assert section 552.108(b)(1), which excepts from disclosure "[a]n internal record of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution." Gov't Code § 552.108(b)(1). In this instance, the submitted information is in the possession of the college for what appears to be an administrative purpose. We have no reason to believe that the college maintains this information for any law enforcement or prosecutorial purpose. Therefore, as there is no indication that the submitted information falls within the scope of section 552.108(b)(1), we conclude that the college may not withhold any of the remaining information under section 552.108 of the Government Code.

We note, however, that the college must withhold some of the remaining information under section 552.136 of the Government Code.³ Section 552.136 provides as follows:

(a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

- (1) obtain money, goods, services, or another thing of value; or
- (2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.

³Unlike other exceptions to disclosure, this office will raise section 552.136 on behalf of a governmental body, as it is a mandatory exception and may not be waived. *See* Gov't Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions).

Gov't Code § 552.136. We have marked information relating to a bank account that the college must withhold under section 552.136.⁴

We also note that some of the remaining information appears to be protected by copyright. A governmental body must allow inspection of copyrighted information unless an exception to disclosure applies to the information. *See* Attorney General Opinion JM-672 (1987). An officer for public information also must comply with copyright law, however, and is not required to furnish copies of copyrighted information. *Id.* A member of the public who wishes to make copies of copyrighted information 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 at 8-9 (1990).

In summary, (1) the college must withhold the marked information that is confidential under section 552.101 of the Government Code and (2) the college must withhold the marked bank account information under section 552.136 of the Government Code. The rest of the submitted information must be released. Information that is protected by copyright must be released in accordance 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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the

⁴Although the college has redacted this bank account information from the submitted documents, we are able to determine in this instance that the information falls within the scope of section 552.136. In the future, the college must not redact requested information that it submits to this office in seeking an open records ruling, unless the information is the subject of a previous determination under section 552.301. *See* Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision No. 673 (2001).

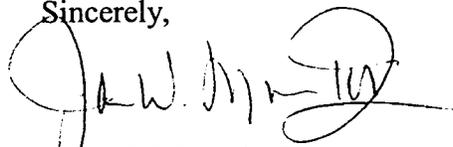
Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor 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 Office of the Attorney General 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. 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,



James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/sdk

Ref: ID# 237206

Enc: Submitted documents

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