



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

August 22, 2007

Ms. Linda Meekins McLain  
Attorney for Blinn College  
P.O. Box 208  
Navasota, Texas 77868

OR2007-10901

Dear Ms. McLain:

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# 287366.

Blinn College (the "college") received a request for information relating to: (1) the college and its contract with American Campus Communities ("ACC"); (2) an anonymous donation made to the college; (3) a sign about the college's "Roll Back Petition;" (4) the college's administration and finances; (5) payments made to an architect; and (6) litigation between the college and ACC discussed in a closed session of the Board of Trustees. The college states that it has released some of the requested information and that some of the requested information does not exist.<sup>1</sup> You claim that the remaining requested information is excepted from disclosure under sections 552.101<sup>2</sup>, 552.103, 552.107, and 552.111 of the Government Code.<sup>3</sup> We have considered the exceptions you claim and reviewed the submitted information. We have also considered comments submitted by the requestor. *See Gov't*

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<sup>1</sup>The Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.-San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986).

<sup>2</sup>Section 552.101 is the correct exception to raise when asserting that information is confidential pursuant to statutory law.

<sup>3</sup>We understand the college to raise sections 552.107 and 552.111 in asserting the attorney-client and work-product privileges, respectively.

Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

Initially, the college notes, and we agree, that the requestor has asked the college to answer questions regarding the information referenced in items (3) and (4). The Act does not require a governmental body to answer factual questions, conduct legal research, or create new information in responding to a request. *See* Open Records Decision Nos. 563 at 8 (1990), 555 at 1-2 (1990). However, we note that the Act does require that a governmental body make a good faith effort to relate a request to information that it holds. *See* Open Records Decision 561(1990) (construing statutory predecessor). We assume that you have made such an effort.

We next note that the college has failed to comply with section 552.301 of the Government Code in requesting this decision. Section 552.301 describes the procedural obligations placed on a governmental body that receives a written request for information that it wishes to withhold. Pursuant to section 552.301(b), the governmental body must ask for the attorney general's decision and state the exceptions that apply within ten business days after receiving the request. *See* Gov't Code § 552.301(a), (b). 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. *Id.* § 552.301(e)(1)(A)-(D).

You state that the college received the request for information on May 29, 2007. Accordingly, you were required to submit your request for a decision to this office no later than June 12, 2007. Further, you were required to submit the items enumerated under section 552.301(e) to us no later than June 19, 2007. You timely submitted to this office a request for a ruling and argued that the information you submitted at that time was excepted from disclosure under sections 552.101 and 552.103. However, on June 20, 2007, you submitted additional information, which you assert is excepted from disclosure under sections 552.107 and 552.111. *See id.* § 552.308 (describing rules for calculating submission dates of documents sent via first class United States mail, common or contract carrier, or interagency mail). Although you state in the correspondence of June 20, 2007, that through ongoing communication with the requestor you were able to identify additional responsive information, you have not informed us if and when the college requested clarification. Since we are unable to calculate whether or to what extent the deadlines mandated by section 552.301 have been tolled, we find that with respect to the correspondence of June 20, 2007, the college failed to comply with the procedural requirements of section 552.301 in requesting this decision from our office. *See* Open Records Decision No. 663 (1999) (request for clarification does not trigger a new ten business day time

interval, but merely tolls the ten day deadline during the clarification or narrowing process, which resumes upon receipt of the clarification or narrowing response).

A governmental body's failure to comply with the procedural requirements of section 552.301 of the Government Code 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. 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 section 552.302); Open Records Decision No. 319 (1982). Normally, a compelling interest is demonstrated when some other source of law makes the information at issue confidential or third-party interests are at stake. *See* Open Records Decision No. 150 at 2 (1977). Sections 552.107 and 552.111 of the Government Code are discretionary exceptions which protect a governmental body's interest and may be waived. *See* Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under Gov't Code § 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, none of the information submitted on June 20, 2007, may be withheld under section 552.107 or section 552.111. Some of the untimely submitted information may be subject to section 552.137.<sup>4</sup> Because this section can provide a compelling reason to withhold information, we will address this exception, along with the exceptions that were raised within the period prescribed by section 552.301.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses information made confidential by other statutes. Section 551.104(c) of the Government Code provides that "[t]he certified agenda or tape of a closed meeting is available for public inspection and copying only under a court order issued under Subsection (b)(3)." *See id.* § 551.104. Thus, such information cannot be released to a member of the public in response to an open records request. *See* Open Records Decision No. 495 (1988) (attorney general lacks authority to review certified agendas or tapes of executive sessions to determine whether governmental body may withhold such information under statutory predecessor to Gov't Code § 552.101). The college states that it is prohibited from disclosing records of the closed session Board of Trustees meeting. However, the fact that information was discussed in a closed session does not make it confidential under the Act. *See* Open Records Decision No. 605 (1992). Further, there is no indication that the information sought is the certified agenda or tape of the closed session.

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<sup>4</sup>The Office of the Attorney General will raise mandatory exceptions like section 552.137 of the Government Code on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

Accordingly, no part of the submitted information may be withheld under section 552.101 in conjunction with section 551.104 of the Government Code.

Section 552.103 provides in relevant part as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). A governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date that the governmental body received the request for information, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

In this instance, you state that a dispute concerning the “relative rights, duties and obligations of the parties to the agreement in question,” the college and ACC, has been ongoing for one year and that the documents at issue are the “Settlement Discussion File.” However, you further explain that the information at issue consists of correspondence between the principals for ACC and the college. We note that once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing parties in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Therefore, section 552.103 is not applicable because both parties to the anticipated litigation have received and reviewed the information. Accordingly, no part of the information at issue may be withheld under section 552.103.

Section 552.137 of the Government Code exempts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). Gov’t Code § 552.137(a)-(c). Section 552.137 does not apply to a government employee’s work e-mail address because such an address is not that of the employee as a “member of the public” but is instead the address of the individual as a government employee. This section does not protect the work e-mail addresses of the employees of an entity with which a governmental body has a contractual relationship. *Id.* § 552.137(c)(1). The submitted information contains e-mail addresses. To the extent that these e-mail addresses are not a government employee’s work e-mail address or are not excluded by subsection 552.137(c)(1), they must be withheld pursuant to section 552.137.

In summary, to the extent that the submitted e-mail addresses are not a government employee’s work e-mail address or excluded by subsection 552.137(c), they must be withheld pursuant to section 552.137. The remaining information must be released.

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).

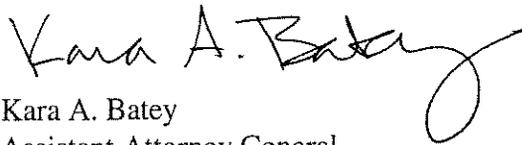
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the 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,



Kara A. Batey  
Assistant Attorney General  
Open Records Division

KAB/jh

Ref: ID# 287366

Enc. Submitted documents

c: Mr. Charles Thielemann  
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(w/o enclosures)