



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 23, 2007

Ms. Susan C. Rocha
Denton, Navarro, Rocha & Bernal
2517 North Main Avenue
San Antonio, Texas 78212

OR2007-10996

Dear Ms. Rocha:

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# 286151.

The San Antonio Water System ("SAWS") received a request for the "Enterprise Resource Software System Software Quality Assurance Audit Report dated March 20, 2007." You claim that the requested information is excepted from disclosure under sections 552.101, 552.111, 552.116, and 552.139 of the Government Code.¹ You also state, and provide documentation showing, that you notified the interested third-parties Blue Heron Consulting ("Blue Heron"), Hansen Information Technologies, Inc. ("Hansen"), Lawson Software, Inc. ("Lawson"), and Allegis Group, Inc. ("Allegis") of SAWS's receipt of the request for information and of the right of each to submit arguments to this office as to why the requested information should not be released to the requestor. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have considered the submitted arguments and reviewed the submitted information. We have also considered comments

¹Although you also assert that some of the submitted information is excepted under section 552.147 of the Government Code, we note that the submitted information does not contain social security numbers. *See* Gov't Code § 552.147(b) (governmental body may redact social security number without necessity of requesting decision from this office under the Act).

submitted by a representative of the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we must address SAWS's obligations under section 552.301 of the Government Code, which prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Section 552.301(e-1) provides the following:

A governmental body that submits written comments to the attorney general under Subsection (e)(1)(A) shall send a copy of those comments to the person who requested the information from the governmental body. If the written comments disclose or contain the substance of the information requested, the copy of the comments provided to the person must be a redacted copy.

Gov't Code § 552.301(e-1). SAWS sent to the requestor a copy of its written comments submitted to this office pursuant to section (e)(1)(A). The copy contains the introductory portion of SAWS's brief, but the remaining information in the copy is redacted. The requestor argues that SAWS failed to comply with section 552.301(e-1) by redacting this information and that the Act "does not authorize a governmental body to redact its brief in full and leave the requestor guessing as to how or why all or part of the requested information is exempt." After review of the copy of SAWS's brief sent to the requestor, we agree that SAWS redacted information from it that does not disclose or contain the substance of the information requested; therefore, we conclude that SAWS failed to comply with the procedural requirements of section 552.301(e-1) of the Government Code.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 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. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ); Open Records Decision No. 319 (1982). A compelling reason exists when third-party interests are at stake or when information is confidential under other law. Open Records Decision No. 150 (1977). Sections 552.111 and 552.116 of the Government Code are discretionary in nature; they serve only to protect a governmental body's interests and may be waived. *See* Open Records Decision No. 677 at 10 (2002); *see also* Open Records Decision No. 522 (1989) (discretionary exceptions in general). As such, they do not constitute compelling reasons to withhold information for purposes of section 552.302. In failing to comply with section 552.301, SAWS has waived its claims under sections 552.111 and 552.116; therefore, SAWS may not withhold any of the submitted information under these sections. However, sections 552.101 and 552.139 of the Government Code can provide compelling reasons to overcome this presumption; therefore, we will consider whether these sections require you to withhold the submitted information. In addition,

because third-party interests are implicated, we will consider whether any of the submitted information must be withheld to protect these interests.

Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” This section encompasses information protected by other statutes. You raise section 552.101 in conjunction with certain provisions of the Texas Homeland Security Act. Specifically, you claim that the submitted information is subject to sections 418.177 and 418.181 of the Government Code. Section 418.177 provides that information is confidential if it

(1) is collected, assembled, or maintained by or for a governmental entity for the purpose of preventing, detecting, or investigating an act of terrorism or related criminal activity; and

(2) relates to an assessment by or for a governmental entity, or an assessment that is maintained by a governmental entity, of the risk or vulnerability of persons or property, including critical infrastructure, to an act of terrorism or related criminal activity.

Gov’t Code § 418.177. Section 418.181 provides that “[t]hose documents or portions of documents in the possession of a governmental entity are confidential if they identify the technical details of particular vulnerabilities of critical infrastructure to an act of terrorism. *Id.* § 418.181.

The fact that information may relate to a governmental body’s security concerns or emergency management activities does not make the information *per se* confidential under the Texas Homeland Security Act. *See* Open Records Decision No. 649 at 3 (1996) (language of confidentiality provision controls scope of its protection). Furthermore, the mere recitation by a governmental body of a statute’s key terms is not sufficient to demonstrate the applicability of a claimed provision. As with any exception to disclosure, a governmental body asserting one of the confidentiality provisions of the Texas Homeland Security Act must adequately explain how the responsive records fall within the scope of the claimed provision. *See* Gov’t Code § 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies).

You inform us that SAWS upgraded its system software to the Enterprise Resource Software System (“ERSS”). You explain that the purpose of the ERSS program “was to centralize the various computer program systems in SAWS in order to allow easier access by employees and to consolidate its resources in order to best perform the administrative and internal functions necessary to provide an efficient water systems for the citizens of San Antonio.” The submitted information consists of a quality-assurance audit of the ERSS. The audit addresses problems with the management of the project and the project contractors, including problems in the finance and procurement departments. You argue that the audit “exposes

the shortcomings of the system and the cracks in the surface” and that its release “could expose the information systems of SAWS to outside hackers and internal loss.” However, you have not identified the specific portions of the audit that expose the vulnerability of the information systems to hackers or internal loss. *See id.* § 552.301(e)(2). You have also not otherwise explained how the information pertaining to the management problems of the ERSS program is related to an assessment of the risk or vulnerability of persons or property to an act of terrorism or related criminal activity. *See id.* § 418.177. Similarly, you have not identified which portions of the quality control audit consist of technical details of particular vulnerabilities of critical infrastructure to an act of terrorism. *See id.* § 418.181. Thus, you have not demonstrated that any of the submitted information is made confidential under section 418.177 or section 418.181 of the Homeland Security Act. *See Open Records Decision Nos. 542 (1990) (governmental body has burden of establishing that exception applies to requested information), 532 (1989), 515 (1988), 252 (1980).* We therefore determine that SAWS may not withhold any of the submitted information under section 552.101 in conjunction with section 418.177 or section 418.181 of the Homeland Security Act.

You also assert that the submitted information is excepted under section 552.139 of the Government Code, which provides the following:

(a) Information is excepted from the requirements of Section 552.021 if it is information that relates to computer network security or to the design, operation, or defense of a computer network.

(b) The following information is confidential:

(1) a computer network vulnerability report; and

(2) any other assessment of the extent to which data processing operations, a computer, or a computer program, network, system, or software of a governmental body or of a contractor of a governmental body is vulnerable to unauthorized access or harm, including an assessment of the extent to which the governmental body’s or contractor’s electronically stored information is vulnerable to alteration, damage, or erasure.

Gov’t Code § 552.139. After review of your arguments, we conclude you have not established that the quality-assurance audit (1) relates to computer network security or to the design, operation, or defense of a computer network for purposes of section 552.139, (2) consists of a computer network vulnerability report, or (3) consists of an assessment of the extent to which data processing operations, a computer, or a computer program, network, system, or software of a governmental body or of a contractor of a governmental body is

vulnerable to unauthorized access or harm. Therefore, SAWS may not withhold the submitted information under section 552.139.

We next note that an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why requested information relating to it should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, Hansen, Lawson, and Allegis have not submitted to this office any reasons explaining why the requested information should not be released. We thus have no basis for concluding that any portion of the submitted information constitutes proprietary information of these companies, and SAWS may not withhold any portion of the submitted information on that basis. *See* Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990).

Blue Heron, in correspondence to this office, argues that its information is excepted under section 552.104 of the Government Code. We note that section 552.104 is a discretionary exception that protects only the interests of a governmental body, as distinguished from exceptions that are intended to protect the interests of third parties. *See* Open Records Decision Nos. 592 (1991) (statutory predecessor to section 552.104 designed to protect interests of a governmental body in a competitive situation, and not interests of private parties submitting information to the government), 522 (1989) (discretionary exceptions in general). As SAWS does not seek to withhold any information pursuant to section 552.104, we find this section does not apply to the submitted information. *See* ORD 592 (governmental body may waive section 552.104). Therefore, SAWS may not withhold any of the information at issue pursuant to section 552.104.

Blue Heron also asserts that the information at issue is excepted under section 552.110(b) of the Government Code. Section 552.110(b) excepts from disclosure “[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.” Section 552.110(b) requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the requested information. *See* ORD 661 at 5-6 (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

Blue Heron argues that the submitted audit “contains numerous statements with respect to [Blue Heron] and its method of operation that are not substantiated by evidence” and that “[s]uch statements would cause both current and potential clients/customers of [Blue Heron] to reconsider their affiliation with [Blue Heron], thereby harming [Blue Heron]’s reputation

in the business community and marketplace.” However, having considered Blue Heron’s arguments and reviewed the information at issue, we find Blue Heron has made only conclusory allegations that release of the submitted information would cause it substantial competitive injury, and has provided no specific factual or evidentiary showing to support such allegations. Thus, none of the information at issue may be withheld pursuant to section 552.110(b). Instead, SAWS must release the submitted information to the requestor.

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,



James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/jh

Ref: ID# 286151

Enc. Submitted documents

c: Ms. Tanji Patton
Anchor/ News 4 WOAI
P. O. Box 2641
San Antonio, Texas 78299-2641
(w/o enclosures)

Ms. Taline Manassian
Counsel to Ms. Patton/ News 4 WOAI
Sedgwick, Deter, Moran & Arnold LLP
919 Congress Avenue, Suite 1250
Austin, Texas 78701-3656
(w/o enclosures)

Mr. Jeffrey B. Scheer
Counsel to Blue Heron Consulting
Scolaro, Shulman, Cohen, Fetter & Burstein, P.C.
507 Plum Street, Suite 300
Syracuse, New York 13204
(w/o enclosures)

Ms. Eva Ware
Hansen Information Technologies, Inc.
11092 Sun Center Drive
Rancho Cordova, California 95670
(w/o enclosures)

Ref: ID# 286151

Mr. Francis Buckley
Allegis Group, Inc.
7301 Parkway Drive
Hanover, Maryland 21076
(w/o enclosures)