



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 3, 2009

Mr. James Tourtelott
Assistant General Counsel
Texas Higher Education Coordinating Board
P.O. Box 12778
Austin, Texas 78711

OR2009-01361

Dear Mr. Tourtelott:

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# 333910.

The Texas Higher Education Coordinating Board (the "board") received a request for twelve categories of information pertaining to five named career and technical training centers. You state that you have released some of the requested information. Although you take no position on the public availability of the submitted information, you indicate that it may contain proprietary information. You state, and provide documentation showing, that you have notified ATI Enterprises, Inc. ("ATI") of the request and of its opportunity to submit comments 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) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain the applicability of exception to disclose under Act in certain circumstances). We have reviewed the submitted information.

Initially, we note that some of the submitted information is not responsive to the instant request for information because it was created after the date of the request. We have marked the non-responsive information. This ruling does not address the public availability of any information that is not responsive to the request and the board is not required to release that information in response to the request.

Next, we note the board 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 it wishes to withhold. Pursuant to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply not later than the tenth business day after the date of receiving a written request for information. Gov't Code § 552.301(b). Section 552.308 states:

(a) When this subchapter requires a request, notice, or other document to be submitted or otherwise given to a person within a specified period, the requirement is met in a timely fashion if the document is sent to the person by first class United States mail or common or contract carrier properly addressed with postage or handling charges prepaid and:

- (1) it bears a post office cancellation mark or a receipt mark of a common or contract carrier indicating a time within that period; or
- (2) the person required to submit or otherwise give the document furnishes satisfactory proof that it was deposited in the mail or common or contract carrier within that period.

Id. § 552.308(a). The board states it received the request for information on November 5, 2008. Accordingly, the board's ten business day deadline was November 20, 2008. In correspondence received by this office on November 21, 2008, the board requested a ruling regarding the present request for information. However, the envelope in which the board's request for a ruling was sent to this office does not bear a postmark date. Further, the board has not furnished satisfactory proof that its request for a ruling was deposited in the mail within the ten business day deadline. Thus, we are unable to determine that the board mailed its request for a ruling within the ten business day deadline required by section 552.301(d). *See id.* § 552.308(a) (prescribing standards for timeliness of action by United States or common or contract carrier). Consequently, we find that the board failed to comply with the procedural requirements mandated by section 552.301.

When a governmental body fails to comply with the procedural requirements of section 552.301, the information at issue is presumed public. *See id.* § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ). To overcome this presumption, the governmental body must show a compelling reason to withhold the information. *See* Gov't Code § 552.302; *Hancock*, 797 S.W.2d at 381. Generally, a compelling reason exists when some other source of law makes the information confidential or third party interests are at stake. *See* Open Records Decision No. 630 at 3 (1994). Accordingly, we will determine whether any of the submitted information is confidential by law or must be withheld to protect third party interests.

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 that party should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this decision, this office has not received correspondence from ATI. Thus, we have no basis to conclude that release of any portion of the submitted information would implicate its proprietary interests. *See id.* § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (stating that business enterprise that claims exception for commercial or financial information under section 552.110(b) must show by specific factual evidence 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). Accordingly, the board may not withhold any of the submitted information based on the proprietary interests of ATI; instead, the board must release the submitted information to the requestor.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Jonathan Miles
Assistant Attorney General
Open Records Division

JM/cc

Ref: ID# 333910

Enc. Submitted documents

c: Requestor
(w/o enclosures)