



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

August 6, 2009

Mr. Brian S. Nelson  
General Counsel  
Lone Star College System  
5000 Research Forest Drive  
The Woodlands, Texas 77381-4356

OR2009-10938

Dear Mr. Nelson:

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# 351399.

The Lone Star College System ("LSCS") received a request for (1) proposals submitted to LSCS for operation of its on-campus bookstore; (2) the final contract executed for operation of LSCS's on-campus bookstore; (3) "month-to-month sales from 2004 to present[;]" and (4) information related to LSCS's bid evaluations for selecting the winning proposal for operation of LSCS's on-campus bookstore. You state that LSCS will release information responsive to items (2), (3), and (4). Although LSCS takes no position on the release of the submitted information, you explain that this information may contain third parties' proprietary information subject to exception under the Act. Accordingly, you have notified Texas Book Company ("TBC"), Follett Higher Education Group ("Follett"), and Barnes & Noble College Booksellers ("Barnes & Noble") of this request for information and of their right to submit arguments to this office explaining why the submitted information should not

be released.<sup>1</sup> See Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances). We have considered comments received from TBC and Barnes & Noble and have reviewed the submitted information.

Initially, we must address LSCS's obligations under section 552.301 of the Government Code, which prescribes the procedures a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Pursuant to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply within ten business days of receiving the written request. You inform us that LSCS received the request for information on April 27, 2009, requested clarification of item (2), received such clarification on May 18, 2009, and requested a ruling from this office on June 1, 2009. Section 552.222(b) of the Government Code provides that a governmental body may communicate with a requestor for the purpose of clarifying or narrowing the request for information. See Gov't Code § 552.222(b). The governmental body's procedural deadlines under the Act are tolled from the date the governmental body requests clarification until the date the governmental body receives clarification. See Open Records Decision No. 663 (1999). However, in this instance, you have not informed us of the date on which LSCS requested clarification from the requestor. Accordingly, you have not established that LSCS's deadlines were tolled in such a way as to make your request for a ruling timely under section 552.301(b). Consequently, we find you have failed to comply with the requirements of section 552.301.

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; the governmental body can overcome this presumption only by demonstrating 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 generally exists when third-party interests are at stake or when information is confidential under other law. Open Records Decision No. 150 (1977). Because release of the information at issue may affect the rights of third-parties, we will consider whether these third-parties' rights provide a compelling reason to withhold the submitted information from disclosure.

We next note that there is a pending lawsuit filed against our office: *Barnes & Noble Booksellers, Inc. v. Greg Abbott*, Cause No. D-1-GN08-001978, District Court, 98th Judicial

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<sup>1</sup>You inform us that the requestor's company also submitted a proposal that is technically responsive to this request. You have not submitted this proposal for our review and we understand that the requestor did not intend to request his own company's proposal. This ruling does not address the public availability of that proposal.

District, Travis County, Texas. At issue in this lawsuit is a Barnes & Noble bookstore proposal that, per Barnes & Noble's representation, is similar to Barnes & Noble's proposal at issue in the present request. Furthermore, in response to this request, Barnes & Noble advances arguments against disclosure that are similar to the arguments it advances in the pending lawsuit. Accordingly, with respect to Barnes & Noble's proposal, we decline to issue a decision and will allow the trial court to resolve the issue of whether any portion of this proposal must be released to the public.

The remaining information at issue consists of the responses from TBC and Follett. This information was the subject of a previous LSCS request for a ruling, as a result of which this office issued Open Records Letter No. 2009-00218 (2009). In that ruling, we determined that LSCS must withhold insurance policy and bank account numbers from TBC and Follett's responses under section 552.136 of the Government Code, and must release the remainder of each response. As we have no indication that there has been any change in the law, facts, or circumstances on which the previous ruling on Follett's response was based, we conclude that LSCS must rely on Open Records Letter No. 2009-00218 as a previous determination for Follett's response and continue to treat Follett's information in accordance with that ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). With regard to TBC's response, we note that LSCS notified TBC pursuant to section 552.305 when LSCS received the previous request for information and that TBC failed to submit any arguments that its information was excepted under the Act. However, TBC now claims that its response contains bidding information that is excepted from disclosure under section 552.104 of the Government Code, as well as trade secret information protected under section 552.110(a) of the Government Code and commercial and financial information protected under section 552.110(b) of the Government Code. Because information subject to section 552.110 is deemed confidential by law, we will address TBC's claims under this exception.

First, however, we note that section 552.104 excepts from required public disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104. The purpose of section 552.104 is to protect the purchasing interests of a governmental body in competitive bidding situations where the governmental body wishes to withhold information in order to obtain more favorable offers. *See* Open Records Decision No. 592 (1991). Significantly, section 552.104 protects information from disclosure only if a governmental body demonstrates potential harm to its interests in a particular competitive situation. *See* Open Records Decision No. 463 (1987). Thus, this exception may be properly raised only by a governmental body. Because LSCS does not raise section 552.104, we conclude that LSCS may not withhold any portion of TBC's proposal under this exception.

We next consider TBC's arguments under section 552.110. As mentioned above, TBC's proposal was subject to a previous request for information, in response to which this office issued Open Records Letter No. 2009-00218. In that ruling, we concluded that LSCS must release TBC's proposal, except for certain bank account and insurance policy information we marked under section 552.136 of the Government Code. We again note that TBC failed to submit arguments to this office explaining why its information should be withheld from disclosure in response to the previous request. Further, we note that since the previous ruling was issued on January 7, 2009, TBC has not disputed this office's conclusion regarding the release of TBC's proposal, and we presume that, in accordance with that ruling, LSCS has released TBC's proposal. In this regard, we find that TBC has not taken necessary measures to protect its proposal in order for this office to conclude that it now either qualifies as a trade secret or is commercial or financial information, the release of which would cause TBC substantial harm. *See* Gov't Code § 552.110, RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980), 180 at 3 (1977). Accordingly, we conclude that LSCS may not withhold any information in TBC's proposal under section 552.110 of the Government Code.

As noted in the previous ruling, TBC's proposal contains a bank account number and insurance policy numbers. This information is subject to section 552.136 of the Government Code, which states that "[n]otwithstanding any other provision of [the Act], 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." Gov't Code § 552.136(b). This office has determined that insurance policy numbers are access device numbers for purposes of section 552.136. *See id.* § 552.136(a) (defining "access device"). Therefore, LSCS must withhold the information we have marked under section 552.136 of the Government Code.

In summary: (1) with respect to Barnes & Noble's proposal, we decline to issue a decision and will allow the trial court to resolve the issue of whether any portion of Barnes & Noble's proposal must be released to the public; (2) LSCS must rely on Open Records Letter No. 2009-00218 as a previous determination for Follet's response and continue to treat Follet's information in accordance with that ruling; (3) LSCS must withhold from TBC's response the information we have marked under section 552.136 of the Government Code; and (4) LSCS must release the remainder of TBC's proposal.

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](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,



Ryan T. Mitchell  
Assistant Attorney General  
Open Records Division

RTM/rl

Ref: ID# 351399

Enc. Submitted documents

cc: Requestor  
(w/o enclosures)

cc: Tom Steele, CFO  
Texas Book Company  
P.O. Box 212  
Greenville, Texas 75403  
(w/o enclosures)

Ben Dixon  
Barnes & Noble  
120 Mountain View Boulevard  
Basking Ridge, New Jersey 07920  
(w/o enclosures)

Alan Stratman  
Follett Higher Education Group  
1818 Swift Drive  
Oak Brook, Illinois 60523  
(w/o enclosures)

Suzanne Berger  
Bryan Cave LLP  
1290 Avenue of the Americas  
New York, New York 10104-3300  
(w/o enclosures)