



November 29, 1999

Ms. Linda Meekins McLain
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OR99-3417

Dear Ms. McLain:

You have asked 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# 128428.

Blinn College, Junior College District of Washington County, (the "College"), which your firm represents, received a request from VarsityBooks.com ("VarsityBooks") for textbook "requisition forms" and a request from eCampus.com ("eCampus") for "adoption lists." In response to the requests, you submit to this office for review a portion of the information which you assert is responsive, consisting of the "Course Book Information Request" forms (the "book forms"), which Barnes and Noble College Bookstores, Inc. ("Barnes & Noble") submits to and collects from College faculty members. You explain that Barnes & Noble's counsel has taken the position that the requested information is not public information, in that it was prepared by and for the exclusive use of Barnes & Noble, thus implicating section 552.002. Alternatively, Barnes & Noble contends that the requested information is exempt from disclosure under sections 552.104 or 552.110¹ of the Government Code.² We have considered the exceptions and arguments raised and reviewed the submitted information.

¹Barnes & Noble states that the company cannot invoke the "trade secrets" prong of section 552.110, because Barnes & Noble "has shared, with an off-campus neighbor, the booklist information." *See also* Gov't Code § 552.007 (prohibiting selective disclosure of information to public).

²Although the College states that Barnes & Noble is also claiming section 552.104 as an applicable exception, we note that Barnes & Noble did not brief our office with respect to this exception. Furthermore, section 552.104 is not applicable to protect the proprietary interests of a third party. *See* Open Records Decision No. 592 (1991) (section 552.104 is not designed to protect interests of private parties that submit information to governmental body).

As a preface to our discussion and analysis of the applicable Public Information Act provisions, we note that VarsityBooks's pending request for "the textbook requisition forms filled-out by individual faculty members or department heads for the Fall 1999 term," is related to an earlier request for information. According to the brief submitted by the College, the information responsive to VarsityBooks's earlier request has been released "based on the fact that it was undisputed that Blinn College had actual possession of the information requested, namely, that prior to ever receiving the May, 1999 request, the College actually had in its possession a hard copy of Barnes & Noble computer print-out which contained the information identified in the request." See Gov't Code § 552.002. As for the pending request for information, you state that "[t]here is no dispute among any of the parties about providing records requested from the Brenham bookstore location, and Blinn College has already forwarded documents responsive to pending request."³ However, you seek a ruling for the requested information to the extent it pertains to the college's Bryan campus bookstore operated by Barnes & Noble.

We first address Barnes & Noble's contention that the book forms are not subject to the Public Information Act. We note that paragraph 7 of the contract between the College and Barnes & Noble provides that "Barnes & Noble shall comply with all laws, ordinances, rules, orders and regulations of federal, *state*, and *municipal governments*." (Emphasis added). The Public Information Act, which is a law of the State of Texas, generally governs disclosure of information that fits within the section 552.002 definition of public information.⁴

Section 552.002 of the Government Code defines public information as "information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business: (1) by a governmental body; or (2) *for a governmental body and the governmental body owns the information or has a right of access to it*." (Emphasis added). Thus, information that is collected, assembled, or maintained by a third party may be subject to disclosure under chapter 552 of the Government Code if a governmental body owns or has a right of access to the information. See Open Records Decision No. 462 (1987); *cf.* Open Records Decision No. 499 (1988). However, the Public Information Act

³In your brief to this office, you state that "the College has campuses in the cities of both Brenham, Texas and Bryan, Texas." You also explain that "[t]he bookstore at the Brenham, Texas campus is both owned and operated by the College."

⁴We note that a governmental body may not enter into an agreement to withhold information as confidential unless the governmental body has specific statutory authority to do so. JM-672 (1987); Open Records Decision No. 514 (1988). Furthermore, information is not confidential under the act simply because the party submitting it to a governmental body anticipates or requests that it be kept confidential. Open Records Decision No. 479 (1987).

does not ordinarily require a governmental body to obtain information not in its possession. Open Records Decision Nos. 558 (1990), 499 (1988). Where a third party has prepared information on behalf of a governmental body, the information is subject to the act, even though it is not in the governmental body's custody. Open Records Decision No. 558 at 2 (1990). Moreover, if a governmental entity employs an agent to carry out a task that otherwise would have been performed by the entity itself, information relating to that task that has been assembled or maintained by the agent is subject to disclosure. Open Records Decision No. 518 at 3 (1989). We note here that whether the College has physical custody of the book forms or professes an inability to obtain the information from Barnes & Noble is not determinative of whether the information is subject to the Public Information Act. Open Records Decision No. 485 at 7 (1987) (concluding that governmental body had right of access to report not physically held by governmental body but which was "disclosed orally to the Board").⁵

Barnes & Noble's counsel asserts that the contract between the College and the company restricts the college's access to the records for accounting purposes only, and not the book forms. Paragraph 11 reads as follows "Blinn College shall not be responsible for compiling [textbook list], nor shall it maintain, a list of such adoptions." However, paragraph 22 of the contract provides that "Blinn College shall have *full access at all times* to the [Barnes & Noble] Bookstore records, including all cash registers being used by Barnes & Noble, with or without notice." (Emphasis added). The college's contract with the company does not specifically state that the College has access to the book forms maintained by Barnes & Noble, but neither does it preclude such access.⁶ See, e.g., Attorney General Opinions DM-192 (1992), JM-697 (1987), JM-672 (1987) (governmental body cannot, through contract or agreement, overrule or repeal provisions of the Public Information Act); Open Records Decision No. 621 (1993).

In its brief to this office, Barnes & Noble argues that the "'access' provision [within the contract], properly construed, is limited to the financial records necessary to substantiate the 'percentage rent' payments the Company is obligated to make to Blinn College. It does not apply to the Course Book Information Forms." Furthermore, Barnes & Noble asserts that "the Company compiles the requested information on its own behalf, not on behalf of the College and the College does not have the contractual right of access to this compilation." Based on the relevant information, it is our opinion that the information maintained by

⁵In Open Records Decision No. 485 at 7 (1987), this office stated that to determine that information is outside the scope of the Public Information Act because the governmental body does not physically have the records "would afford governmental bodies a ready means of circumventing the intent of the act."

⁶Based on the submitted briefs, it is evident that in the past Barnes & Noble provided to the College "*either* computer-generated booklist reports . . . *or* photocopies of the original textbook adoption requisition forms that were filled out by faculty members or academic departments."

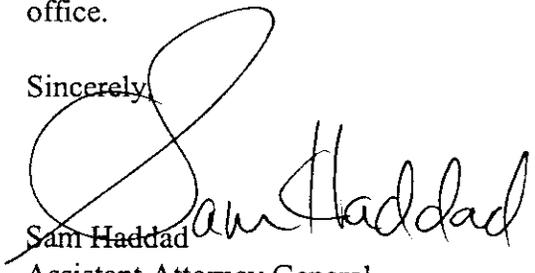
Barnes & Noble is not maintained or prepared for the College such as to be subject to the act. *See Gov't Code § 552.002* (definition of "public information" subject to act). Accordingly, we conclude that the requested book forms, which are maintained by Barnes & Noble, are not subject to disclosure under the Public Information Act. Since we have determined that the information maintained by Barnes & Noble is not subject to the act, we need not address Barnes & Noble's arguments for withholding the information under the claimed exceptions.

However, while we conclude that the book forms compiled and maintained by Barnes & Noble are not public information, the responsive information on the book forms was, and will be on future book forms, completed by individual College departments and faculty members. Thus, it is plausible then that such information may exist at the College in some form. Further, nothing precludes the College from keeping a copy of the completed book forms after supplying Barnes & Noble with the course book information. Accordingly, if there is responsive information, we advise the College that state agency records, including those of institutions of higher education, must be retained in accordance with retention schedules approved under section 441.185 of the Government Code. *See also §§ 441.180(9)* (definitions), 441.187 (destruction of records).

We emphasize that if responsive information exists in any form, in the possession of the College, it is subject to disclosure, absent an applicable exception under the Public Information Act. A governmental body must make a good faith effort to relate a request to information which it holds. *Open Records Decision No. 561 (1990)*. Accordingly, the requestors may request the book form information from the individual College faculty or departments.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Sincerely,



Sam Haddad

Assistant Attorney General
Open Records Division

SH/ch

Ref.: ID# 128428

Encl: Submitted documents

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