



December 1, 2000

Ms. Pamela Smith  
Assistant General Counsel  
Texas Department of Public Safety  
P.O. Box 4087  
Austin, Texas 78773-0001

OR2000-4581

Dear Ms. Smith:

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 requests were assigned ID#s 141773 and 141973. We have combined these files and will consider the issues presented in this single ruling assigned ID# 141773.

The Texas Department of Public Safety (the "department") received three requests for the vendor responses and other information relating to the department's Request for Offers #405 CO-5319, Automated Driver License Testing Systems. You assert that the department cannot make a copy of one document available to the requestors because that document was copyrighted by the private party that submitted it to you. You do not raise any exception under the Act to the disclosure of the information that you claim is protected by copyright, and you did not submit that information to this office in requesting this decision. You also believe that the release of other responsive information, which you provided for our review, might implicate the proprietary interests of the private entity that submitted that information to the department. Pursuant to section 552.305 of the Government Code, you notified that entity, Solutions Thru Software ("STS"), of the requests for information and of STS's right to submit comments as to why information relating to STS should not be released. STS submitted arguments to this office. The department takes no position as to whether the information relating to STS is excepted from public disclosure. We have reviewed the information you submitted and have considered the comments submitted by STS.

Initially, we must address the department's failure to submit to this office, in compliance with section 552.301 of the Government Code, the requested information that you claim is subject to copyright law. Section 552.301(b) requires a governmental body that seeks to withhold requested information from the public to ask for an attorney general decision and state the exceptions that apply not later than the tenth business day after its receipt of the information request. Section 552.301(e) further provides that not later than the fifteenth

business day after the date of receipt of the information request, the governmental body must submit to the attorney general a copy of the specific information requested, or submit a representative sample if a voluminous amount of information was requested. Gov't Code § 552.301(e)(1)(D). Section 552.302 provides as follows:

If a governmental body does not request an attorney general decision as provided by Section 552.301 and provide the requestor with the information required by Section 552.301(d), the information requested in writing is presumed to be subject to required public disclosure and must be released unless there is a compelling reason to withhold the information.

Gov't Code § 552.302. Thus, under section 552.301, the department had ten business days in which to raise an exception to the disclosure of the copyrighted information and fifteen business days in which to submit that information to this office. The statutory periods for compliance with section 552.301 have expired. Because the department failed to comply with section 552.301 as to the copyrighted information, that information is presumed to be subject to required public disclosure and must be made available to the requestors, unless there is a compelling reason to withhold any of that information. Gov't Code § 552.302; see also *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 380-81 (Tex. App.--Austin 1990, no writ).

As a general rule, the statutory presumption of openness under section 552.302 can be rebutted by a demonstration that the information at issue is confidential under some other source of law or that the interests of third parties are at stake. See Open Records Decision No. 630 at 3 (1994). Thus, a showing that information is confidential under section 552.101 of the Government Code or excepted from disclosure under section 552.110 may overcome the presumption under section 552.302 that the requested information must be released. *Id.* However, as you have not submitted the copyrighted information to this office, we have no basis for finding that any compelling reason exists to withhold that information. Thus, you must make that information available to the requestors, pursuant to section 552.302.

We note, however, that in making the copyrighted information available to the requestors, the department must comply with the copyright law and is not required to furnish copies of information that is copyrighted. See Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception to disclosure under the Act applies to that information. *Id.* However, if a member of the public wishes to make copies of copyrighted materials, he or she must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. See Open Records Decision No. 550 at 8-9 (1990).

We now address the information that was submitted to the department by STS. Section 552.110 of the Government Code protects the proprietary interests of private parties that submit information to governmental bodies by excepting from disclosure two types of information: (1) trade secrets, and (2) commercial 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. *See* Gov't Code § 552.110(a), (b). If, as is true here, the governmental body takes no position on the application of the "trade secrets" component of section 552.110 to requested information, this office will accept a private person's claim for exception as valid under section 552.110(a) if that person establishes a *prima facie* case for the exception and no one submits an argument that rebuts the claim as a matter of law. *See* Open Records Decision No. 552 at 5 (1990) (addressing statutory predecessor); *see also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958), *cert. denied*, 358 U.S. 898 (1958). Under section 552.110(b), the private entity must provide a specific factual or evidentiary showing, and not conclusory or generalized allegations, that substantial competitive injury likely would result from the release of the information at issue. *See* Open Records Decision No. 661 at 5-6 (1999) (addressing required showing); *see also National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

STS claims that because it marked a document that it submitted to the department as being "Proprietary Informaiton"[sic], "[t]his should allow the document to be protected under section 552.110." Such a designation of information that is submitted to a governmental body by a private party does not protect that information from public disclosure. Information that is subject to disclosure under the Act may not be withheld simply because the party submitting it anticipates or requests confidentiality. *See Industrial Found. v. Texas Industrial Accident Bd.*, 540 S.W.2d 668, 676-78 (Tex, 1976), *cert. denied*, 430 U.S. 931 (1977); Open Records Decision Nos. 514 at 1 (1988), 479 at 1-2 (1987), 444 at 6 (1986).

In support of its claim that information which STS designated as proprietary should not be released, STS also contends:

Release of this information would give competitors a technical advantage over STS in contract negotiations with future potential customers and could lead to financial hardship if this advantage lead to contract award of a competitor company. [sic]

STS feels the information contained within the main part of our proposal to be enough to allow competitors to fully evaluate our proposal.

Having considered the comments submitted by STS and carefully examined the information that STS claims should be withheld, we conclude that STS has not demonstrated that the information in question is excepted from disclosure under either component of section 552.110 of the Government Code. Accordingly, the department also must make that information available to the requestors.

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, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, 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).

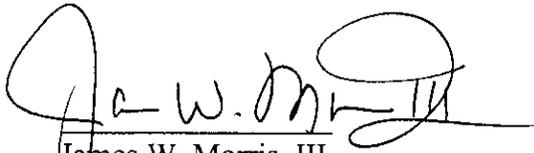
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

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 General Services Commission 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,

A handwritten signature in black ink, appearing to read "J. W. Morris, III". The signature is fluid and cursive, with a large initial "J" and "M".

James W. Morris, III  
Assistant Attorney General  
Open Records Division

JWM/er

Ref: ID#s 141773 & 141973

Encl: Submitted documents

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