



OFFICE of the ATTORNEY GENERAL  
GREG ABBOTT

January 3, 2003

Ms. Carol Longoria  
Office of the General Counsel  
University of Texas System  
201 West Seventh Street  
Austin, Texas 78701-2902

OR2003-0059

Dear Ms. Longoria:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 174446.

The University of Texas at Houston Health Science Center (the "university") received a request for copies of 41 categories of information pertaining to, among other items, various personnel issues and audit documents. You state that you will provide the requestor with information that is responsive to request items 1 through 4, 6, 7, 18 through 25, and 27 through 30 to the extent that such information exists. You also state that the university does not maintain any information that would be responsive to request items 8, 9, 13, 14, and 16.<sup>1</sup> You claim, however, that portions of the remaining requested information are excepted from disclosure pursuant to sections 552.101, 552.103, 552.108, 552.110, 552.111, 552.113, 552.116, 552.125, 552.131, and 552.136 of the Government Code.<sup>2</sup> You also state that,

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<sup>1</sup> We note that it is implicit in several provisions of the Public Information Act (the "Act") that the Act applies only to information already in existence. See Gov't Code §§ 552.002, .021, .227, .351. The Act does not require a governmental body to prepare new information in response to a request. See Attorney General Opinion H-90 (1973); see also Open Records Decision Nos. 87 (1975), 342 at 3 (1982), 416 at 5 (1984), 452 at 2-3 (1986), 555 at 1-2 (1990), 572 at 1 (1990). A governmental body must only make a good faith effort to relate a request to information which it holds. See Open Records Decision No. 561 at 8 (1990).

<sup>2</sup> As the university did not submit written comments to this office stating the reasons why sections 552.111 and 552.125 of the Government Code would allow the remaining requested information, or portions thereof, to be withheld from disclosure, we find that the university has waived these exceptions. See Gov't Code §§ 552.301, .302. In addition, as the university did not claim that portions of the remaining requested information were excepted from disclosure under section 552.108 within ten business days of the university's receipt of the request for information, we find that the university has also waived this exception to disclosure. See *id.* Finally, although the university did not claim that portions of the remaining requested

pursuant to section 552.305(d) of the Government Code, the university notified an interested third party, Profiles International, Inc. ("Profiles"), of the university's receipt of the request and of Profiles' right to submit arguments to this office as to why any portion of the remaining requested information relating to Profiles 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 Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under Act in certain circumstances). We have considered the exceptions you claim and have reviewed the submitted information, which includes representative sample documents.<sup>3</sup>

Initially, we 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 that party should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, Profiles has not submitted any comments to this office explaining why any portion of the information at issue should not be released to the requestor. Therefore, we have no basis to conclude that the release of any portion of the submitted information would implicate Profiles' proprietary interests under sections 552.110, 552.113, or 552.131 of the Government Code. *See* Open Records Decision Nos. 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 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). Accordingly, we conclude that the university may not withhold any portion of the submitted information under sections 552.110, 552.113, or 552.131 of the Government Code.

You state that the requestor asks the university to manipulate the information that is responsive to request items 34 through 41 and report it to him in a manner that is designed to support or facilitate his threatened litigation against the university. You admit that this information exists and that the university maintains the information. You fail to submit any responsive information to us for our review. You indicate that the request requires the university to manipulate the information into a particular form in order to be responsive to the request. You seek protection from having to manipulate the information that exists into the form requested under section 552.103 of the Government Code by asking that our office

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information were excepted from disclosure under section 552.136 within ten business days of the university's receipt of the request, we will address the university's claim under this exception since such a claim constitutes a compelling interest sufficient to overcome the existing presumption that these portions are now public. *See id.*; *see also* Open Records Decision Nos. 150 at 2 (1977), 319 (1982).

<sup>3</sup> We assume that the representative sample of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach and, therefore, does not authorize the withholding of any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

rule that you are not required to participate in programming or manipulation of data in response to requests that are issued during the processing of and directly related to a requestor's Equal Employment Opportunity Commission claim or other pending complaint.

We note that section 552.231 of the Government Code sets out the procedures a governmental body must follow if responding to a request for information would require programming or manipulation of data.<sup>4</sup> *See* Gov't Code § 552.231 (providing procedures for governmental body to respond to requestor if manipulation of requested information is not feasible, will result in substantial interference with ongoing operations, or will result in costs to cover manipulation of information). A governmental body that fails to follow the requirements of section 552.231 is not released by that section from its obligation under the Act to provide the requested information to the requestor or seek a ruling from this office as to whether the information is excepted from disclosure. *See Fish v. Dallas Indep. Sch. Dist.*, 31 S.W. 3d 678, 682 (Tex. App. - Eastland 2000, pet. denied). Thus, a governmental body's officer for public information carries the duty of promptly producing such information to a requestor when it is requested, unless it wishes to withhold the information from disclosure. *See* Gov't Code §§ 552.203, .221.

It appears that the university is raising section 552.103 to except the university from complying with the request to manipulate the responsive information. We note, however, that exceptions to disclosure under the Act can only be claimed by a governmental body in order to withhold requested information from disclosure, not to avoid compliance with procedural requirements that are specified in the Act. *See* Gov't Code § 552.301. If alternatively, the university is raising section 552.103 to withhold the information that is responsive to request items 34 through 41, we address the applicability of this exception to disclosure to this information.

We must first address the procedural requirements of section 552.301 of the Government Code with respect to this particular information. Section 552.301(e) provides in pertinent part that a governmental body that requests an attorney general decision under section 552.301(a) must, within a reasonable time, but not later than the fifteenth business day after the date of receiving the written request, submit to the attorney general, among other items, a copy of the specific information requested or representative samples of the information, if a voluminous amount of information was requested, labeled to indicate which exceptions apply to which parts of the information. *See* Gov't Code § 552.301(e). To date, the university has not provided our office with the information that is responsive to request items 34 through 41 of the request. Consequently, we find that the university failed to comply with the procedural requirements of section 552.301 in requesting a decision from our office with regard to this particular information.

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<sup>4</sup> We note that the term "manipulation" is defined by the Act as the "process of modifying, rendering, or decoding of information with human intervention." Gov't Code § 552.003(2).

Because the university failed to comply with the procedural requirements of section 552.301, the information that is responsive to request items 34 through 41 of the request is now presumed public. *See* Gov't Code § 552.302; *see also Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex. App.--Austin 1990, no writ); *City of Houston v. Houston Chronicle Publ'g Co.*, 673 S.W.2d 316, 323 (Tex. App.--Houston [1st Dist.] 1984, no writ); Open Records Decision No. 319 (1982). The university must demonstrate a compelling interest in order to overcome the presumption that this information is now public. *See id.* Normally, a compelling interest is demonstrated when some other source of law makes the requested information confidential or when third party interests are at stake. *See* Open Records Decision No. 150 at 2 (1977). Although the university claims that this information is excepted from disclosure under section 552.103, we note that this exception to disclosure is a discretionary exception under the Act that may be waived by the university.<sup>5</sup> Accordingly, we conclude that the university may not withhold any portion of the information that is responsive to request items 34 through 41 under section 552.103 of the Government Code. Consequently, the university must release this particular information to the requestor in the requested manipulated form.

You claim that the information that you submitted to us for review as Tab 6 is excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with section 552.228(b)(3) of the Government Code.<sup>6</sup> Section 552.228(b)(3) provides:

(b) If public information exists in an electronic or magnetic medium, the requestor may request a copy either on paper or in an electronic medium, such as on diskette or on magnetic tape. A governmental body shall provide a copy in the requested medium if:

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(3) provision of a copy of the information in the requested medium will not violate the terms of any copyright agreement between the governmental body and a third party.

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<sup>5</sup> Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.,* Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 551 (1990) (statutory predecessor to section 552.103 serves only to protect governmental body's position in litigation and does not itself make information confidential), 522 at 4 (1989) (discretionary exceptions in general), 473 (1987) (governmental body may waive section 552.111). Discretionary exceptions, therefore, do not constitute "other law" that makes information confidential.

<sup>6</sup> Section 552.101 of the Government Code excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. *See* Gov't Code § 552.101. Section 552.101 encompasses information that is protected from disclosure by other statutes.

Gov't Code § 552.228(b)(3). We note that Tab 6 consists of a representative copy of the information that is responsive to request item 5 which you state was taken from a booklet that was provided to the university by Profiles. Thus, as this information exists in a medium other than an electronic or magnetic medium, we do not agree that section 552.228(b)(3) is applicable. Accordingly, we conclude that the university may not withhold Tab 6 under section 552.101 of the Government Code in conjunction with section 552.228(b)(3) of the Government Code.

We note that a custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. *See* Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *See id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making such 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 (1990). Thus, the university must release Tab 6 to the requestor in its entirety. However, in doing so, the university must comply with applicable copyright law.

You also claim that the information that you submitted to us as Tabs 7 through 10 is excepted from disclosure pursuant to section 552.116 of the Government Code. Section 552.116 provides:

(a) An audit working paper of an audit of the state auditor or the auditor of a state agency or institution of higher education as defined by Section 61.003, Education Code, is excepted from the [public disclosure] requirements of Section 552.021. If information in an audit working paper is also maintained in another record, that other record is not excepted from the requirements of Section 552.021 by this section.

(b) In this section:

(1) "Audit" means an audit authorized or required by a statute of this state or the United States and includes an investigation.

(2) "Audit working paper" includes all information, documentary or otherwise, prepared or maintained in conducting an audit or preparing an audit report, including:

(A) intra-agency and interagency communications; and

(B) drafts of the audit report or portions of those drafts.

Gov't Code § 552.116. Section 552.116 excepts from disclosure only information that is prepared or maintained in conducting an audit or investigation which is authorized or required by a statute. You indicate that the information in Tabs 7 through 10 relates to audits that were authorized by sections 321.0133 through 321.0136 of the Government Code. We

note that this information reflects that the audits were performed under the auspices of the university's Office of Auditing and Advisory Services. Accordingly, we conclude that the information in Tabs 7 through 10 constitutes audit working papers under section 552.116(b)(2) and is, thus, excepted from disclosure pursuant to section 552.116 of the Government Code.

You also claim that the information that you submitted to us for review as Tab 11 is excepted from disclosure pursuant to section 552.136 of the Government Code. Section 552.136 provides in pertinent part:

(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 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 § 552.136. Based on our review of the information submitted to us as Tab 11, we find that portions of this information constitute reports and/or assessments of the extent to which the university's computer network systems are vulnerable to unauthorized access or harm under section 552.136(b). Accordingly, we conclude that the university must withhold the information that we have marked in Tab 11 pursuant to section 552.136(b). We also find that portions of the remaining information in Tab 11 relate to the security of the university's computers for purposes of section 552.136(a). Accordingly, we conclude that the university must withhold the information that we have marked in Tab 11 pursuant to section 552.136(a). However, we do not agree that the remaining information in Tab 11 constitutes reports and/or assessments of the extent to which the university's computer network systems are vulnerable to unauthorized access or harm or otherwise relates to the security of the university's computers. Consequently, we conclude that the university may not withhold any portion of the remaining information in Tab 11 under section 552.136 of the Government Code.

Finally, you claim that the remaining information in Tab 11 is excepted from disclosure pursuant to section 552.101 in conjunction with section 2054.077 of the Government Code. Section 2054.077 provides in pertinent part:

...

- (b) [t]he information resources manager of a state agency may prepare or have prepared a report assessing the extent to which a computer, a computer program, a computer network, a computer system, computer software, or data processing of the agency or of a contractor of the agency is vulnerable to unauthorized access or harm, including the extent to which the agency's or contractor's electronically stored information is vulnerable to alteration, damage, or erasure.
- (c) [e]xcept as provided by this section, a vulnerability report and any information or communication prepared or maintained for use in the preparation of a vulnerability report is confidential and is not subject to disclosure under Chapter 552.

Gov't Code § 2054.077(b), (c). After carefully reviewing the remaining information in Tab 11 to which section 552.136 does not apply, we find that the university has failed to specifically demonstrate that any portion of this information constitutes a vulnerability report or any information or communication prepared or maintained for use in the preparation of a vulnerability report. Accordingly, we conclude that the university may not withhold any portion of the remaining information in Tab 11 under section 552.101 of the Government Code in conjunction with section 2054.077 of the Government Code. Consequently, the remaining information in Tab 11 must be released to the requestor.

In summary, the university may withhold Tabs 7 through 10 pursuant to section 552.116 of the Government Code. The university must withhold the information that we have marked in Tab 11 pursuant to section 552.136(b) of the Government Code. The university must also withhold the information that we have marked in Tab 11 pursuant to section 552.136(a) of the Government Code. The university must release the entirety of Tab 6 to the requestor in compliance with copyright law. The university must also release to the requestor the remaining portions of Tab 11, as well the information that is responsive to request items 34 through 41 of the request.

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).

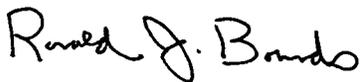
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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 Texas Building and Procurement 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,



Ronald J. Bounds  
Assistant Attorney General  
Open Records Division

RJB/lmt

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