



OFFICE *of the* ATTORNEY GENERAL  
GREG ABBOTT

April 3, 2003

Mr. Scott A. Kelly  
Texas A & M University System  
John B. Connally Building  
301 Tarrow, 6th Floor  
College Station, Texas 77840-7896

OR2003-2263

Dear Mr. Kelly:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 178766.

Texas A&M University (the "university") received a request for information concerning a particular Request for Proposals, including (1) the Boise Office Solutions proposal, (2) the Purchasing Services proposal, and (3) the evaluation score sheet. You state that you will release information responsive to items two and three of the request. However, you claim that portions of the information requested in item one are excepted from disclosure under section 552.137 of the Government Code. You have also notified the third party whose information is at issue in the current request of its right to submit reasons for withholding the requested information pursuant to section 552.305 of the Government Code. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); 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 in Public Information Act in certain circumstances). Boise Office Solutions ("Boise") has responded to the notice, asserting that the requested information is excepted from disclosure by sections 552.104 and 552.110 of the Government Code. We have considered the exceptions claimed by both the university and Boise and reviewed the submitted information.

Initially, we note, and you acknowledge, that the university has not sought an open records decision from this office within ten business days, as prescribed by section 552.301 of the Government Code. When a governmental body fails to comply with the procedural requirements of section 552.301, the information at issue is presumed public. *See* Gov't

Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (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). To overcome this presumption, the governmental body must show a compelling interest to withhold the information. See Gov't Code § 552.302; *Hancock*, 797 S.W.2d at 381. Normally, a compelling interest is that some other source of law makes the information confidential or that third party interests are at stake. Open Records Decision No. 150 at 2 (1977). As section 552.137 provides a compelling reason to overcome the presumption of openness and as third-party interests are at stake, we will consider the arguments raised by the university and Boise.

We next note that both the university and Boise point out that a portion of Boise's proposal is designated as being confidential and/or proprietary. However, information is not confidential under the Public Information Act (the "Act") simply because the party submitting the information anticipates or requests that it be kept confidential. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot, through an agreement or contract, overrule or repeal provisions of the Act. Attorney General Opinion JM-672 (1987); Open Records Decision No. 541 at 3 (1990) ("[T]he obligations of a governmental body under [the predecessor to the Act] cannot be compromised simply by its decision to enter into a contract."). Consequently, unless the information at issue falls within an exception to disclosure, it must be released, notwithstanding any agreement specifying otherwise.

We next address the applicability of section 552.104. Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." The purpose of section 552.104 is to protect a governmental body's interests in competitive bidding situations. See Open Records Decision No. 592 (1991). Section 552.104 protects the interests of governmental bodies, not third parties. Open Records Decision No. 592 (1991). As the university does not raise section 552.104, this section is not applicable to the requested information. *Id.* (Gov't Code § 552.104 may be waived by governmental body). Therefore, Boise's proposal may not be withheld under section 552.104.

With regard to section 552.110, Boise argues that all information regarding Boise's pricing, rebate structure, and service strategies is proprietary and confidential information of Boise which is excepted under the commercial or financial branch of section 552.110. Section 552.110(b) requires the business enterprise whose information is at issue to make a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would result from disclosure. See Open Records Decision No. 661 (1999).

Upon review of the submitted information and the arguments submitted by Boise, we conclude that Boise has established that release of a portion of its proposal would result in substantial competitive harm to the company. We have marked the information in the

submitted materials that may be withheld under section 552.110(b). In this regard, we do not believe that pricing information from a winning bid proposal is excepted from disclosure under section 552.110. *See* Open Records Decision Nos. 514 (1988) (public has interest in knowing prices charged by government contractors); 509 at 5 (1988) (stating that because costs, bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts was entirely too speculative); 319 (1982) (finding information relating to organization, personnel, market studies, professional references, qualifications, experience, and pricing not excepted under predecessor to section 552.110 and that pricing proposals are entitled to protection only during bid submission process); *see also* Gov't Code § 552.022(a)(3) (information in account, voucher, or contract relating to receipt or expenditure of public funds by governmental body is public information). Therefore, the university may not withhold the information relating to the final price charged to the university after discount.

We note that some of the information that is not protected by section 552.110 is protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *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 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).

Finally, we note that the submitted proposals contain information that must be withheld under section 552.137 of the Government Code. Section 552.137 makes certain e-mail addresses confidential. Section 552.137 provides:

- (a) An e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.
- (b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

Gov't Code §552.137. You do not inform us that a member of the public has affirmatively consented to the release of any e-mail address contained in the submitted materials. The university must, therefore, withhold e-mail addresses of members of the public under section 552.137. We note that section 552.137 does not apply to a business' general e-mail address or to a government employee's work e-mail address. Accordingly, we have marked in red the e-mail addresses that you must withhold under section 552.137.

To summarize, the university must withhold the information we have marked in the submitted materials under section 552.110(b). Some of the information is protected by copyright and must be released in compliance with federal copyright law. The marked e-mail addresses must be withheld under section 552.137. The remaining submitted information must be released to the requestor.

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).

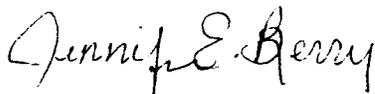
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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 Dep't of Pub. 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,



Jennifer E. Berry  
Assistant Attorney General  
Open Records Division

JEB/sdk

Ref: ID# 178766

Enc: Submitted documents

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