



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 6, 2005

Mr. Miles J. LeBlanc
General Counsel
Houston Community College System
P. O. Box 667517
Houston, Texas 77266-7517

OR2005-02975

Dear Mr. LeBlanc:

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# 220582.

The Houston Community College System (the "system") received a request for five categories of information pertaining to the system's network infrastructure. You state that portions of the requested information will be released to the requestor, but claim that some of the submitted information is excepted under section 552.139 of the Government Code. You also state that some of the submitted information may contain proprietary information subject to exception under the Act, but make no arguments and take no position as to whether the information is so excepted from disclosure. You state and provide documentation showing that you have notified Enterasys Networks, Inc. ("Enterasys"), a third party whose proprietary interests may be implicated, of the request for information. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); *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 in Act in certain circumstances). We have considered the submitted arguments and reviewed the submitted information. We have also considered comments submitted by the requestor's authorized representative. *See* Gov't Code § 552.304 (providing that person may submit comments stating why information should or should not be released).

Initially, we address the system's obligations under section 552.301 of the Government Code. Section 552.301(e) of the Government Code provides that a governmental body is required to submit to this office within fifteen business days of receiving an open records request a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. You state that the system received the request for information on December 16, 2004, and that the system offices were closed from December 18, 2004 through January 2, 2005 and on January 17, 2005. The system sent a second set of responsive documents on January 24, 2005. As this second set of documents was sent after the fifteen-business-day deadline imposed under section 552.301(e), the system failed to comply with section 552.301 with respect to the second set of documents.

Pursuant to section 552.302, a governmental body's failure to comply with section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates 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) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). Normally, a compelling reason for non-disclosure exists where some other source of law makes the information confidential or where third party interests are at stake. Open Records Decision No. 150 at 2 (1977). Here, because section 552.139 is a mandatory exception to disclosure that cannot be waived by the governmental body's failure to comply with the procedural requirements of the Act, and as third party interests are implicated, we will consider whether any of the information in the second set of documents must be withheld on these bases.

Section 552.139 of the Government Code provides as follows:

(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, or 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 § 552.139. You claim that portions of the submitted information, which you have marked, contain information that analyzes the system's computer network vulnerability

and the plans to correct such issues. Upon review, we agree that portions of the information for which you claim section 552.139 constitute information that relates to computer network security or to the design, operation, or defense of a computer network. Accordingly, the information we have marked must be withheld under section 552.139 of the Government Code. However, you have failed to establish that any of the remaining information falls within the scope of section 552.139 of the Government Code. Therefore, no portion of the remaining information may be withheld pursuant to section 552.139.

In response to your section 552.305 notice, Enterasys argues that portions of the remaining submitted information are not responsive to the instant request. Specifically, Enterasys asserts that portions of the remaining submitted information post-date a specified board meeting on September 29, 2004, but do not fit any category of information requested encompassing post-board meeting records. As such, Enterasys argues that only select documents dated prior to September 29, 2004 are responsive in this instance. The Act requires a governmental body to release only information that it believes to be responsive to a request. However, in determining whether information is responsive, a governmental body has a duty to make a good faith effort to relate the request to information that it holds. Open Records Decision No. 590 at 1 n. 1 (1991). In this instance, the system has submitted records Bates stamped 000001-000248 as responsive to the request. Whether all of the submitted information is responsive to the instant request is a question of fact. This office cannot resolve disputes of fact in its decisional process. *See* Open Records Decision Nos. 592 at 2 (1991), 552 at 4 (1990), 435 at 4 (1986). Where fact issues are not resolvable as a matter of law, we must rely on the facts alleged to us by the governmental body requesting our decision, or upon those facts that are discernible from the documents submitted for our inspection. *See* Open Records Decision No. 552 at 4 (1990). Accordingly, we must accept the system's representation that the information submitted to this office is responsive to the request for information.

Enterasys also argues that portions of the remaining information are excepted under sections 552.007, 552.101, 552.104, 552.110, 552.116 and 552.128 of the Government Code.¹ Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104. Section 552.116 of the Government Code excepts from disclosure audit working papers 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 of the Texas Education Code. Gov't Code § 552.116. However, the purpose of sections 552.104 and 552.116 is to protect the interests of a governmental body, not third parties. *See* Open Records Decision No. 592 (1991). Because these sections are designed to protect the interests of governmental bodies and not third parties and the system has

¹ We note that Enterasys also raises section 552.352 of the Government Code as an exception to disclosure. Section 552.352 states in relevant part that "[a] person commits an offense if the person distributes information considered confidential under the terms of [chapter 552]." Gov't Code § 552.352(a). Thus, section 552.352 is not an exception to disclosure under the Act. Rather, section 552.352 is a procedural provision that sets forth criminal penalties for the distribution of confidential information.

chosen not to argue section 552.104 or section 552.116 in this instance, none of the remaining information may be withheld pursuant to these exceptions.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception protects information that another statute makes confidential. Enterasys asserts that section 106 of title 17 of the United States Code constitutes statutory law that, for purposes of section 552.101, prohibits copying those portions of the remaining submitted information that are copyrighted. 17 U.S.C. § 106. Similarly, Enterasys asserts that these records are excepted from disclosure pursuant to section 552.007 of the Government Code, which provides that a governmental body is not prohibited "from voluntarily making part of all of its information available to the public, unless the disclosure is expressly prohibited by law." Gov't Code § 552.007(a). We understand Enterasys to indicate that the system is prohibited from making copyrighted portions of the remaining submitted information available to the public pursuant to section 106 of title 17 of the United States Code and section 552.007 of the Government Code. We disagree. Generally, copyright law gives the copyright holder the exclusive right to reproduce his work, subject to another person's right to make fair use of it. 17 U.S.C. §§ 106, 107. A governmental body must allow inspection of copyrighted materials unless an exception to required public disclosure applies to the information. Attorney General Opinion JM-672 (1987) at 2-3. 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).

Enterasys also claims exception for some of its information under section 552.110(b), which protects "[c]ommercial 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[.]" Gov't Code § 552.110(b). This exception to disclosure requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. *Id.*; *see also* Open Records Decision No. 661 at 5-6 (1999).

Having reviewed the submitted arguments, we conclude that Enterasys has made only conclusory allegations that release of the information at issue would cause the company substantial competitive injury and has provided no specific factual or evidentiary showing to support such allegations. *See also* Open Records Decision Nos. 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 at 2 (1982) (finding information relating to organization, personnel, market studies, professional references, qualifications, experience, and pricing not excepted under section 552.110). We further note that the pricing information of a winning bidder is generally not excepted under section 552.110(b). *See* Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by

government contractors). *See generally* Freedom of Information Act Guide & Privacy Act Overview, 219 (2000) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). Moreover, we believe the public has a strong interest in the release of prices in government contract awards. *See* Open Records Decision No. 494 (1988) (requiring balancing of public interest in disclosure with competitive injury to company). Accordingly, the system may not withhold any of the remaining information pursuant to section 552.110 of the Government Code.

Finally, Enterasys argues that portions of its information are excepted from disclosure under section 552.128 of the Government Code. Section 552.128(a) applies to information “submitted by a potential vendor or contractor to a governmental body in connection with an application for certification as a historically underutilized or disadvantaged business under a local, state, or federal certification program[.]” Gov’t Code § 552.128(a). We have no indication that any of the information at issue was submitted to the system in connection with an application for certification under such a program. Further, section 552.128(c) states

(c) Information submitted by a vendor or contractor or a potential vendor or contractor to a governmental body in connection with a specific proposed contractual relationship, a specific contract, or an application to be placed on a bidders list . . . is subject to required disclosure, excepted from required disclosure, or confidential in accordance with other law.

Gov’t Code § 552.128(c). Enterasys argues that the copyrighted portions of its information submitted to the system “in connection with a specific contract ... [are] confidential in accordance with other [copyright] law” as contemplated by section 552.128(c). We disagree, and note again that copyright does not render information confidential per se; rather, a custodian of public records must comply with applicable copyright law with respect to copyrighted information. Moreover, because the submitted information pertaining to Enterasys does not relate to an application for certification as a historically underutilized or disadvantaged business under a local, state, or federal certification program, no portion of the remaining information may be withheld under section 552.128. As no other exceptions to disclosure have been claimed, all remaining submitted information must be released.

In summary, the system must withhold the information we have marked under section 552.139. All remaining information must be released in accordance with applicable copyright law.

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).

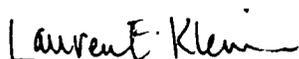
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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); *Tex. 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,



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Open Records Division

LEK/MAB/sdk

Ref: ID# 220582

Enc. Submitted documents

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