



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 18, 2005

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

OR2005-07486

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# 229859.

The Houston Community College System (the "system") received a request for a copy of the videotape of a Town Hall Meeting convened by Dr. Bill Cosby at Texas Southern University on May 16, 2005. You assert that, according to the terms of a contract between the system and SAH Enterprises, Inc. ("SAH"), the system must obtain prior written approval from SAH to release the requested videotape to a third party, and to release it without such approval would be a violation of federal copyright law. Pursuant to section 552.305(d) of the Government Code, you notified SAH of the request and of its opportunity to submit arguments to this office as to why the requested information should not be released to the requestor. *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 section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure in certain circumstances). In its response to the notice, SAH claims that the requested videotape is excepted from disclosure under section 552.101 of the Government Code. We have considered all submitted arguments and reviewed the submitted information. We have also received and considered comments submitted by the requestor. *See Gov't Code § 552.304* (a person may submit written comments stating why information should or should not be released).

Initially, we address the system's and SAH's assertions that release of the requested videotape would violate the terms of the system's contract with SAH. We note that information is not confidential under the Act simply because the party that submits the information anticipates or requests that it be kept confidential. *See Indus. Found. v. Tex. 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. *See* Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) ("[T]he obligations of a governmental body under [the Act] cannot be compromised simply by its decision to enter into a contract."), 203 at 1 (1978) (mere expectation of confidentiality by person supplying information did not satisfy requirements of statutory predecessor to Gov't Code § 552.110). Consequently, unless the requested videotape comes within an exception to disclosure, it must be released, notwithstanding any expectation or agreement to the contrary.

The system and SAH also claim that release of the requested videotape would violate the Federal Copyright Act (the "FCA"), title 17 of the United States Code. While SAH claims that the requested videotape is excepted from disclosure under section 552.101 of the Government Code in conjunction with federal copyright law, we note that federal copyright law does not make information confidential for purposes of section 552.101.¹ *See* Open Records Decision No. 660 at 5 (1999). Rather, federal 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. Assuming that SAH in fact holds a legal, enforceable copyright on the videotape at issue, we believe that any copying must be consistent with federal copyright law. *See* 17 U.S.C. § 101 *et seq.*; Attorney General Opinion JM-672 (1987) (custodian of public records must comply with copyright law and is not required to furnish copies of copyrighted records owned by third-parties). Thus, if the requested videotape is in fact copyrighted, under the Act, the system must nevertheless allow the requestor access to inspect the information.² *See* Gov't Code § 552.221. However, since it is the requestor's responsibility to adhere to federal copyright law, then the requestor assumes the duty of

¹Section 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.

²A governmental body is not required to furnish copies of copyrighted records; however, a member of the public may inspect and make copies of such records unassisted by the governmental body, but that member of the public assumes the duty and risk of compliance with copyright law. Open Records Decision No. 550 (1990). *See* Open Records Decision Nos. 660 (1999), 505 (1988) (federal law, not the Act, governs right to reproduce copyrighted records).

compliance with federal copyright law and the risk of a copyright infringement suit.³ See Open Records Decision No. 550 (1990).

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

³The FCA gives copyright protection to "original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, whether directly or with the aid of a machine or device." Furthermore, the FCA gives copyright owners the exclusive right to control the use of copyrighted works. See 17 U.S.C. § 106. This right is subject to exceptions, the most important of which may be the "fair use" of the works. See *id.* § 107.

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,



Caroline E. Cho
Assistant Attorney General
Open Records Division

CEC/sdk

Ref: ID# 229859

Enc. Submitted documents

c: Mr. Curtis Hanson
Managing Editor
KTRK-TV Channel 13
3310 Bissonnet
Houston, Texas 77005
(w/o enclosures)

Mr. John P. Schmitt
Patterson Belknap Webb & Tyler LLP
1133 Avenue of the Americas
New York, New York 10036-6710
(w/o enclosures)