



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 10, 2006

Mr. Michael B. Gary
Assistant Criminal District Attorney
Smith County Courthouse
100 N. Broadway 4th Floor
Tyler, Texas 75702

OR2006-04843

Dear Mr. Gary:

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# 248730.

The Smith County Commissioner's Court (the "court") received a request for a specified presentation regarding sites of a new jail. You state that the court has released one portion of the requested presentation. While you raise no exceptions on behalf of the court for the requested PowerPoint presentation, you state that it may contain proprietary information excepted from disclosure under the Act. Accordingly, you state and provide documentation showing that you have notified third-party Wiginton Hooker Jeffrey, P.C., ("Wiginton Hooker") of the court's receipt of the request for information and of the company's right to submit arguments to this office as to why the information at issue should not be released. *See Gov't Code § 552.305(d); see also 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).*

Initially, we note that you have not submitted the PowerPoint presentation for our review. You state that this information was delivered and presented to the court by Wiginton Hooker. You state that after the presentation, Wiginton Hooker retrieved the PowerPoint presentation, which was stored in a memory stick, and maintained possession of it. You state that the court does not maintain a copy of the PowerPoint presentation. Section 552.002 of the Government Code defines public information as "information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official

business: (1) by a governmental body; or (2) for a governmental body and the governmental body owns the information or has a right of access to it." See Gov't Code § 552.002(a). Thus, information that is collected, assembled, or maintained by a third party may be subject to disclosure under the Act if a governmental body owns or has a right of access to the information. See Open Records Decision Nos. 462 (1987), 445 (1986); cf. Open Records Decision No. 499 (1988).

This office has previously ruled that the Act applies to information collected or maintained by third party consultants or contractors of governmental bodies. See ORD 462. Additionally, this office has ruled that information prepared by a third party on behalf of a governmental body is subject to the Act even if the information is not in the governmental body's custody. See Open Records Decision No. 558 (1990). In determining whether a governmental body owns or has a right of access to information held by a third party, we look to the terms of the contract between the two entities. Through communications with this office, you have stated that although Wiginton Hooker is the winner of the Request for Proposals, the court does not maintain a contractual relationship with Wiginton Hooker. You state that Wiginton Hooker is on retainer with the court by a court order. However, you have not provided the court order, or any other documentation, to this office to allow us to determine whether a right of access to this information exists. Therefore, the court must determine whether it has a right of access to the PowerPoint presentation. To the extent that the court does not own or have a right of access to the PowerPoint presentation, we conclude that such information is not subject to disclosure under the Act and need not be released to the requestor. To the extent that the court owns or has a right of access to the PowerPoint presentation, we conclude that such information is subject to disclosure under the Act. In that event, we address the court's obligations under the Act.

Section 552.301(e) requires the governmental body to submit to the attorney general, not later than the fifteenth business day after the date of its receipt of the request, (1) written comments stating why the governmental body's claimed exceptions apply to the information that it seeks to withhold; (2) a copy of the written request for information; (3) a signed statement of the date on which the governmental body received the request, or evidence sufficient to establish that date; and (4) the specific information that the governmental body seeks to withhold or representative samples of the information if it is voluminous. See Gov't Code § 552.301(e)(1)(A)-(D). You have not provided the requested PowerPoint presentation or a representative sample of such information to this office for review. We therefore find that the court failed to comply with the procedural requirements of section 552.301.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of 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 section 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). Although you assert third-party interests are at stake, you have not submitted the PowerPoint presentation to this office for our review, and we have not received comments from Wington Hooker explaining how release of this information would affect its proprietary interests. See Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information under section 552.110(b) of the Government Code, third party must show by specific factual evidence, not conclusory or generalized allegations, that release of information would cause that party substantial competitive harm), 552 at 5 (1990) (if governmental body takes no position under section 552.110(a) of the Government Code, third party must establish *prima facie* case that information is trade secret). Therefore, we conclude that the court must release the PowerPoint presentation to the requestor.

In summary, to the extent that the court does not own or have a right of access to the PowerPoint presentation, we conclude that such information is not subject to disclosure under the Act and need not be released to the requestor. However, if the court owns or has a right of access to the PowerPoint presentation, such information is subject to the Act, and must be released to the requestor pursuant to section 552.302 of the Government Code.

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); *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 Office of the Attorney General 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,



Candice M. De La Garza
Assistant Attorney General
Open Records Division

CMD/krl

Ref: ID# 248730

Enc. Submitted documents

c: Mr. Martin Heines, MAI
Martin Heines Properties
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Tyler, Texas 75702

Mr. Jim Wiginton
c/o Mr. Bill McGinnis
Public Information Officer
Smith County Commissioner's Court
200 East Ferguson
Tyler, Texas 75702
(w/o enclosures)