



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 1, 2007

Ms. Angela G. Bishop
Region 4 Education Service Center
7145 West Tidwell Road
Houston, Texas 77092-2096

OR2007-05047

Dear Ms. Bishop:

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# 277859.

The Region 4 Education Service Center ("Region 4") received a request for various categories of information pertaining to Region 4's attempt to market the Katy Management of Automated Curriculum ("KMAC") of the Katy Independent School District (the "district"). You inform us that Region 4 does not have some of the requested information.¹ You state that some of the requested information has been provided to the requestor, but claim that some of the submitted information is excepted from disclosure under sections 552.104 and 552.105 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.105 of the Government Code excepts from disclosure information relating to "appraisals or purchase price of real or personal property for a public purpose prior to the formal award of contracts for the property." Gov't Code § 552.105(2). Section 552.105 is designed to protect a governmental body's planning and negotiating position with regard to particular transactions. *See* Open Records Decision Nos. 564 at 2 (1990), 357 at 3 (1982). Information protected by section 552.105 that pertains to such negotiations may be withheld for so long as the transaction is not complete. *See* Open Records Decision No. 310 at 2 (1982).

¹We note the Act does not require a governmental body to disclose information that did not exist when the request for information was received. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex.App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986).

“The opinions construing section [552.105], as well as the actual language of the exception, tie the provision to situations entailing the expenditure of public funds to acquire or use the subject property for public purposes in order to prevent speculation from inflating the price.” Open Records Decision No. 590 at 4 (1991); *see also* Open Records Decision No. 357 (1982). Thus, section 552.105 permits a governmental body to withhold information “which, if released, would impair or tend to impair [its] ‘planning and negotiating position in regard to particular transactions.’” ORD 357 at 3 (quoting Open Records Decision No. 222 at 1-2 (1979)). The question of whether specific information, if publicly released, would impair a governmental body’s planning and negotiating position with regard to particular transactions is a question of fact. Accordingly, this office will accept a governmental body’s good faith determination in this regard, unless the contrary is clearly shown as a matter of law. *See* ORD 564 at 2.

You explain that Region 4 is in the process of developing an online instructional system (“CCAP”) and that you are negotiating with the district to acquire an exclusive license to incorporate the district’s KMAC system into Region 4’s CCAP system. You also explain that the submitted information “illustrates how Region 4 arrived at the offering price for [the district]’s software.” You state that the negotiations with the district are ongoing and that no licensing agreement has been signed. We agree that the software at issue constitutes personal property for purposes of section 552.105. *Cf.* Penal Code § 33.01(16) (under Penal Code chapter 33, “property” includes computer software); Tax Code § 151.009 (under Tax Code chapter 151, “tangible personal property” includes computer programs); *see also San Antonio Area Found. v. Lang*, 35 S.W.3d 636, 640 (Tex. 2000) (in probate proceeding, court held that “[p]ersonal property” is defined broadly to include everything that is subject to ownership not falling under the definition of real estate”). We find that you have made a good faith determination that release of the submitted information would damage Region 4’s negotiating position with respect to the acquisition of the property in question. In addition, our review of the submitted records does not indicate that, as a matter of law, release of the submitted information would not damage Region 4’s negotiating position. Therefore, we conclude that Region 4 may withhold the information you have marked under section 552.105 of the Government Code.² Region 4 must release the remaining information.

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

²As we are able to resolve this under section 552.105, we do not address your other arguments for exception of this information.

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,



James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/jb

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Enc. Submitted documents

c: Mr. George Scott
The Katy News
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Katy, Texas 77493
(w/o enclosures)