



August 2, 2001

Mr. Jerome H. Supple
President
Southwest Texas State University
601 University Drive
San Marcos, Texas 78666-4615

OR2001-3357

Dear Mr. Supple:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 150221.

Southwest Texas State University (the "university") received a request for the university bookstore's comparative income statements for fiscal years 1997-2000 and all revenue broken down into Department Class Category. You claim that the requested information is excepted from disclosure under section 552.104 of the Government Code. We have considered the exception you claim and reviewed the submitted representative sample of information.¹ We have also received and considered the requestor's comments. Gov't Code § 552.304.

Initially, we note that the submitted sales information is subject to section 552.022 of the Government Code. Section 552.022 provides, in pertinent part:

- (a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

.....

¹ We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Gov't Code § 552.022(a)(3). The submitted information is information in an account relating to the receipt or expenditure of public or other funds by a governmental body. This information must be released under section 552.022, unless the information is expressly made confidential under other law. However, the 77th Legislature enacted Senate Bill 1458,² which amends section 552.104 by adding subsection (b) as follows:

The requirement of Section 552.022 that a category of information listed under Section 552.022(a) is public information and not excepted from required disclosure under this chapter unless expressly confidential under law does not apply to information that is excepted from required disclosure under [section 552.104].

Senate Bill 1458 became effective on June 15, 2001, and is therefore applicable to this ruling.

We therefore address your section 552.104 arguments. Section 552.104 protects from required public disclosure “information that, if released, would give advantage to a competitor or bidder.” The purpose of section 552.104 is to protect the government’s interests when it is involved in certain commercial transactions. For example, section 552.104 is generally invoked to except information submitted to a governmental body as part of a bid or similar proposal. *See, e.g.*, Open Records Decision No. 463 (1987). In these situations, the exception protects the government’s interests in obtaining the most favorable proposal terms possible by denying access to proposals prior to the award of a contract. When a governmental body seeks protection as a competitor, however, we have stated that it must be afforded the right to claim the “competitive advantage” aspect of section 552.104 if it meets two criteria. The governmental body must first demonstrate that it has specific marketplace interests. Open Records Decision No. 593 at 4 (1991) (holding that the Teacher Retirement System, as an entity that is authorized by both constitutional and statutory law to invest its securities, may be deemed, with regard to its investments, a competitor in the marketplace for purposes of section 552.104). Second, a governmental body must demonstrate actual or potential harm to its interests in a particular competitive situation. A general allegation of a remote possibility of harm is not sufficient to invoke section 552.104. *Id.* at 2. Whether release of particular information would harm the legitimate marketplace interests of a governmental body requires a showing of the possibility of some specific harm in a particular competitive situation. *Id.* at 5, 10.

² Act of May 28, 2001, 77th Leg., R.S., S.B. 1458, § 7.01 (to be codified at Gov't Code § 552.104).

In support of your section 552.104 argument you state that:

Several Texas statutes recognize university bookstores' role as authorized competitors in the marketplace. For example, Education Code 51.929 prohibits retail stores owned or operated by institutions of higher education from certain extensions of credit. Government Code § 2252.061 defines "auxiliary enterprise" broadly as a "business activity" conducted at a state agency. Education Code § 51.008(b) permits institutions of higher education to retain funds received from their auxiliary enterprises....Retail stores and auxiliary enterprises are accepted operations at public universities, and their implicit charge is to generate profit from sales of their products to help universities meet their educational goals.

In addition, you state that the university bookstore competes for business with another bookstore located near the campus and that bookstore sells the same types of products. You further state how release of the requested information would harm the university:

[T]he release of this information would harm the [university bookstore's] marketplace interests. The information reveals total sales broken down into sales categories. It reveals sales strengths and weaknesses. It would permit a competitor to make sales and inventory decisions based on those strengths and weaknesses. For example, a competitor could learn what sells best in [the university's bookstore], stock and sell those same items, and deteriorate sales in [the university's bookstore]. This information would facilitate competitors determining our margin per item and using that information to undercut prices.

Based on your arguments and our review of the submitted information, we find that you have demonstrated that the university has specific marketplace interests; therefore, we believe that the university may be considered a "competitor" for purposes of section 552.104. *See* Open Records Decision No. 593 (1991). Furthermore, we conclude that you have shown that release of the requested information will bring about a specific harm to the university's marketplace interest. Accordingly, the university may withhold the requested information under section 552.104.

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.

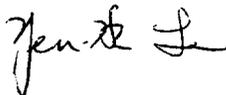
The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

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 Department of Public 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 General Services 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. 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,



Yen-Ha Le
Assistant Attorney General
Open Records Division

YHL/DKB/seg

Ref: ID# 150221

Enc. Submitted documents

c: Mr. Chris Secrest
Colloquium Bookstores
320 University Drive
San Marcos, Texas 78666
(w/o enclosures)