



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

October 8, 2003

Ms. Carol Longoria
Public Information Coordinator
The University of Texas System
201 West 7th Street
Austin, Texas 78701-2902

OR2003-7133

Dear Ms. Longoria:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 189006.

The University of Texas at Austin (the "university") received a request for information relating to a specified invitation for bid, including the proposal responses and product spreadsheets of all bidders, any correspondence between the university and the bidders, final bid tabulations for each bidder, the scoring/point system used to determine the award, and the spreadsheet with the point totals. You have submitted information that the university claims is excepted from disclosure under section 552.104 of the Government Code. You also believe that the submitted information implicates the interests of third parties. You notified those parties of this request and of their right to submit arguments to this office as to why information relating to the third parties should not be released.¹ We received arguments from attorneys for U.S. Foodservice, Inc. We have considered all of the submitted arguments and have reviewed the submitted information.² We assume that the university has released any other information that is responsive to this request, to the extent that such information

¹See Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under Gov't Code ch. 552 in certain circumstances).

²U.S. Foodservice states in its brief that to the extent that the scope of this request for information is deemed to encompass information other than the company's bid documents, the company's arguments apply equally to any other responsive information relating to U.S. Foodservice. This decision is limited, however, to the information that the university submitted in requesting this decision. See Gov't Code § 552.301(e)(1)(D).

existed when the university received the request. If not, then any such information must be released at this time. *See* Gov't Code §§ 552.301, .302; Open Records Decision No. 664 (2000). We note that chapter 552 of the Government Code does not require the university to release information that did not exist when it received this request or to create responsive information.³

We next note that section 552.305 of the Government Code allows an interested third party ten business days from the date of its receipt of the governmental body's notice to submit its reasons, if any, as to why information relating to that party should not be released. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this decision, this office has received no correspondence from Ben E. Keith Foods or Sysco Food Service of Austin, L.P. Thus, neither Ben E. Keith Foods nor Sysco Food Service has demonstrated that any of the submitted information is proprietary for purposes of section 552.110 of the Government Code. *See* Gov't Code § 552.110(a)-(b); Open Records Decision Nos. 552 at 5 (1990), 661 at 5-6 (1999).

The university claims that all of the submitted information is excepted from disclosure under section 552.104 of the Government Code. Section 552.104 excepts from required public disclosure "information that, if released, would give advantage to a competitor or bidder." The purpose of this exception is to protect a governmental body's interests in competitive bidding situations. *See* Open Records Decision No. 592 (1991). Section 552.104 requires a showing of some actual or specific harm in a particular competitive situation; a general allegation that a competitor will gain an unfair advantage will not suffice. *See* Open Records Decision No. 541 at 4 (1990). Section 552.104 does not protect information relating to competitive bidding situations once a contract has been awarded and is in effect. *See* Open Records Decision Nos. 306 (1982), 184 (1978).

You inform us that the university is currently negotiating a contract with regard to the invitation to bid to which the submitted information pertains. You therefore assert that the invitation to bid is pending and incomplete and that until such time as a final contract is executed, the release of the submitted information would disadvantage the university in obtaining a fair contract. Based on your representations, we conclude that the submitted information is excepted from disclosure at this time under section 552.104 of the Government Code. We note, however, that the university may no longer withhold the submitted information under this exception once a contract has been executed and is in effect. *See* Open Records Decision No. 541 at 5 (1990). As our conclusion under section 552.104 is dispositive, we need not address U.S. Foodservice's arguments under section 552.110.

³*See Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

You also ask this office to grant the university a previous determination under section 552.104 with regard to information relating to competitive bidding. *See* Gov't Code § 552.301(a); Open Records Decision No. 673 (2001). We decline to do so at this time.

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).

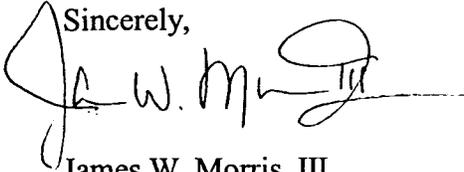
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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 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,

A handwritten signature in black ink, appearing to read "J.W. Morris, III". The signature is written in a cursive style with a horizontal line extending to the right.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/sdk

Ref: ID# 189006

Enc: Submitted documents

c: Ms. Cara Johnson
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