



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 8, 2006

Mr. Scott A. Kelly
Deputy General Counsel
The Texas A&M University System
Office of the General Counsel
A&M System Building, Suite 2079
200 Technology Way
College Station, Texas 77845-3424

OR2006-06043

Dear Mr. Kelly:

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# 252272.

Texas A&M University (the "university") received a request for (1) "[t]he entire Expression of Interest (EOI) in the National Bio- and Agro-terrorism Facility (NBAF) recently sent by [the university] to the Department of Homeland Security" and (2) "[a]ll correspondence with Kay Bailey Hutchinson or John Cornyn, or their staff, in relation to [the university's] interest in the NBAF facility." You inform us that the university does not have any information responsive to the second part of the request.¹ You claim that the submitted information, which is responsive to the first part of the request, is excepted from disclosure under section 552.104 of the Government Code.² We have considered the exception you claim and

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

²Although you also raise sections 552.101 and 552.110 in your initial brief to this office, you have not submitted any arguments explaining how these sections apply to the submitted information nor have you informed us of any third-parties whose proprietary interests may be implicated by the request. We therefore assume the university is no longer claiming these sections as exceptions to disclosure for the information at issue. See Gov't Code §§ 552.301, .302, .305.

reviewed the submitted information. We have also received and considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

Section 552.104 of the Government Code exempts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). The purpose of section 552.104 is to protect a governmental body's interests in competitive situations. *See* Open Records Decision No. 592 (1991). We have concluded that when a governmental body demonstrates that it has specific marketplace interests, it must be afforded the right to claim the "competitive advantage" aspect of section 552.104. Open Records Decision No. 593 at 4 (1991). 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.

In this case, you inform us that the university "and at least 12 competing public and private bidders submitted Expressions of Interest (EOI) for the Department of Homeland Security's National Bio and Agro-Defense Facility (NBAF)." You argue that disclosure of the submitted information would harm the university's competitive position at this time because it "would . . . provide competitors a chance to modify their own proposals during the upcoming course of site visits scheduled to follow the submission of the initial proposal." Based on your arguments and our review, we conclude that the submitted information is excepted from disclosure at this time based on section 552.104 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 ten 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 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 ten calendar days of the date of this ruling.

Sincerely,



Robert B. Rapfogel
Assistant Attorney General
Open Records Division

RBR/eb

Ref: ID# 252272

Enc. Submitted documents

c: Mr. Edward Hammond
The Sunshine Project
P. O. Box 41987
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(w/o enclosures)