



February 19, 2015

Ms. Cynthia Tynan
Attorney and Public Information Coordinator
Office of the General Counsel
The University of Texas System
201 West Seventh Street
Austin, Texas 78701-2902

OR2015-03324

Dear Ms. Tynan:

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# 554194 (UT OGC# 159245, 159391, 159650, and 159735).

The University of Texas at Austin (the "university") received four requests from different requestors for the purchase price and contract for the university's acquisition of a specified archive. One of the requests also sought copies of any agreements, side agreements, and memoranda of understanding relating to the university's acquisition of the archive. You state the university does not possess any agreements, side agreements, and memoranda of understanding relating to the university's acquisition of the archive.¹ You claim portions of the submitted information are excepted from disclosure under section 552.104 of the Government Code. You also state the release of the requested information may implicate the interests of third parties. Accordingly, you state, and provide documentation demonstrating, the university notified the third parties of the request for information and of their rights to

¹The Act does not require a governmental body to release information that did not exist when it received a request, create responsive information, or obtain information that is not held by the governmental body or on its behalf. 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), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

submit arguments stating why their information should not be released.² *See* Gov't Code §§ 552.304 (interested third party may submit comments stating why information should or should not be released), .305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in certain circumstances). We also received correspondence from one of the requestors and representatives of two of the requestors. *See* Gov't Code § 552.304. We have considered the submitted arguments and reviewed the submitted information.

Section 552.104 of the Government Code exempts from required public disclosure "information that, if released, would give advantage to a competitor or bidder." *Id.* § 552.104. This exception protects a governmental body's interests in connection with competitive bidding and in certain other competitive situations. *See* Open Records Decision No. 592 (1991) (construing statutory predecessor). This office has held that a governmental body may seek protection as a competitor in the marketplace under section 552.104 and avail itself of the "competitive advantage" aspect of this exception if it can satisfy two criteria. *See* Open Records Decision No. 593 (1991) (construing statutory predecessor). First, the governmental body must demonstrate that it has specific marketplace interests. *See id.* at 3. Second, the governmental body must demonstrate a specific threat of actual or potential harm to its interests in a particular competitive situation. *See id.* at 5. Thus, the question of whether the release of particular information will harm a governmental body's legitimate interests as a competitor in a marketplace depends on the sufficiency of the governmental body's demonstration of the prospect of specific harm to its marketplace interests in a particular competitive situation. *See id.* at 10. A general allegation of a remote possibility of harm is not sufficient. *See* Open Records Decision No. 514 at 2 (1988). Furthermore, section 552.104 generally does not except bids from disclosure after bidding is completed and the contract has been executed. *See* Open Records Decision No. 541 (1990). However, in Open Records Decision No. 541, this office stated the predecessor to section 552.104 may protect information after bidding is complete if the governmental body demonstrates public disclosure of the information will allow competitors to undercut future bids, and the governmental body solicits bids for same or similar goods or services on a recurring basis. *See id.* at 5 (recognizing limited situation in which statutory predecessor to section 552.104 continued to protect information submitted by successful bidder when disclosure would allow competitors to accurately estimate and undercut future bids); *see also* Open Records Decision No. 309 (1983) (suggesting such principle will apply when governmental body solicits bids for same or similar goods or services on recurring basis). *But see* ORD 541 at 5 (construing statutory predecessor and noting duration of coal transportation contract and unique services provided under contract make it highly unlikely the governmental body at issue would solicit coal transportation services again in near future).

²The third parties notified are the following: Ms. Mercedes de García Márquez and Glenn Horowitz Bookseller.

You assert the information you have marked pertains to the acquisition of the specified archive by the university's Harry Ransom Center (the "center"). You explain the center competes against other libraries, universities, and private entities in acquiring the archives of major historical, artistic, and literary figures. However, after consideration of your arguments, we find you have failed to demonstrate the release of the information at issue would cause specific harm to the university's marketplace interests in a particular competitive situation. Consequently, we conclude the university may not withhold the information at issue under section 552.104 of the Government Code.

An interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) of the Government Code to submit its reasons, if any, as to why requested information relating to it should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, this office has not received comments from the third parties explaining why their information should not be released to the requestor. Thus, we have no basis to conclude the release of the submitted information would implicate the third parties' interests, and none of the submitted information may be withheld on that basis. *See id.* § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3.

We note some of the submitted information may be subject to copyright law. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; *see* Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. As no further arguments against disclosure have been raised, the university must release the submitted information; however, any information protected by copyright may only be released in accordance with copyright law.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for

providing public information under the Act may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in black ink that reads "Lindsay E. Hale". The signature is written in a cursive style with a large initial "L".

Lindsay E. Hale
Assistant Attorney General
Open Records Division

LEH/akg

Ref: ID# 554194

Enc. Submitted documents

c: Requestors
(w/o enclosures)

Ms. Mercedes de García Márquez
Calle Fuego 144, Colonia Jardines del Pedregal
Delegación Alvaro Obregón México DF 019000
Mexico
(w/o enclosures)

Glenn Horowitz Bookseller
20 West 55th Street, PH
New York, New York 10019
(w/o enclosures)