



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 4, 2004

Ms. Carol Longoria
The University of Texas System
201 West Seventh Street
Austin, Texas 78701-2902

OR2004-9409

Dear Ms. Longoria:

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# 211331.

The University of Texas at Austin (the "university") received a request for "licenses or other agreements with Neocrin Company or its successor, Novocell, Inc. ("Novocell") . . . conveying rights in or to intellectual property owned in part or in whole by the [university]." You claim that the requested information is excepted from disclosure under sections 552.101 and 552.104 of the Government Code. You also claim that release of the requested information may implicate the proprietary interests of a third party under sections 552.110, 552.113, and 552.131 of the Government Code, although you take no position as to whether the information is so excepted. You state that you have notified Novocell of this request and of its right to submit arguments to this office as to why information pertaining to Novocell should not be released. *See Gov't Code § 552.305(d); see also Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under Act in certain circumstances).* We have considered the claimed exceptions and reviewed the submitted information.

Initially, we note that some of the requested information is subject to section 552.022(a) of the Government Code, which provides in pertinent part as follows:

- (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:

...

(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). Under section 552.022, the submitted contracts must be released unless they are expressly confidential under other law. However, because the university asserts section 552.104 of the Government Code, we will address this argument. *See* Gov't Code § 552.104(b) (section 552.022 does not apply to information that is excepted from required disclosure under section 552.104).

Section 552.104 of the Government Code is applicable to "information that, if released, would give advantage to a competitor or bidder." This exception protects a governmental body's interests in competitive bidding and certain other competitive situations. *See* Open Records Decision No. 593 (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. First, the governmental body must demonstrate that it has specific marketplace interests. *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. *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. *Id.* at 10. A general allegation of a remote possibility of harm is not sufficient. *See* Open Records Decision No. 514 at 2 (1988).

You state that the university is a competitor in the open marketplace "with regard to research discoveries and subsequent licensing of technologies discovered and patented." You further state that in the present situation, the university "is providing a 'service' or 'good' by licensing its inventions to Novocell." You inform this office that the information at issue relates to the development of certain research technologies. Finally, you assert that if competitive information regarding these technologies or the terms under which they were developed and licensed were made public, it would undermine the ability of the university "to optimize the financial benefit of its investment for the state" because the university would no longer be on an equal footing with private biotechnology research and development groups.

Having carefully considered all of your arguments, we find that you have demonstrated that the university has specific marketplace interests and that the prospective release of the

information at issue poses a specific threat of harm to the university's interests in a particular competitive situation. We therefore conclude that the university may withhold the submitted information under section 552.104. Because our ruling is dispositive, we need not address either the university's or Novocell's remaining claimed exceptions.

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,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/jh

Ref: ID# 211331
Enc. Submitted documents

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