



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 3, 2006

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

OR2006-08660

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# 255747.

The University of Texas at Austin (the "university") received a request for "complete copies of the applications and supporting documents filed with the FutureGen Industrial Alliance on or before May 4, 2006 for the FutureGen plant candidate sites near Odessa and Jewett, Texas." You claim that the requested information is excepted from disclosure under section 552.104 of the Government Code. You also state, and provide documentation showing, that pursuant to section 552.305 of the Government Code, the university notified the Office of the Governor (the "governor") of the request and of its right to submit arguments to this office as to why the information should not be released. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); *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 Public Information Act in certain circumstances). We have received correspondence from the governor. We have considered all of the submitted arguments and reviewed the submitted information.

Both the university and the governor argue that the requested information is excepted from disclosure under section 552.104 of the Government Code. This section excepts from

required public disclosure “information that, if released, would give advantage to a competitor or bidder.” Gov’t Code § 552.104. 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. *See* Open Records Decision Nos. 306 (1982), 184 (1978). 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. *See* Open Records Decision No. 593 at 4 (1991) (governmental body that has been granted specific authority to compete in the private marketplace may demonstrate marketplace interests analogous to those of a private entity). Second, the 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. *See 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.

The governor asserts that the state has specific marketplace interests in the requested information because the information was created at the governor’s request in an effort to secure a limited \$1 billion award from the Department of Energy. The governor states that the requested information was prepared by the university and submitted in response to a request for proposals by the FutureGen Industrial Alliance (the “alliance”) on behalf of the State of Texas (the “state”) under a cover letter from the governor. The governor adds that Texas is one of seven states competing for the award. Based on these representations, we find that the governor has demonstrated that the state has specific marketplace interests and may be considered a “competitor” for purposes of section 552.104. *See* Open Records Decision No. 593 (1991).

The governor informs us that the proposals are still under review by the alliance and that a final decision is expected in September of 2007. The governor further asserts that the requested information contains “precise details of the proposal, including the amount of funding being used and precisely how it will be utilized.” Thus, the governor contends that allowing competing states access to the requested documents will undermine the state’s ability to compete for the contract award. Similarly, the university claims that release of the requested information would “compromise [the state’s] team competitiveness by divulging information that other competitors are not required to release in kind.” Based on the submitted representations and arguments, we conclude that the governor and the university have shown that release of the submitted information would cause specific harm to the state’s

marketplace interests. *Id.* We therefore conclude that the university may withhold this information under section 552.104 of the Government Code.¹

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, 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).

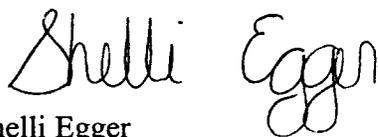
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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 Office of the Attorney General at (512) 475-2497.

¹As our ruling is dispositive, we need not address the governor's remaining arguments against disclosure.

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,

A handwritten signature in black ink that reads "Shelli Egger". The signature is written in a cursive style with a large initial "S" and "E".

Shelli Egger
Assistant Attorney General
Open Records Division

SE/sdk

Ref: ID# 255747

Enc. Submitted documents

c: Mr. Spencer Hunt
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