ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 27, 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

OR2006-12726

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# 263143.

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 (the "NBAF")] recently sent by [the university] to the Department of Homeland Security" and (2) "[a] valid login name and password to access all content at the website http://nbaf.tamu.edu." 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. You claim that the second part of the request asks the university to produce information that is not subject to the Act. We have considered your arguments and 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).

Initially, we address your claim that information responsive to the second part of the request is not subject to the Act. You state that the university is "uncertain whether [the requestor] is asking for the university to assign him his own login name and password to the www.nbaf.tamu.edu website or whether he is asking to be provided valid login name and

password belonging to another individual thus enabling his entry to a password-protected site as the valid user."[1] We understand that the university did not maintain a valid login name and password for the requestor at the time of the request. We note that the 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 dism'd); Open Records Decision No. 452 at 3 (1986). Therefore, the university is not required to provide the requestor with information that did not exist when the university received the present request.

In the alternative, you note that the request can be interpreted as seeking the existing login and password of another individual. However, you argue that, to the extent the requestor seeks another individual's valid login and password, such information is not subject to the Act pursuant to section 552.002 of the Government Code. In Open Records Decision No. 581 (1990), this office determined that certain computer information that has no significance other than its use as a tool for the maintenance, manipulation, or protection of public property, such as source codes, documentation information, and other computer programming, is not the kind of information made public under section 552.021 of the Government Code. You have submitted an administrative user login and password. You state that an administrative login and password "allow[s] access to and the ability to manipulate and alter data on all sites within the content management system, not just the site of interest to the requestor." You also state that "there is no content on this site that is not currently publicly available and viewable without a password and user id." Based on your arguments, our review of the information at issue, and the reasoning in ORD 581, we determine that the username and password that you have submitted do not constitute public information under section 552.002 of the Government Code. Accordingly, this information is not subject to the Act and need not be released.

Next, you note that the information responsive to the first portion of the request, the university Expression of Interst, was the subject of a previous ruling issued by this office. In Open Records Letter No. 2006-06043 (2006), this office determined that the university could withhold the requested Expression of Interest under section 552.104 of the Government Code. You note, however, that the Department of Homeland Security narrowed the list of competitors from 29 to 18 subsequent to the issuance of Open Records Letter No. 2006-06043. Therefore, the facts and circumstances have changed with regard to the submitted information, and the university may not rely on the ruling in Open Records Letter No. 2006-08503 in this instance. However, we will address your current argument against the disclosure of the information at issue.

Section 552.104 of the Government Code excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). The

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[1]We note that a governmental body may ask a requestor to clarify a request that is unclear. Gov't Code § 552.222

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 17 other competing bidders "have advanced to the next phase of the competitive process to ultimately select one site for the $450 million NBAF. You argue that disclosure of the university's Expression of Interest 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." You further state "[a]lthough the field has been narrowed to 18 finalists, the competition is by no means complete." Based on your arguments and our review, we conclude that the university's Expression of Interest is excepted from disclosure at this time based on section 552.104 of the Government Code.

In conclusion, we find that information responsive to the second part of the request is not subject to the Act. Furthermore, we find that information responsive to the first part of the request may be withheld under 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 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

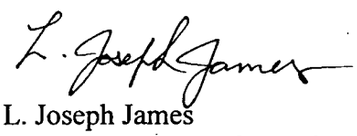
requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

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.

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,



L. Joseph James
Assistant Attorney General
Open Records Division

LJJ/dh

Ref: ID# 263143

Enc. Submitted documents

c: Mr. Edward Hammond
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(w/o enclosures)