



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 5, 2007

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

OR2007-01422

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# 269475.

The University of Texas at Austin (the "university") received two requests for information relating to the licensing agreement between the university and Hydro-Quebec. You state that you do not have any documents responsive to a portion of the request, but claim that the submitted information is excepted from disclosure pursuant to sections 552.101, 552.103, 552.104, 552.136, and 552.137 of the Government Code.¹ You also believe that the submitted information implicates the proprietary interests of private parties. You notified the third parties of this request for information and of their right to submit arguments to this office as to why the submitted information should not be released.² We have received correspondence from Hydro-Quebec, Phostech Lithium, and Sony. We have considered all of the exceptions claimed and reviewed the submitted information. We have also considered comments submitted by one of the requestors. *See Gov't Code § 552.304* (interested party may submit comments stating why information should or should not be released).

¹The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

²The third parties notified by the university are the following: Hydro-Quebec; Phostech Lithium, Inc.; and Sony Corporation. *See Gov't Code § 552.305(d)*; Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances).

Initially, we note that the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a)(3) provides for the required public disclosure of “information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body,” unless the information is expressly confidential under other law. Gov’t Code § 552.022(a)(3). Although you seek to withhold the information that is subject to section 552.022 under section 552.103, this section is a discretionary exception to disclosure that protects a governmental body’s interests and may be waived. *See id.* § 552.007; *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, section 552.103 is not other law that makes information confidential for the purposes of section 552.022(a)(3). Therefore, the university may not withhold any of the information that is subject to section 552.022 under section 552.103. However, because information that is subject to section 552.022 may be withheld under section 552.104 of the Government Code, we will consider your claims for this exception. *See* Gov’t Code § 552.104(b) (information protected by section 552.104 not subject to required public disclosure under section 552.022(a)). We will also address your claims under sections 552.101, 552.136, and 552.137 of the Government Code because these sections constitute other law for the purposes of section 552.022.

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 assert that the university has specific marketplace interests in the information at issue because “the [u]niversity is a competitor in the 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 the third parties at issue. You inform this office that the submitted information contains details about the development of certain research technologies, pricing and commercial information, and the terms of the agreements that reflect the approach taken by the university when negotiating its licensing contracts. You explain that if the 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 “market its research discoveries” and “to optimize the financial benefit of its investment for the state” because the university would no longer be on an equal footing with private research companies. 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 the remaining claimed exceptions argued by the university and third parties.

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,



Debbie K. Lee
Assistant Attorney General
Open Records Division

DKL/eb

Ref: ID# 269475

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