



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 5, 2008

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

OR2008-07703

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# 311917.

The University of Texas at Tyler (the "university") received a request for information regarding university textbooks for the Spring, Summer, and Fall 2008 semesters. You claim that the requested information is excepted from disclosure under section 552.104 of the Government Code. We have considered the exception you claim and reviewed the submitted representative sample of information.¹

Initially, we address your claim that the university may rely on Open Records Letter No. 2005-05465 (2005) as a previous determination for withholding the information at issue in the current request. We note that Open Records Letter No. 2005-05465 addressed information pertaining to textbooks for the semester of Fall 2005, and the current request seeks information regarding textbooks for the Summer, Spring, and Fall of 2008 semesters. Because the relevant facts have changed since the issuance of Open Records Letter No. 2005-05465, we conclude that the university may not rely on that ruling as a previous

¹We assume that the representative sample of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

determination in this instance. *See* Open Records Decision No. 673 (2001) (so long as law, facts, circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). Therefore, we will address your claim under section 552.104 of the Government Code for the information at issue in the current request.

Section 552.104 of the Government Code is applicable to "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104. 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).

In this case, you inform us that the university's bookstore is an auxiliary enterprise, and as such, "is required to be financially self-supporting and to generate revenue for its operating budget." *See* Gov't Code § 2252.061(1) (defining auxiliary enterprise as "a business activity that is conducted at a state agency, provides a service to the agency, and is not paid for with appropriated money"). You indicate that the university bookstore competes with other bookstores in providing textbooks for students. Having considered your representations and arguments, we find that you have demonstrated that the university bookstore has specific marketplace interests and may be considered a "competitor" for purposes of section 552.104. *See* ORD 593.

We next address whether release of the submitted information would harm the university bookstore's marketplace interests. You assert that a competitor could "gain an unfair competitive advantage by using the work product generated with the [u]niversity's own limited resources to determine which books sold best, then stock and sell those books, resulting in deteriorating sales in the [u]niversity [b]ookstore." You further contend that a competitor could use the requested information "in determining the [u]niversity [b]ookstore's profit margin per item and then using the information to undercut the prices charged by the [u]niversity [b]ookstore, thereby deteriorating sales." Having considered your arguments, we conclude that you have shown that release of the submitted information will bring about

specific harm to the university bookstore's marketplace interests. *See id.* Therefore, the university may withhold the submitted information pursuant to 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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, 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).

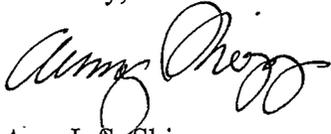
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can challenge that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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,

A handwritten signature in cursive script, appearing to read "Amy Shipp".

Amy L.S. Shipp
Assistant Attorney General
Open Records Division

ALS/jb

Ref: ID# 311917

Enc. Submitted documents

c: Mr. David Bankster
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(w/o enclosures)