ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 19, 2008

Ms. Neera Chatterjee
University of Texas System
201 West Seventh Street
Austin, Texas 78701-2902

OR2008-17282

Dear Ms. Chatterjee:

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# 330454.

The University of Texas at Austin (the "university") received a request for a list of the 10 anabolic steroids and/or other performance enhancing drugs that are being tested under the University Interscholastic League's (the "UIL") statewide Anabolic Steroid Testing Program.[1] You claim the requested information is excepted from disclosure under sections 552.101 and 552.122 of the Government Code. You also state, and provide documentation showing, that you notified The National Center for Drug Free Sport, Inc. (the "center") of the university's receipt of the request for information and of its right to submit arguments to this office as to why the submitted information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note the requestor seeks only the list of anabolic steroids and other performance enhancing drugs. Therefore, the additional submitted information, which we have marked,

[1]We note that the university received clarification regarding this request from the requestor. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information).

is not responsive to the request for information. This ruling does not address the public availability of any information that is not responsive to the request and the university is not required to release that information in response to the request.

An interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why requested information relating to it should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, the center has not submitted to this office any reasons explaining why the submitted information should not be released. We thus have no basis for concluding that any portion of the submitted information constitutes proprietary information of this company, and the university may not withhold any portion of the submitted information on that basis. *See* Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990).

We next address your argument under section 552.101 of the Government Code for the submitted responsive information. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. You cite no constitutional provision, statute, or judicial decision that makes confidential the information at issue. Instead, you argue that the UIL has been given the statutory power to create and conduct an anabolic steroid testing program and that statutory grant of express power necessarily carries with it every other power necessary for the execution of that power. You further state the statutory authority to conduct this testing implies the authority to maintain the confidentiality of the steroid testing program, and as such, the information at issue is excepted from disclosure under section 552.101.

We do not imply the authority of the university to maintain the confidentiality of the steroids from the UIL's grant of statutory authority to randomly test athletics for steroid use. The Act "does not authorize the withholding of pubic information or limit the availability of public information to the public, except as expressly provided by this chapter." *Id.* § 552.006. The Act, section 552.101, does not except information based on a finding of implied confidentiality. A statute must explicitly require confidentiality; a confidentiality requirement will not be inferred. Open Records Decision Nos. 658 at 4 (1998); 478 at 2 (1987); *see also City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 326 (Tex. App.—Austin 2002, no pet.) (holding that incidental effects of disclosure of information does not "warrant a strained reading of section 552.108 that would result in denying . . . requestor information not clearly specified by that exception . . . To find otherwise would also be inconsistent with the Legislature's directive to liberally construe the Act in favor of disclosure"). Furthermore, section 552.001(b) of the Government Code requires the Act "be liberally construed in favor of granting a request for information." Gov't Code 552.001(b); *see also City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 356 (Tex. 2000).

Exceptions to disclosure are construed narrowly. *AT&T Consultant, Inc. v. Sharp*, 904 S.W.2d 668, 680 (Tex. 1995). Therefore, we determine that no portion of the submitted responsive information may be withheld under section 552.101 of the Government Code.

You also raise section 552.122 of the Government Code, which excepts from disclosure "a test item developed by a . . . governmental body[.]" Gov't Code § 552.122(b). In Open Records Decision No. 626 (1994), this office determined that the term "test item" includes any standard means by which an individual's or group's knowledge or ability in a particular area is evaluated, but does not encompass evaluations of an employee's overall job performance or suitability. Whether information falls within the section 552.122 exception must be determined on a case-by-case basis. *Id.* at 6. Traditionally, this office has applied section 552.122 where release of test items might compromise the effectiveness of future examinations. *Id.* at 4-5; *see also* Open Records Decision No. 118 (1976). Section 552.122 also protects the answers to test questions when the answers might reveal the questions themselves. *See* Attorney General Opinion JM-640 at 3 (1987); ORD 626 at 8.

You state that "the anabolic steroid testing program measures whether the athletic ability of a student is derived, at least in part, from the use of illegal anabolic steroids" and that "the steroid testing program is therefore a 'test item' under the Act, as it is a standard method utilized to evaluate an individual's athletic ability." We find, however, that section 552.122 does not apply to the list of anabolic steroids, as they are not a standard means to test any specific knowledge or ability of an athlete. To the contrary, the steroid test is used to determine the presence of steroids in the athlete's system. Accordingly, we determine the list of steroids does not constitute a test item for purposes of section 552.122, and it may not be withheld on this basis. We therefore conclude that the university may not withhold any of the submitted information under section 552.122 of the Government Code. As you raise no other arguments against disclosure of the submitted responsive information, it must be released to the requestor.

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). If the governmental body does not file suit over 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,

Jordan Hale
Assistant Attorney General
Open Records Division

JH/jb

Ref: ID# 330454

Enc. Submitted documents

cc: Requestor
(w/o enclosures)