



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

December 22, 2017

Ms. Cynthia Tynan
Office of the General Counsel
University of Texas System
210 West Seventh Street
Austin, Texas 78701-2901

OR2017-29122

Dear Ms. Tynan:

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# 690224 (OGC# 177756).

The University of Texas M.D. Anderson Cancer Center (the "university") received a request for information pertaining to the university's supply and delivery of natural gas. The university states it has released some of the requested information. The university does not take a position as to whether the submitted information is excepted from disclosure under the Act. However, the university states, and provides documentation showing, it notified the Texas General Land Office (the "GLO") of the university's receipt of the request for information and of the GLO's right to submit arguments to this office as to why the requested information should not be released. *See* Gov't Code §§ 552.304 (interested party may submit written comments stating why information should or should not be released), .305(d); *see also* Open Records Decision No. 542 at 3 (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 received comments from the GLO objecting to the release of some of the information at issue. We have considered the submitted arguments and reviewed the submitted information.

Section 552.104 of the Government Code excepts from required public disclosure "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 connection with

competitive bidding and in certain other competitive situations. *See* Open Records Decision No. 593 (1991) (construing statutory predecessor). This office has held 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. *See id.* First, the governmental body must demonstrate it has specific marketplace interests. *See 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. *See 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. *See id.* at 10. A general allegation of a remote possibility of harm is not sufficient. *See* Open Records Decision No. 514 at 2 (1988).

The GLO asserts it has specific marketplace interests in the submitted information because it is authorized by statute to “sell or otherwise convey power or natural gas generated from royalties taken in kind[.]” Util. Code § 35.102(a). The GLO advises us, under that authority, it created the Public Customer Power Program, through which it “competes for the provision and transport of natural gas to the public retail customers, and created specific pricing formulae to enable it to fully compete in the marketplace.” The GLO also informs us “[i]n the case of state agencies, the GLO has ‘last look’ at the prices offered by other bidders, and prevails it if meets or beats the other bidders’ price.” Based on these representations, we find the GLO has demonstrated it has specific marketplace interests and may be considered a “competitor” for purposes of section 552.104. *See* ORD 593.

The GLO informs us the information it has marked reveals key components of the natural gas contracts at issue, which “are used over and over in GLO’s continuous course of daily business.” The GLO further asserts the release of this information would allow “competitors to gain insight into the GLO’s business and marketing strategies, including its pricing formulae.” Thus, the GLO contends allowing competitors access to information at issue would undermine its ability to compete in this marketplace. Based on the GLO’s representations, we conclude the GLO has shown release of the information it has marked would cause specific harm to the GLO’s marketplace interests. *See id.* Therefore, we conclude the university may withhold the information that the GLO has marked under section 552.104 of the Government Code.¹

We note some of the materials at issue may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; *see* Open Records Decision No. 109 (1975). If a member of the public

¹As our ruling is dispositive, we do not address the other arguments to withhold this information.

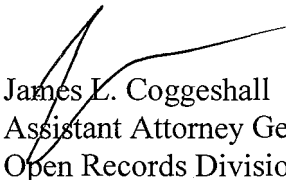
wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

In summary, the university may withhold the information that the GLO has marked under section 552.104 of the Government Code. The university must release the remaining information, but may only release any copyrighted information in accordance with copyright law.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/tdw

Ref: ID# 690224

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Third Party
(w/o enclosures)