



November 10, 2000

Mr. Kenneth Stewart
Associate General Counsel
Texas Department of Transportation
125 East 11th Street
Austin, Texas 78701-2483

OR2000-4383

Dear Mr. Stewart:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 141145.

The Texas Department of Transportation (the "department") received a request (dated August 31, 2000) for "documents pertaining to pre-qualification of Jet Concrete in order for Jet Concrete to bid on ... work for [the department]." You indicate that the requestor also made two additional requests for which you are not requesting rulings from this office. You have submitted for our review a representative sample of records which you indicate are responsive to the request.¹ We assume that the representative sample submitted is responsive to the August 31, 2000 request.

The submitted records appear to comprise pre-bid questionnaire information submitted by Jet Concrete, Inc. to the department. You assert that the information is excepted from disclosure under sections 552.104 and 552.110 of the Government Code. You have also notified Jet Concrete, Inc. of the request by a letter dated September 8, 2000, in compliance with section 552.305 of the Government Code. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Public Information Act in certain circumstances). Mr.

¹ We 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. ¶

David J. Potter, an attorney, responded to the notice on behalf of his client, Jet Concrete, to assert that the information is excepted from disclosure under sections 552.101 and 552.110 of the Government Code.

Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." The purpose of section 552.104 is to protect a governmental body's interests in competitive bidding situations. *See* Open Records Decision No. 592 (1991). Moreover, section 552.104 requires a showing of some actual or specific harm in a particular competitive situation; a general allegation that a competitor will gain an unfair advantage will not suffice. Open Records Decision No. 541 at 4 (1990). Section 552.104 does not except information relating to competitive bidding situations once a contract has been awarded. Open Records Decision Nos. 306 (1982), 184 (1978).

You indicate that "to maximize efficiency and save time and money, [the department] has instituted a 'pre-qualification' procedure that requires contractors to submit certain financial information in advance of any bid." You assert that the release of the information would impair the department's "ability to compete for contractors with entities that do not have to release private financial information" and would in effect reduce competition on competitive bids. We believe you have adequately demonstrated the requisite showing for the application of section 552.104.

We note however that the information at issue contains completed auditor reports and that the department asserts this information is not subject to release under section 552.022 of the Government Code. In relevant part, this provision states that unless expressly confidential under other law "a completed report, audit, evaluation or investigation made of, for, or by a governmental body" is public information and not excepted from required disclosure. Gov't Code § 552.022(a)(1). However, in this instance the auditor reports at issue pertain to a private third party. The reports indicate on their face that they were prepared for the third party, and not for the department. We accordingly agree that section 552.022(a)(1) does not encompass this information. Therefore, we conclude that the department may withhold the information in its entirety under section 552.104 of the Government Code.

Because we make a determination under section 552.104 of the Public Information Act, we need not consider your additional arguments and the additional arguments of Jet Concrete. 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).

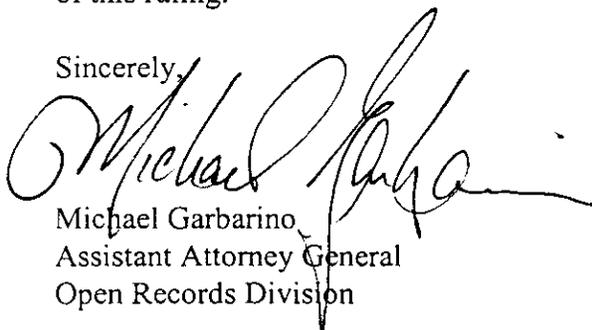
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, 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 Department of Public 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 the General Services Commission 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 black ink, appearing to read "Michael Garbarino". The signature is written in a cursive style and is positioned above the typed name and title.

Michael Garbarino
Assistant Attorney General
Open Records Division

MG/db/seg

Ref: ID# 141145

Encl. Submitted information

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