



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

February 24, 2003

Mr. Richard Hamala
Tiemann, Shahady, Blackman & Hamala, P.C.
P.O. Box 1190
Pflugerville, Texas 78691-1190

OR2003-1191

Dear Mr. Hamala:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 176910.

The Texas Municipal Power Agency (the "agency"), which you represent, received a request for 1) contracts awarded to Boral Material Technologies, Inc. ("Boral") in the last ten years; 2) all documents reflecting the price of fly ash; 3) agreements with Boral signed by the agency; 4) public bids submitted by Boral in the last ten years, and 5) the name and title of each employee and officer involved in the production or sale of fly ash. You claim that information responsive to categories one through three of the request is excepted under section 552.133 of the Government Code. In addition, pursuant to section 552.305 of the Government Code, you have notified Boral, a third party whose proprietary interests may be implicated by the request. *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 section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure in certain circumstances). We have considered all claimed exceptions and reviewed the submitted information.¹

¹We assume that the 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.

Initially, we note that Boral makes arguments for withholding information responsive to the fourth category of the request. However, the agency did not submit information responsive to the fourth or fifth category for our review. Therefore, this ruling does not address this information. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested, or representative sample if voluminous amount of information was requested).

Section 552.133 excepts from disclosure a public power utility's information related to a competitive matter. Section 552.133(b) provides in pertinent part:

Information or records are excepted from [required public disclosure] if the information or records are reasonably related to a competitive matter, as defined in this section. Excepted information or records include the text of any resolution of the public power utility governing body determining which issues, activities, or matters constitute competitive matters. Information or records of a municipally owned utility that are reasonably related to a competitive matter are not subject to disclosure under this chapter, whether or not, under the Utilities Code, the municipally owned utility has adopted customer choice or serves in a multiply certificated service area.

Gov't Code § 552.133(b). A "competitive matter" is defined as a matter that the public power utility governing body in good faith determines by vote to be related to the public power utility's competitive activity, and the release of which would give an advantage to competitors or prospective competitors. Gov't Code § 552.133(a)(3). Section 552.133 does not require a governmental body to demonstrate that the person or entity requesting the information is in competition with the governmentally owned utility. *See id.* Section 552.133(a)(3) lists thirteen categories of information that may not be deemed competitive matters. The attorney general may conclude that section 552.133 is inapplicable to requested information only if, based on the information provided, this office determines the public power utility governing body has not acted in good faith in determining that the issue, matter, or activity is a competitive matter or that the information requested is not reasonably related to a competitive matter. Gov't Code § 552.133(c).

Pursuant to the predecessor of section 552.133, the agency's board, as governing body of a public electric utility, passed a resolution by vote in which it determined that certain information constitutes "competitive matters." The listed "competitive matters" are not clearly among the thirteen categories of information expressly exempted from the definition of competitive matter, and we have no evidence from which to conclude that the city council failed to act in good faith in adopting that resolution. You indicate that the first three categories of requested information fall within categories of information designated as a "competitive matter" in the resolution adopted by the board. We agree. Consequently, we conclude that the first three categories of requested information are excepted from disclosure

pursuant to section 552.133 of the Government Code. As our ruling on this information is dispositive, we need not address Boral's arguments concerning these categories.

In summary, information responsive to categories one, two, and three of the request may be withheld pursuant to section 552.133. This ruling does not address information responsive to the fourth and fifth categories of the request.

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).

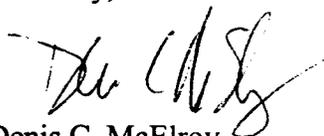
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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 Texas Building and Procurement 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,



Denis C. McElroy
Assistant Attorney General
Open Records Division

DCM/lmt

Ref: ID# 176910

Enc. Submitted documents

c: Mr. J. Jason Underbrink
Lone Star Ash, Inc.
Pleasanton, TX 78064
(w/o enclosures)