



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

August 7, 2003

Mr. Jason Martinson
Open Records Coordinator
Texas Parks & Wildlife
4200 Smith School Road
Austin, Texas 78744-3291

OR2003-5514

Dear Mr. Martinson:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 185550.

The Texas Parks and Wildlife Department (the "department") received a request for information pertaining to the Shrimp License Buyback Program (the "program"). You state that some responsive information will be provided to the requestor. You claim that portions of the remaining requested information are excepted from disclosure under sections 552.104, 552.110, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information, which you contend is a representative sample.

We must address first the department's obligations under section 552.301 of the Government Code. Under section 552.301(e), a governmental body receiving an open records request for information that it wishes to withhold pursuant to one of the exceptions to public disclosure is required to submit to this office within fifteen business days of receiving the request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. You have submitted a blank copy of the program application form for our review. The blank form document does not contain information about individual applicants to the program, which the requestor specifically requested, and therefore is not sufficient to satisfy the requirement

that the department provide a copy or representative sample of the specific information requested. *See* Gov't Code § 552.301(e)(4); Open Records Decision Nos. 499 (1988), 497 (1988) (governmental body receiving request for voluminous or repetitive records may submit representative samples of requested information, provided that if responsive information contains substantially different types of information, submitted sample includes all information). Because you have not submitted some of the information at issue, we determine that the department has not complied with section 552.301(e) in making this request for a decision from this office.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to submit to this office the information required in section 552.301(e) results in the legal presumption that the information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). Generally, a governmental body can overcome the presumption that information is public under section 552.302 by demonstrating that the information is confidential by law or that its disclosure affects third party interests. *See* Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982). Section 552.104 is a discretionary exception under the Public Information Act (the "Act") that does not constitute a compelling reason sufficient to overcome the presumption that the program application form is public.¹ Thus, the department may not withhold the information contained in the application form under section 552.104.

You also claim that portions of the information in the application form are confidential under sections 552.110 and 552.130 of the Government Code. However, because you have not submitted any responsive information for our review, we have no basis for finding that the information is confidential. We therefore conclude that the department must release the information contained in the application form to the requestor. If you believe the information is confidential and may not lawfully be released, you must challenge this ruling in court as outlined below.

¹Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.*, Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 592 (1991) (governmental body may waive section 552.104), 551 (1990) (statutory predecessor to section 552.103 serves only to protect governmental body's position in litigation and does not itself make information confidential), 522 at 4 (1989) (discretionary exceptions in general), 473 (1987) (governmental body may waive section 552.111).

We next address your claims for the information that you have submitted to us for review.² 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 state that the program allows the department to purchase and retire shrimp licenses. You explain that the department assigns an Established Maximum Value (“EMV”) for each application, and then ranks the applications “based on the difference between the EMV and the bid offers, with applications having the greatest difference being purchased first.” You indicate that “release of EMV’s and related bid amounts will diminish the department’s ability to obtain favorable bid offers, and therefore weaken the [p]rogram as a whole.” Furthermore, you assert that “releasing past EMV’s and related bid amounts would give applicants an advantage in estimating future bids,” thus impairing the department’s ability to obtain favorable offers. Upon careful review of the arguments submitted by the department, we believe that the department has demonstrated that public release of the information at issue would cause specific harm to the department’s interests in particular competitive bidding situations. Accordingly, we believe the department has adequately demonstrated the applicability of section 552.104 to this information. Therefore, the department may withhold the marked information pertaining to EMVs and related bid amounts from required public disclosure under section 552.104.

In summary, the department must release the information contained in the application form to the requestor. The marked information pertaining to EMVs and related bid amounts may be withheld from required public disclosure under section 552.104. The remaining submitted information must be released to the requestor.³

²We assume that the ranking sheet you have submitted as a “representative sample” is truly representative of the remaining requested records. *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.

³Because section 552.104 is dispositive in this case, we do not consider the department’s additional argument.

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,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/jh

Ref: ID# 185550

Enc. Submitted documents

c: Ms. Karisa King
San Antonio Express-News
P.O. Box 2171
San Antonio, Texas 78297
(w/o enclosures)