



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

October 7, 2003

Ms. Robin Abbott
Contract Officer
Economic Development & Tourism
Office of the Governor
P.O. Box 12428
Austin, Texas 78711

OR2003-7085

Dear Ms. Abbott:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 188951.

The Texas Department of Economic Development (the "department") received a request for access to the "package of incentives" that the department mailed on June 20, 2003 to the Boeing Company in Chicago ("Boeing") and its consultant, McCallum-Sweeney Consulting Co. of Greenville, South Carolina.¹ You claim that the requested information is excepted from disclosure under section 552.131 of the Government Code. We have considered the exception you claim and reviewed the submitted sample of information.²

¹ We note that the requestor states that this is his request for this information and that he sent a prior request to the department on June 22, 2003, to which the department did not respond. However, you state that the department never received the initial request. Whether the department received a previous request for these documents is a question of fact. This office cannot resolve disputes of fact in its decisional process. *See* Open Records Decision Nos. 592 at 2 (1991), 552 at 4 (1990), 435 at 4 (1986). Where fact issues are not resolvable as a matter of law, we must rely on the facts alleged to us by the governmental body requesting our decision, or upon those facts that are discernible from the documents submitted for our inspection. *See* Open Records Decision No. 552 at 4 (1990). Accordingly, we must presume that the instant request for information was the only request received by the department for the documents in question.

² 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.

Section 552.131(a) of the Government Code excepts from public disclosure a business prospect's trade secret or commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm if the information relates to economic development negotiations involving a governmental body and a business prospect that the governmental body seeks to have locate, stay, or expand in or near the governmental body's territory. Gov't Code § 552.131(a). Section 552.131(a) only protects the proprietary information of a third party, not a governmental body. Because you have not demonstrated that the submitted information is protected trade secret information or commercial or financial information of a business prospect, we conclude that section 552.131(a) does not apply to the responsive information.

Section 552.131(b) Code provides that "[u]nless and until an agreement is made with [a] business prospect, information about a financial or other incentive being offered to the business prospect by the governmental body or by another person is excepted from [required public disclosure]." Gov't Code § 552.131(b). You assert that the "Texas proposal contains commercial and financial incentives offered by Texas and communities around the state" and that "[p]remature disclosure of the state's total incentive proposal would give a competitive advantage to other states competing for Boeing's manufacturing facility." You further state that the department is currently involved in negotiations with Boeing that include discussions of the incentives package. Upon review of your arguments and the submitted information, we conclude that the department may withhold some of the requested information, which we have marked, under section 552.131(b). We note that the applicability of section 552.131 ends once the department finalizes an agreement with the business prospect. Gov't Code § 552.131(c). However, you have not demonstrated how the remaining information consists of a financial or other incentive for the purpose of section 552.131(b). Therefore, you must release the remaining information 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 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,



Jennifer E. Berry
Assistant Attorney General
Open Records Division

JEB/sdk

Ref: ID# 188951

Enc: Submitted documents

c: Mr. Alfred E. Ehm
Texas Central Rail-Corridor Coalition, Inc.
170 Carousel Drive
San Antonio, Texas 78227-4712
(w/o enclosures)