



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 24, 2003

Ms. Joanne Wright
Associate General Counsel
Texas Department of Transportation
125 East 11th Street
Austin, Texas 78701-2483

OR2003-7649

Dear Ms. Wright:

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# 189139.

The Texas Department of Transportation ("TxDOT") received a request for copies of "any and all proposals submitted in connection with" a specified portion of State Highway 45 as well as "any correspondence by, to, or from anyone connected with the project[.]" You assert the requested information is excepted from disclosure under sections 552.101 and 552.110 of the Government Code. In addition, you inform us, and provide supporting documentation showing, that the TxDOT notified Strategic Land Management Consultants ("SLMC"), an interested third party, of TxDOT's receipt of the request and of SLMC's right to submit arguments to this office explaining why its information should not be released to the requestor. *See* Gov't Code § 552.305(d); *see also* 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 under Act in certain circumstances). Further, we acknowledge our receipt of comments from a representative of the requestor. *See* Gov't Code § 552.304 (permitting interested third party to submit comments explaining why information should or should not be released). We reviewed the information you submitted and considered your arguments. We have also considered the comments submitted on behalf of the requestor.

Initially, we address TxDOT's obligations under section 552.301 of the Government Code. Pursuant to section 552.301(b), a governmental body must ask the attorney general for a

decision as to whether requested information must be disclosed not later than the tenth business day after the date of receiving the written request for information. *See* Gov't Code § 552.301(b). In addition, section 552.301(e) provides that a governmental body that requests an attorney general decision under section 552.301(a) must, within a reasonable time, but not later than the fifteenth business day after the date of receiving the written request, submit to the attorney general: (1) 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 as to the date on which the written request for information was received by the governmental body or evidence sufficient to establish that date; and (4) a copy of the specific information requested or representative samples of it, if a voluminous amount of the information was requested, labeled to indicate which exceptions apply to which parts of the information. *See* Gov't Code § 552.301(e).

You state that TxDOT received the written request for information on July 2, 2003. Thus, TxDOT should have submitted a request for an attorney general decision no later than July 21, 2003 and forwarded all other required documentation to this office by July 28, 2003. However, you did not submit your letter requesting a decision from our office and your supporting documentation until August 7, 2003. Consequently, we conclude that TxDOT failed to comply with the procedural requirements of section 552.301 in requesting this decision.

According to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301 results in the legal presumption that the information is public and must be released. A governmental body must release information presumed public under section 552.302, unless it demonstrates a compelling reason to withhold the information. *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). Normally, a compelling interest exists when some other source of law makes the information confidential or third party interests are at stake. *See* Open Records Decision No. 150 at 2 (1977). As TxDOT asserts sections 552.101 and 552.110 of the Government Code, both of which can provide compelling reasons to overcome the presumption of openness, we will address these claims.

Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This exception encompasses confidentiality provisions of other statutes. You assert the submitted information is confidential under section 361.3023 of the Transportation Code, which states the following:

- (a) To encourage private entities to submit proposals under Section 361.3022, the following information is confidential, is not subject to disclosure, inspection, or copying under Chapter 552, Government Code, and is not

subject to disclosure, discovery, subpoena, or other means of legal compulsion for its release until a final contract for a proposed project is entered into:

- (1) all or part of a proposal that is submitted by a private entity for a comprehensive development agreement, except information provided under Section 361.3022(b)(1) and (2);
- (2) supplemental information or material submitted by a private entity in connection with a proposal for a comprehensive development agreement; and
- (3) information created or collected by the department or its agent during consideration of a proposal for a comprehensive development agreement.

(b) After the department completes its final ranking of proposals under Section 361.3022(h), the final rankings of each proposal under each of the published criteria are not confidential.

Act of June 1, 2003, 78th Leg., R.S., ch. 1325, 2003 Tex. Sess. Law Serv. 4884, 4971-72 (Vernon) (to be codified at Transp. Code § 361.3023).¹ Section 361.3022(b)(1) and (2) state the following:

- (b) The department shall establish rules and procedures for accepting unsolicited proposals that require the private entity to include in the proposal:
- (1) information regarding the proposed project location, scope, and limits;
 - (2) information regarding the private entity's qualifications, experience, technical competence, and capability to develop the project[.]

Id. at 4970 (to be codified at Transp. Code § 361.3022). Section 361.302 of the Transportation Code defines a “comprehensive development agreement” as “an agreement with a private entity that, at a minimum, provides for the design and construction of a turnpike project and may also provide for the financing, acquisition, maintenance, or operation of a turnpike project.” *Id.* at 4969 (to be codified as an amendment to Transp. Code § 361.302). In this instance, you state the submitted information “is a proposal and

¹ For purposes of chapter 361 of the Transportation Code, “department” means TxDOT. *See* Transp. Code § 201.001.

supplemental information regarding a comprehensive development agreement.” Further, you inform us that TxDOT has not awarded the contract to which the submitted information relates, as TxDOT is still negotiating the terms of the contract.² Based on our review of your representations and the submitted information, we conclude that, with the exception of information covered by subsections 361.3022(b)(1) and (2), TxDOT must withhold the submitted information under section 552.101 of the Government Code in conjunction with section 361.3023 of the Transportation Code at this time.³

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).

² We note comments submitted by the requestor’s representative in which he states that, in meetings with TxDOT, the requestor has “received the impression that a deal had already been struck between TxDOT and [SLMG].” TxDOT maintains that it has not awarded a contract relating to the information at issue. This office is unable to make factual determinations or resolve factual disputes in the opinion process. *See* Attorney General Opinions GA-0087 at 1 (2003), GA-0003 at 1 n. 2 (2003), JC-0534 at 1 (2002). We therefore must rely on a governmental body’s representations with regard to such issues.

³ As we make this determination, we need not address your arguments under section 552.110 of the Government Code.

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,



Christen Sorrell
Assistant Attorney General
Open Records Division

CHS/seg

Ref: ID# 189139

Enc: Submitted documents

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