



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 21, 2005

Mr. Kevin McCalla
Director, General Law Division
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

OR2005-09580

Dear Mr. McCalla:

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# 234734.

The Texas Commission on Environmental Quality (the "commission") received a request for nine categories of information relating to a requisition for a remedial investigation and removal services contract. You inform us that the commission is releasing some of the requested information. You seek to withhold the rest of the requested information under sections 552.101, 552.104, and 552.110 of the Government Code.¹ You also believe that some of the remaining information implicates the proprietary interests of Shaw Environmental, Inc. ("Shaw"), URS Corporation ("URS"), and Weston Solutions, Inc. ("Weston"). You notified Shaw, URS, and Weston of this request for information and of their right to submit arguments to this office as to why the information at issue should not

¹You inform us that you no longer claim sections 552.107 and 552.111, as the commission reached an agreement with the requestor that limited the scope of the original request as it applied to information that may have been encompassed by those exceptions. Accordingly, we do not address sections 552.107 and 552.111. See Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information).

be released.² We also received correspondence from URS.³ We have considered all of the submitted arguments and have reviewed the submitted information.⁴ We also have considered the comments that we received from the requestor.⁵

Section 552.104 excepts from public disclosure “information that, if released, would give advantage to a competitor or bidder.” Gov’t Code § 552.104(a). The purpose of this exception is to protect a governmental body’s interests in competitive bidding situations. *See* Open Records Decision No. 592 (1991). 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. *See* Open Records Decision No. 541 at 4 (1990). Section 552.104 does not protect information relating to competitive bidding situations once a contract has been awarded and is in effect. *See* Open Records Decision Nos. 306 (1982), 184 (1978).

You seek to withhold the information at Attachment A Tabs 1, 2, and 3, as well as the weighting factor and independent cost estimate information in Attachment A Tab 4, under section 552.104. You inform us that the information at issue relates to two contracts that have been awarded and signed. You explain, however, that the requestor’s company has filed a protest. You inform us that work cannot commence until the protest has been resolved. You state that the commission “face[s] the prospect of going through the entire process once more, if the protest is successful. Put another way, [the commission] is in essentially the same position as if there had been no award.” You also state that “[t]he very real prospect exists then for proposers to submit or furnish additional information in the future[.]” Having considered your representations, we conclude that you have demonstrated that the commission may withhold all of the information at issue under section 552.104 of

²*See* Gov’t Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to Gov’t Code § 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances).

³We note that URS has enclosed copies of information that it seeks to have withheld from disclosure. This decision addresses only the information that the commission submitted to this office. *See* Gov’t Code § 552.301(e)(1)(D), .302.

⁴To the extent that the commission has submitted representative samples of requested information, this letter ruling assumes that such information is truly representative of the requested information as a whole. This ruling neither reaches nor authorizes the commission to withhold any information that is substantially different from the submitted information. *See* Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

⁵*See* Gov’t Code § 552.304 (any person may submit written comments stating why information at issue in request for attorney general decision should or should not be released).

the Government Code until such time as the protest has been resolved and the contracts have been finally awarded and are in effect.⁶ See Open Records Decision No. 541 at 5 (1990).

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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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).

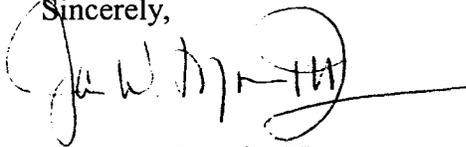
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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 Office of the Attorney General at (512) 475-2497.

⁶As we are able to make this determination, we need not address the commission's remaining arguments or the arguments that we received from URS.

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,



James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/sdk

Ref: ID# 234734

Enc: Submitted documents

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