



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 4, 2008

Ms. Blakely Fernandez
Tuggey, Rosenthal, Pauerstein, Sandoloski, & Agather, L.L.P.
755 East Mulberry, Suite 200
San Antonio, Texas 78212

OR2008-12185

Dear Ms. Fernandez:

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# 320937.

The Alamo Regional Mobility Authority (the "authority"), which you represent, received a request for information pertaining to cost estimates regarding a specified authority construction project. You have withdrawn your own assertions under the Act in your letter dated August 21, 2008, and you state that you will release all information not subject to third party interests. However, you state that release of some of the requested information could implicate the proprietary interests of third parties, HNTB Corporation ("HNTB"), Cibolo Creek Infrastructure IV ("Cibolo") and Zachary Construction Company ("Zachary"). Accordingly, you state that you have notified these third parties of the request and of each company's opportunity to submit arguments to this office as to why its information should be excepted from public disclosure. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have reviewed the submitted representative samples of information.¹ We have also received and considered arguments from Cibolo and Zachary.

¹We 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.

We note that an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. See Gov't Code § 552.305(d)(2)(B). As of the date of this letter, HNTB has not submitted to this office any reasons explaining why any of its information, submitted as "Exhibit E," should not be released. Therefore, HNTB has failed to provide us with any basis to conclude that it has a protected proprietary interest in any of its information. Thus, none of Exhibit E may be withheld on that basis. See Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). As you raise no exceptions on behalf of the authority, Exhibit E must be released to the requestor.

The remaining information at issue consists of Cibolo's "Development Price Form," which you have submitted as Exhibit C. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information protected by other statutes, such as section 370.307 of the Transportation Code, which provides in part:

(a) To encourage private entities to submit proposals under Section 370.306, the following information is confidential, is not subject to disclosure, inspection, or copying under Chapter 552, Government Code . . . until a final contract for a proposed project is entered into:

(1) all or part of a proposal submitted by a private entity for a comprehensive development agreement, except information provided under Sections 370.306(b)(1) and (2)[.]

Transp. Code § 370.307(a)(1). Cibolo asserts that Exhibit C is subject to section 370.307 of the Transportation Code. You represent to this office that Exhibit C was submitted to the authority by Cibolo as part of its proposal for a comprehensive development agreement. You also state that the final contract for this project has not been executed. Based on these representations and our review, we conclude that Exhibit C is subject to section 370.307(a)(1). We note that section 370.306(b) of the Transportation Code sets forth the information that must be included in a proposal for a proposed transportation project if a regional mobility authority accepts an unsolicited proposal. *Id.* § 370.306(b). Information that is subject to subsections 370.306(b)(1) and (2) is not confidential under section 370.307(a). You represent that the project at issue went through a formal procurement process in which the authority solicited proposals from private entities. Since the authority solicited proposals on this project, we conclude that section 370.306(b) does not apply to this project. We therefore agree that the authority must withhold Exhibit C in

its entirety under section 552.101 of the Government Code in conjunction with section 370.307(a)(1) of the Transportation Code. As our ruling is dispositive, we need not address Cibolo's remaining arguments against disclosure.

In summary, the authority must withhold Exhibit C under section 552.101 of the Government Code in conjunction with section 370.307(a)(1) of the Transportation Code. The remaining requested information must be released 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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3). If the governmental body does not file suit over 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 challenge 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.

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,



Reg Hargrove
Assistant Attorney General
Open Records Division

RJH/eeg

Ref: ID# 320937

Enc. Submitted documents

c: Mr. Patrick Driscoll
P.O. Box 2171
San Antonio, Texas 78297
(w/o enclosures)

Mr. Michael Lipinski
Cibolo Creek Infrastructure
1114 Lost Creek Boulevard, Suite 130
Austin, Texas 78746
(w/o enclosures)

Mr. Jean Abiassi
Zachary Construction Corporation
P.O. Box 240130
San Antonio, Texas 78224-0130
(w/o enclosures)

Mr. Robert Slimp
HNTB Corporation
301 Congress Avenue, Suite 600
San Antonio, Texas 78701
(w/o enclosures)