



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 28, 2010

Mr. Mark Adams
Assistant General Counsel
Office of the Governor
P.O. Box 12428
Austin, Texas 78711

OR2010-14769

Dear Mr. Adams:

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# 395506.

The Office of the Governor (the "governor") received a request for information relating to Albany Engineered Composites, Inc. ("Albany"), including (1) Albany's original economic development agreement (the "agreement") with the State of Texas and amendment number one (the "amendment") to the agreement; (2) communications with Albany, including records of the criteria employed to approve the amendment to the agreement and the names of the persons who approved the amendment; and (3) communications with specified officials of the City of Boerne, Kendall County, and the Kendall County Economic Development Corporation. You state that some of the requested information has been released. You claim that some of the submitted information is excepted from disclosure under section 552.104 of the Government Code. You also believe that the submitted information may implicate Albany's interests. You inform us that Albany was notified of this request for information and of its right to submit arguments to this office as to why the information should not be released.¹ We have considered the exception you claim and reviewed the information you submitted.

¹See 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).

We note that the requestor also asks questions regarding Albany and the agreement. A governmental body need not answer factual questions or create new information in responding to a request for information under the Act. A governmental body must make a good-faith effort, however, to relate a request to responsive information that is within its possession or control. *See* Open Records Decision No. 561 at 8-9 (1990). We assume that the governor will do so and respond appropriately to the requestor's questions.

Next, we must determine whether the governor complied with section 552.301 of the Government Code in requesting this decision. Section 552.301 prescribes procedures that must be followed in asking this office to determine whether requested information is excepted from public disclosure. *See* Gov't Code § 552.301(a). Section 552.301(b) provides that a governmental body must ask for the attorney general's decision and claim its exceptions to disclosure no later than the tenth business day after the date of its receipt of the written request for information. *See id.* § 552.301(b). Section 552.301(e) requires the governmental body to submit to this office, not later than the fifteenth business day after the date of its receipt of the request, (1) written comments stating why the governmental body's claimed exceptions apply to the information that it seeks to withhold; (2) a copy of the written request for information; (3) a signed statement of the date on which the governmental body received the request, or evidence sufficient to establish that date; and (4) the specific information that the governmental body seeks to withhold or representative samples of the information if it is voluminous. *See id.* § 552.301(e)(1)(A)-(D). Section 552.302 of the Government Code provides that if a governmental body fails to comply with section 552.301, the requested information is presumed to be subject to required public disclosure and must be released, unless there is a compelling reason to withhold any of the information. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ).

You inform us that the governor received the instant request for information on July 7, 2010. You explain, and have provided documentation reflecting, that your office communicated with the requestor for the purpose of clarifying the request. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information). You state that clarification of the request was completed on July 14. We have no indication that the governor did not act in good faith in seeking clarification of the request. Therefore, based on your representations and documentation, we consider the governor's ten- and fifteen-business-day periods for requesting a decision under section 552.301 to have begun on July 14. *See City of Dallas v. Abbott*, 304 S.W.3d 380, 384 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or over-broad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed). Thus, we consider the governor to have timely

submitted his request for this decision and subsequent correspondence with this office, which we received on July 28 and August 4.

Section 552.104 of the Government Code excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). The protections afforded by section 552.104 serve two purposes. One purpose is to protect the interests of a governmental body by preventing one competitor or bidder from gaining an unfair advantage over others in the context of a pending competitive bidding process. *See* Open Records Decision No. 541 (1990). The other purpose is to protect the legitimate marketplace interests of a governmental body when acting as a competitor in the marketplace. *See* Open Records Decision No. 593 (1991). In both instances, the governmental body must demonstrate actual or potential harm to its interests in a particular competitive situation. *See* Open Records Decision Nos. 593 at 2, 463 at 1 (1987), 453 at 3 (1986). A general allegation of a remote possibility of harm is not sufficient to invoke section 552.104. *See* ORD 593 at 2. Furthermore, section 552.104 generally is not applicable once a competitive bidding situation has concluded and a contract has been executed. *See* ORD 541.

You indicate that the submitted information is related to the Texas Enterprise Fund (the "TEF"), which provides monetary incentives for companies coming to Texas. You seek to withhold marked portions of the information submitted as Exhibit B under section 552.104. You state that the information at issue is related to the revision of Albany's TEF agreement. You contend that the release of this information would give advantage to other companies that are seeking similar revisions. You also contend that the release of this information would give advantage to other entities that are competing to obtain financial incentives from the State of Texas and would disadvantage the state by revealing to other states what Texas is offering to businesses and Texas's negotiation strategies and procedures. Having considered your arguments, we find that you have not demonstrated that the information at issue pertains to a competition for TEF funds that existed on the date of the governor's receipt of the instant request for information. We also find that you have not demonstrated that the release of the information at issue would harm the legitimate marketplace interests of the State of Texas in a particular competitive situation. We therefore conclude that the governor may not withhold any of the submitted information under section 552.104 of the Government Code.

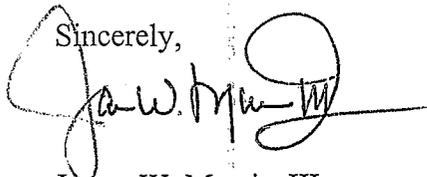
Lastly, we note that an interested third party is allowed ten business days from the date of its receipt of a governmental body's notice under section 552.305 of the Government Code to submit its reasons, if any, as to why information relating to that party should not be released. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this decision, this office has received no correspondence from Albany. Therefore, because Albany has not demonstrated that any of the information at issue is proprietary for the purposes of the Act, the governor may not withhold any of the submitted information on the basis of any proprietary interest that Albany may have in the information. *See id.* § 552.110(a)-(b); Open Records Decision

Nos. 552 at 5 (1990), 661 at 5-6 (1999). Thus, because the governor claims no other exception to disclosure, all of the submitted information must be released.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in black ink, appearing to read "James W. Morris, III". The signature is stylized with a large initial "J" and a long horizontal stroke at the end.

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

JWM/em

Ref: ID# 395506

Enc: Submitted documents

c: Requestor
(w/o enclosures)

Albany Engineered Composites, Inc.
c/o Mr. Mark Adams
Office of the Governor
P.O. Box 12428
Austin, Texas 78711
(w/o enclosures)