



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 1, 2011

Ms. Laura Russell
Attorney
Texas Parks and Wildlife Department
4200 Smith School Road
Austin, Texas 78744-3291

OR2011-16058

Dear Ms. Russell:

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# 434963.

The Texas Parks and Wildlife Department (the "department") received a request for the preliminary findings of the department's contractor, AECOM, that were referenced in a specified department e-mail; information and correspondence between AECOM and any of five named individuals for a specified period of time pertaining to AECOM's contractual obligations; a copy of any written materials the department planned to distribute at a specified meeting; and a copy of the video the department planned to distribute at the same meeting. You indicate the department will make some of the requested information available to the requestor for inspection pursuant to her request. You claim that some of the requested information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted representative sample of information.¹ We have also received and considered comments submitted by a

¹This letter ruling assumes that the submitted representative sample of information is truly representative of the requested information as a whole. This ruling does not reach, and therefore does not authorize, the withholding of any other requested information to the extent that the other information is substantially different than that submitted to this office. See Gov't Code §§ 552.301(e)(1)(D), .302; Open

representative for the requestor and by an interested third party. *See* Gov't Code § 552.304 (interested third party may submit comments stating why information should or should not be released).

Initially, we address the requestor's assertion the department possesses information responsive to the request for the written materials or video the department planned to distribute at a specified meeting. You state the department does not possess the requested written materials or video because the department had not determined what information to distribute. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed) (governmental body not required to disclose documents that did not exist when it received a request). Whether the department has information responsive to these portions of the request is a question of fact. This office cannot resolve factual disputes in the opinion 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* ORD 552 at 4. Accordingly, we must accept the department's representation that it has no additional responsive information that it has not already provided to this office. We note a governmental body has a duty to make a good faith effort to relate a request for information to information that the governmental body holds. *See* Open Records Decision No. 561 at 8-9 (1990). We assume the department has made a good faith effort to do so.

We next address the requestor's and third party's contentions that the department failed to comply with the procedural requirements of the Act. Section 552.301 of the Government Code describes the procedural obligations placed on a governmental body that receives a written request for information that it wishes to withhold. Pursuant to section 552.301(b), the governmental body must ask for the attorney general's decision and state the exceptions that apply within ten business days after receiving the request. *See* Gov't Code § 552.301(b). Section 552.301(e) requires the governmental body to submit to the attorney general, 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 the governmental body seeks to withhold or representative samples if the information is voluminous. *See id.* § 552.301(e)(1)(A)-(D).

The requestor and third party state the department received the request for information on Sunday, August 14, 2011. You state, and provide documentation reflecting, the department

Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

provided the requestor with a written itemized estimate of the charges for responding to the request on August 26, 2011. *See id.* § 552.2615 (providing governmental body shall provide requestor with estimate of charges if charges exceed \$40). In response to the itemized statement, the requestor modified her request on August 28, 2011. *See City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding when governmental entity, acting in good faith, requests clarification or narrowing of unclear or over-broad request for public information, 10-day period to request attorney general ruling is measured from date request is clarified or narrowed). We note August 28, 2011 was a Sunday; therefore, for purposes of the Act, we find the department is deemed to have received the request on Monday, August 29, 2011. *See Gov't Code* § 552.301(b)-(c). We also note September 5, 2011 was a holiday. This office does not count the date the request was received or holidays for the purpose of calculating a governmental body's deadlines under the Act. Accordingly, the ten-business-day deadline for requesting a ruling from this office was September 13, 2011, and the fifteen-business-day deadline was September 20, 2011. After receiving the modified request, the department requested a ruling from this office in a letter bearing a postmark dated September 13, 2011 and submitted the information required by section 552.301(e) in a letter bearing a postmark dated September 20, 2011. *See id.* § 552.308 (describing rules for calculating submission dates of documents sent via first class United States mail, common or contract carrier, or interagency mail). Therefore, we find the department complied with the procedural requirements of section 552.301 of the Government Code in requesting this decision, and we will address your argument under section 552.101 of the Government Code for the submitted information.

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. You raise section 552.101 in conjunction with regulations in part 800 of title 36 of the Code of Federal Regulations, which set forth the procedures for the consultation process of section 106 of the National Historic Preservation Act ("NHPA"), section 470f of title 16 of the United States Code. Section 800.2 of title 36 of the Code of Federal Regulations provides, in pertinent part:

(a)(3) Use of contractors. . . . [T]he [federal] agency official may use the services of applicants, consultants, or designees to prepare information, analyses and recommendations under this part. The [federal] agency official remains legally responsible for all required findings and determinations. If a document or study is prepared by a non-Federal party, the [federal] agency official is responsible for ensuring that its content meets applicable standards and guidelines.

...

(c)(4) Applicants for Federal assistance, permits, licenses, and other approvals. An applicant for Federal . . . approval is entitled to participate as a consulting party as defined in this part. The [federal] agency official may authorize an applicant . . . to initiate consultation with the [State Historic Preservation Officer] . . . and others, but remains legally responsible for all findings and determinations charged to the [federal] agency official. . . . 36 C.F.R. § 800.2(a)(3), (c)(4). You explain that the United States Naval Sea Systems Command (“NAVSEA”) is the federal agency charged with completing the section 106 consultation process under the NHPA, and the department is an applicant for federal approval. Further, you explain that, pursuant to subsections 800.2(a)(3) and (c)(4) of title 36 of the Code of Federal Regulations, NAVSEA has authorized the department to initiate the consultation with the State Historic Preservation Officer. You state the department hired AECOM to “provide conceptual engineering, design and alternative studies” for the consultation process.

36 C.F.R. § 800.2(a)(3), (c)(4). You explain that the United States Naval Sea Systems Command (“NAVSEA”) is the federal agency charged with completing the section 106 consultation process under the NHPA, and the department is an applicant for federal approval. Further, you explain that, pursuant to subsections 800.2(a)(3) and (c)(4) of title 36 of the Code of Federal Regulations, NAVSEA has authorized the department to initiate the consultation with the State Historic Preservation Officer. You state the department hired AECOM to “provide conceptual engineering, design and alternative studies” for the consultation process.

You state NAVSEA must approve the submitted information before it is distributed to consulting parties because “it is explicitly charged with responsibility over the content of those materials.” Thus, you contend release of the information “would violate the oversight NAVSEA is legally charged with to ensure that it retains the ultimate responsibility for the findings and determinations[.]” Upon our review, we find that subsections 800.2(a)(3) and (c)(4) do not expressly make any information confidential or restrict access to any information. *See id.*; *see also* Open Records Decision Nos. 658 at 4 (1989) (statutory confidentiality must be express, and confidentiality requirement will not be implied from statutory structure), 478 at 2 (1987) (statutory confidentiality requires express language making certain information confidential or stating that information shall not be released to the public). Therefore, we conclude that you have not established, and it is not otherwise apparent to this office, how subsections 800.2(a)(3) and (c)(4) make confidential any of the information at issue. Accordingly, the department may not withhold any information under section 552.101 of the Government Code. As you raise no further exceptions against disclosure, we find the department must release the information at issue.

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,



Lindsay E. Hale
Assistant Attorney General
Open Records Division

LEH/ag

Ref: ID# 434963

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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