



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

September 29, 2016

Ms. Linda Pemberton
Paralegal
Office of the City Attorney
City of Killeen
P.O. Box 1329
Killeen, Texas 76540-1329

OR2016-21967

Dear Ms. Pemberton:

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# 628574 (ORR ID# W019737).

The City of Killeen (the "city") received a request for bid requirements from Fort Hood for the purpose of contracting out its animal shelter and the city's response. You claim the submitted information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed 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, such as the provisions of chapter 11 of division B of subtitle I of title 41 of the United States Code, commonly referred to as the Procurement Integrity Act (the "PIA"). Chapter 11 establishes and defines the authority of the Office of Federal Procurement Policy (the "OFPP"), which resides "in the Office of Management and Budget" within the Office of the President of the United States. 41 U.S.C. § 1101. "The head of the [OFPP] is the Administrator for Federal Procurement Policy [(the "Administrator")]."*Id.* § 1102(a). The "Administrator may prescribe Government-wide procurement polices" that are "implemented in a single Government-wide procurement regulation called the Federal Acquisition Regulation [(the "FAR")]."*Id.* § 1121(b). The FAR is found at chapter 1 of title 48 of the Code of Federal

Regulations, and the city claims the submitted information is confidential pursuant to section 3.104-4 of the FAR. Section 3.104-4 provides, in relevant part:

(a) Except as specifically provided for in this subsection, no person or other entity may disclose contractor bid or proposal information or source selection information to any person other than a person authorized, in accordance with applicable agency regulations or procedures, by the agency head or the contracting officer to receive such information.

(b) Contractor bid or proposal information and source selection information must be protected from unauthorized disclosure in accordance with 14.401, 15.207, applicable law, and agency regulations.

48 C.F.R. § 3.104-4(a)-(b). Section 3.104-1 of the FAR provides, in relevant part:

Contractor bid or proposal information means any of the following information submitted to a Federal agency as part of or in connection with a bid or proposal to enter into a Federal agency procurement contract, if that information has not been previously made available to the public or disclosed publicly:

(1) Cost or pricing data (as defined by 10 U.S.C. 2306a(h)) with respect to procurements subject to that section, and 41 U.S.C. 3501(a)(2), with respect to procurements subject to that section.

(2) Indirect costs and direct labor rates.

(3) Proprietary information about manufacturing processes, operations, or techniques marked by the contractor in accordance with applicable law or regulation.

(4) Information marked by the contractor as “contractor bid or proposal information” in accordance with applicable law or regulation.

(5) Information marked in accordance with 52.215-1(e).

Id. § 3.104-1. Section 2.101 of the FAR provides, in relevant part:

Source selection information means any of the following information that is prepared for use by an agency for the purpose of evaluating a bid or proposal

to enter into an agency procurement contract, if that information has not been previously made available to the public or disclosed publicly:

- (1) Bid prices submitted in response to an agency invitation for bids, or lists of those bid prices before bid opening.
- (2) Proposed costs or prices submitted in response to an agency solicitation, or lists of those proposed costs or prices.
- (3) Source selection plans.
- (4) Technical evaluation plans.
- (5) Technical evaluations of proposals.
- (6) Cost or price evaluations of proposals.
- (7) Competitive range determinations that identify proposals that have a reasonable chance of being selected for award of a contract.
- (8) Rankings of bids, proposals, or competitors.
- (9) Reports and evaluations of source selection panels, boards, or advisory councils.
- (10) Other information marked as “Source Selection Information—See FAR 2.101 and 3.104” based on a case-by-case determination by the head of the agency or the contracting officer, that its disclosure would jeopardize the integrity or successful completion of the Federal agency procurement to which the information relates.

Id. § 2.101. Subsection 3.104-4(a) restricts the disclosure of “contractor bid or proposal information” and “source selection information” to a certain type of individual and subsection 3.104-4(b) provides these types of information must be protected from unauthorized disclosure. We understand you to assert the submitted information consists of either “contractor bid or proposal information” or “source selection information” that is subject to the protections of section 3.104-4. Upon review, however, we find you have failed to demonstrate the submitted information consists of either of these types of information, and the city may not withhold the submitted information under section 552.101 of the Government Code on that basis.

Next, we understand you to raise section 552.101 of the Government Code based on the theory that information is confidential when a federal agency shares confidential information with a state agency. This office has repeatedly held that the transfer of confidential information between governmental agencies does not destroy the confidentiality of that information. Attorney General Opinions H-917 (1976), H-836 (1974), Open Records Decision Nos. 561 (1990), 414 (1984), 388 (1983), 272 (1981), 183 (1978). These opinions recognize the need to maintain an unrestricted flow of information between state agencies. In Open Records Decision No. 561 we considered whether the same rule applied regarding information deemed confidential by a federal agency. In that decision, we noted the general rule that the federal Freedom of Information Act (“FOIA”) applies only to federal agencies and does not apply to records held by state agencies. ORD 561 at 6. Further, we stated information is not confidential when in the hands of a Texas agency simply because the same information is confidential in the hands of a federal agency. *Id.* However, in the interests of comity between state and federal authorities and to ensure the flow of information from federal agencies to Texas governmental bodies, we concluded that “when information in the possession of a federal agency is ‘deemed confidential’ by federal law, such confidentiality is not destroyed by the sharing of the information with a governmental body in Texas. In such an instance, [section 552.101] requires a local government to respect the confidentiality imposed on the information by federal law.” *Id.* at 7. Accordingly, if a federal agency shares its information with a Texas governmental agency, the Texas agency must withhold the information the federal agency determines to be confidential under federal law. *See id.* at 6-7; *accord United States v. Napper*, 887 F.2d 1528, 1530 (11th Cir. 1989) (finding documents FBI lent to city police department remained property of FBI and were subject to any restrictions on dissemination of FBI-placed documents).

You state, and provide documentation demonstrating, the Fort Hood Department of Public Works Engineering Services (the “department”) has asked the city to withhold the submitted information. However, beyond the department’s general reference to the PIA, it has not directed our attention to any federal law, nor are we aware of any federal law, that makes the submitted information confidential. Therefore, the city may not withhold the submitted information under section 552.101 of the Government Code on that basis. The city must release the submitted information.

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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Rahat Huq
Assistant Attorney General
Open Records Division

RSH/som

Ref: ID# 628574

Enc. Submitted documents

c: Requestor
(w/o enclosures)