



December 8, 1999

Ms. Joanne Wright  
Associate General Counsel  
Texas Department of Transportation  
125 E. 11th Street  
Austin, Texas 78701-2483

OR99-3574

Dear Ms. Wright:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 130295.

The Texas Department of Transportation (the "department") received a request for all information relating to Shaw Technologies's application and denial of certification for status as a "Disadvantaged Business Enterprise." You have released correspondence from the department to Shaw Technologies. You claim that the remaining requested information is excepted from disclosure under section 552.128 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Section 552.301 of the Government Code provides that a governmental body must ask the attorney general for a decision as to whether requested documents must be disclosed not later than the tenth business day after the date of receiving the written request. The department received the requestor's written request for information on June 30, 1999. You did not request a decision from this office until October 11, 1999, more than ten business days after the requestor's written request. Therefore, we conclude that the department failed to meet its ten-day deadline for requesting a decision from this office.

When a governmental body fails to request a decision within ten business days of receiving a request for information, the information at issue is presumed public. Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex. App.--Austin 1990, no writ); *City of Houston v. Houston Chronicle Publ'g Co.*, 673 S.W.2d 316, 323 (Tex. App.--Houston [1st Dist.] 1984, no writ); Open Records Decision No. 319 (1982). The

governmental body must show a compelling interest to withhold the information to overcome this presumption. *See id.* Normally, a compelling interest is that some other source of law makes the information confidential or that third party interests are at stake. Open Records Decision No. 150 at 2 (1977). Here, the application of section 552.128 and the interests of a third party present compelling reasons to overcome the presumption of openness.

Section 552.128 of the Government Code provides that:

(a) Information submitted by a potential vendor or contractor to a governmental body in connection with an application for certification as a historically underutilized or disadvantaged business under a local, state, or federal certification program is excepted from [required public disclosure], except as provided by this section.

(b) Notwithstanding Section 552.007 and except as provided by Subsection (c), the information may be disclosed only:

(1) to a state or local governmental entity in this state, and the state or local governmental entity may use the information only:

(A) for purposes related to verifying an applicant's status as a historically underutilized or disadvantaged business; or

(B) for the purpose of conducting a study of a public purchasing program established under state law for historically underutilized or disadvantaged businesses; or

(2) with the express written permission of the applicant or the applicant's agent.

(c) Information submitted by a vendor or contractor or a potential vendor or contractor to a governmental body in connection with a specific proposed contractual relationship, a specific contract, or an application to be placed on a bidders list, including information that may also have been submitted in connection with an application for certification as a historically underutilized or disadvantaged business, is subject to required disclosure, excepted from required disclosure, or confidential in accordance with other law.

The responsive documents that the department possesses are information Shaw Technologies submitted in connection with its application for certification as a disadvantaged business.

The applicant expressly has not given permission for release of the information. Subsections (b) and (c) do not apply here. Therefore, we conclude that the requested records consisting of documents submitted by Shaw Technologies to the department are made confidential under section 552.128 and must not be released. In addition, we have marked the information in the department's December 11, 1998 letter to Shaw Technologies that the department must withhold under section 552.128 as it is information submitted by Shaw Technologies in connection with its application for certification as a disadvantaged business.

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).

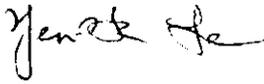
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, 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 Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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,

A handwritten signature in black ink, appearing to read "Yen-Ha Le". The signature is fluid and cursive, with the first name "Yen" and last name "Le" clearly distinguishable.

Yen-Ha Le  
Assistant Attorney General  
Open Records Division

YHL/ljp

Ref.: ID# 130295

Encl. Marked documents

cc: Mr. Tom Schick, P.E.  
Division Manager  
Central Region  
The Reinforced Earth Company  
1331 Airport Freeway, Suite 302  
Eules, Texas 76040-4150  
(w/o enclosures)