



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

August 14, 2003

Mr. Scott A. Kelly  
Deputy General Counsel  
Texas A&M University System  
301 Tarrow, 6<sup>th</sup> Floor  
College Station, Texas 77840-7896

OR2003-5688

Dear Mr. Kelly:

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# 186423.

The Texas A&M University System (the "System") received a request for all information concerning project number 5-2893, including the selection criteria and evaluations. You assert the requested information is excepted from disclosure under section 552.104 of the Government Code. Additionally, you provide supporting documentation showing that the System notified J.T. Vaughan Construction Company, Inc. ("Vaughan"), Satterfield & Pontikes Construction, Inc. ("Satterfield & Pontikes"), SpawGlass Construction Corporation, Tellepsen Builders, L.P. ("Tellepsen"), and Swinerton Builders of the request for information to afford these entities with an opportunity to supply objections to release of the submitted proposal. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 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 acknowledge receipt of comments from Vaughan, Satterfield, and Tellepsen, in which they object to release of some of their information. *See* Gov't Code § 552.305; ORD 542. We reviewed the information you submitted and considered the exceptions claimed by the System and some of the interested third parties.

Section 552.104 states information is excepted from required public disclosure if release of the information would give advantage to a competitor or bidder. Gov't Code § 552.104. The purpose of section 552.104 is to protect a governmental body's interests in competitive bidding situations. *See* Open Records Decision No. 592 (1991). Moreover, section 552.104 requires a showing of some actual or specific harm in a particular competitive situation; a general allegation that a competitor will gain an unfair advantage will not suffice. Open Records Decision No. 541 at 4 (1990). This office has long held that section 552.104 does not except information relating to competitive bidding situations once a contract is in effect. *See, e.g.*, Open Records Decision Nos. 541 (1990), 514 (1988), 306 (1982), 184 (1978), 75 (1975).

In this case, you inform us that the contract associated with building project number 5-2893 "is still under negotiation and has not been finalized." Additionally, you advise us that the System is negotiating with the highest ranking proposer and, should these negotiations be unsuccessful, the System will begin negotiations with the second highest ranking proposer. Further, you explain that release of the requested information prior to the conclusion of the negotiation process would harm the System's negotiation position. Based on your representations and our review of the submitted information, we conclude the System may withhold the submitted information under section 552.104 of the Government Code until the System awards and executes a contract for the building project at issue. As section 552.104 is dispositive, we need not address the comments submitted by Vaughan, Satterfield, and Tellepsen.

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 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 Texas Building and Procurement Commission 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,



Christen Sorrell  
Assistant Attorney General  
Open Records Division

CHS/seg

Ref: ID# 186423

Enc: Submitted documents

c: Mr. Patrick E. Gass  
Coats Rose Yale Ryman Lee  
1001 Fannin, Suite 800  
Houston, Texas 77002-6707  
(w/o enclosures)

Mr. Charles W. Stuber  
Canterbury, Stuber, Elder, Gooch & Surratt  
5005 LBJ Freeway, Suite 1000  
Dallas, Texas 75244  
(w/o enclosures)

Mr. Richard C. McSwain  
Curry & Associates  
45 Northeast Loop 410, Suite 495  
San Antonio, Texas 78216  
(w/o enclosures)

Mr. Tom Vaughn  
Vaughn Construction  
10355 Westpark Drive  
Houston, Texas 77042-5312  
(w/o enclosures)

Mr. Joseph J. Costello  
Swinerton Builders  
55 Waugh Drive, Suite 1200  
Houston, Texas 77007  
(w/o enclosures)

Mr. John English  
SpawGlass Construction Corporation  
13800 West Road  
Houston, Texas 77041  
(w/o enclosures)