



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

December 5, 2003

Ms. Jennifer Soldano
Associate General Counsel
Texas Department of Transportation
125 East 11th Street
Austin, Texas 78701-2483

OR2003-8734

Dear Ms. Soldano:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 192232.

The Texas Department of Transportation (the "department") received three requests for information related to proposals and executive summaries to proposals submitted regarding the Trans Texas Corridor. You claim that portions of the submitted information are excepted from disclosure under section 361.3023 of the Transportation Code. Although you take no position regarding whether the requested information is proprietary, you have notified Cintra, Concesiones de Infraestructuras de Transporte, S.A. ("Cintra"), Fluor Corporation (Fluor), and Trans Texas Express L.L.C. ("TTEX") of the request for information and their opportunity to submit comments to this office. 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 section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure in certain circumstances). This office received no brief from Cintra. In their briefs to this office, Fluor and TTEX each claim that portions of the requested proposals are excepted from disclosure pursuant to

section 552.110 of the Government Code.¹ We have considered all claimed exceptions and reviewed the submitted information.

Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."² This exception encompasses confidentiality provisions of other statutes. You assert that portions of the submitted information are confidential under section 361.3023 of the Transportation Code, which states the following:

(a) To encourage private entities to submit proposals under Section 361.3022, the following information is confidential, is not subject to disclosure, inspection, or copying under Chapter 552, Government Code, and is not subject to disclosure, discovery, subpoena, or other means of legal compulsion for its release until a final contract for a proposed project is entered into:

(1) all or part of a proposal that is submitted by a private entity for a comprehensive development agreement, except information provided under Section 361.3022(b)(1) and (2);

(2) supplemental information or material submitted by a private entity in connection with a proposal for a comprehensive development agreement; and

(3) information created or collected by the department or its agent during consideration of a proposal for a comprehensive development agreement.

(b) After the department completes its final ranking of proposals under Section 361.3022(h), the final rankings of each proposal under each of the published criteria are not confidential.

¹We note that the department has only submitted for our review the executive summaries of each proposal as responsive to the requests, and that Fluor and TTEX have no objection to release of their executive summaries. The department did not submit the information that Fluor and TTEX claim is protected by section 552.110. This ruling addresses only that information submitted to this office as responsive to the requests. See Gov't Code § 552.301(e)(1)(D).

²The Office of the Attorney General will raise a mandatory exception like section 552.101 on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

Act of June 1, 2003, 78th Leg., R.S., ch. 1325, 2003 Tex. Sess. Law Serv. 4884, 4971-72 (Vernon) (to be codified at Transp. Code § 361.3023). Section 361.3022(b)(1) and (2) state the following:

(b) The department shall establish rules and procedures for accepting unsolicited proposals that require the private entity to include in the proposal:

(1) information regarding the proposed project location, scope, and limits;

(2) information regarding the private entity's qualifications, experience, technical competence, and capability to develop the project[.]

Id. at 4970 (to be codified at Transp. Code § 361.3022). Section 361.302 of the Transportation Code defines a "comprehensive development agreement" as "an agreement with a private entity that, at a minimum, provides for the design and construction of a turnpike project and may also provide for the financing, acquisition, maintenance, or operation of a turnpike project." *Id.* at 4969 (to be codified as an amendment to Transp. Code § 361.302). In this instance, you indicate that the information at issue relates to proposals regarding a comprehensive development agreement. Further, you do not inform us that TxDOT has awarded the contract to which the submitted information relates. Based on our review of your representations and the submitted information, we conclude that, with the exception of information covered by subsections 361.3022(b)(1) and (2), TxDOT must withhold the submitted information under section 552.101 of the Government Code in conjunction with section 361.3023 of the Transportation Code at this time. As our ruling is dispositive, we do not address the remaining arguments.

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,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/jh

Ref: ID# 192232

Enc. Submitted documents

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