



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 6, 2005

Mr. Luis Bodden
Director of Administration
Cameron Works
245 East Levee Street
Brownsville, Texas 78520

OR2005-04916

Dear Mr. Bodden:

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# 225650.

Cameron Works ("CW"), the Workforce Development Board of Cameron County, received a request for submitted bids on Request for Application Vendor Listing RFA 04-RFA-12-100. You claim that a portion of the requested information is excepted from disclosure under section 552.104 of the Government Code.¹ We have considered the exception you claim and reviewed the submitted information.

We must first address CW's obligations under section 552.301. Pursuant to section 552.301(b), a governmental body that receives a written request for information that it wishes to withhold from public disclosure and that it considers to be within one of the exceptions under the Act must ask for a decision from this office and state the exceptions that apply not later than the tenth business day after the date of receiving the written request. Further, pursuant to section 552.301(e), a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written

¹You indicate that you do not have a "Bid Tabulation" as requested by the requestor. A governmental body need not create new information in response to a request or release information that does not exist at the time a request is received. See *Economic Opportunities Dev. Corp. of San Antonio v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dism'd).

request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. Gov't Code § 552.301(e). You inform us that CW received the request for information on February 4, 2005. CW did not request a decision from this office until March 31, 2005 or submit the required information until April 18, 2005. Consequently, CW failed to comply with the requirements of section 552.301 of the Government Code in requesting this ruling.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the information at issue is public and must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). The presumption that information is public under section 552.302 can generally be overcome when the information is confidential by law or third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982). Section 552.104 of the Government Code is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See* Gov't Code § 552.007; Open Records Decision Nos. 665 at 2 n.5 (discretionary exceptions generally), 592 at 8 (1991) (statutory predecessor to Gov't Code § 552.104 subject to waiver). Your assertion of section 552.104 does not provide a compelling reason for non-disclosure under section 552.302. In failing to comply with section 552.301, you have waived this exception. *See* Open Records Decision No. 663 at 5 (1999) (failure to comply with Gov't Code § 552.301 resulted in waiver of discretionary exceptions). Therefore, CW may not withhold any of the submitted information under section 552.104.

You also claim that CW is prohibited from releasing the submitted information pursuant to the purchasing rules as governed by the Texas Workforce Commission's Financial Manual for Grants and Contracts (the "manual"). We understand that CW is the Workforce Development Board of Cameron County and was created in accordance with rules established by the Texas Workforce Commission. *See* Gov't Code § 2308.253(a) *et seq.* The manual provides that "certain information may not be disclosed until a particular point in the procurement process has been reached. Other information must be kept confidential permanently." *See* Texas Workforce Commission's Financial Manual for Grants and Contracts § 15.03a. The manual further provides examples of information not to be disclosed: "the number and names of offerors until the contract is awarded and the decision is made public" and "technical or cost/price information to anyone not officially involved in the procurement while the procurement is in progress." *See id.* Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision" and encompasses information protected by other laws. Generally, administrative rules cannot amend the Act by creating new exceptions. Open Records Decision No. 527 (1989). Absent specific authority, a governmental body may not promulgate a rule designating information as confidential so as to bring it within section 552.101. Open Records Decision Nos. 484 (1987), 479 (1987), 392 (1983), 216

(1978), 173 (1977), 152 (1977). You do not cite to any statute that provides for the promulgation of the rules designating the submitted information confidential, nor are we aware of any such statute. Accordingly, we conclude that the manual does not make the submitted material confidential by law; thus CW may not withhold the information pursuant to section 552.101.

Next, we note that section 552.305(d) of the Government Code requires a governmental body to notify a person whose proprietary interests may be implicated by a request for information. An interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure.² See Gov't Code § 552.305(d)(2)(B). As of the date of this decision, no interested third parties have submitted to this office any reasons explaining why its information should not be released. Therefore, we have been provided with no basis to conclude that any third party has a protected proprietary interest in any of the submitted information. See, e.g., Gov't Code § 552.110(b) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure); Open Records Decision Nos. 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). As none of the submitted information is otherwise confidential by law, it must be released in its entirety to the requestor.

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

²From our review of the submitted information, this office has been provided no indication whether CW has sent notice to any interested third parties regarding this request for information. 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 in certain circumstances).

statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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); *Tex. 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,



Elizabeth A. Stephens
Assistant Attorney General
Open Records Division

EAS/krl

Ref: ID#225650

Enc. Submitted documents

c: Mr. Peter Lounsbury
Border Technology Enterprises, Inc.
814 Boca Chica Blvd.
Brownsville, TX 78520
(w/o enclosures)