



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 16, 2007

Ms. Cheryl Gray
Administrative Assistant
Texas General Land Office
P.O. Box 12873
Austin, Texas 78711-2873

OR2007-06075

Dear Ms. Gray:

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# 278659.

The Texas General Land Office (the "GLO") received a request for all bids submitted for the operations management of Ussery-Roan Texas State Veterans Home in Amarillo, Texas. You make no arguments and take no position as to whether the submitted information is excepted from disclosure. You, instead, indicate that the submitted information may be subject to third party proprietary interests. Pursuant to section 552.305 of the Government Code, you have notified Touchstone Communities ("Touchstone") and Skilled Healthcare, LLC ("Skilled") of the request and of each company's right to submit arguments to this office as to why the information should not be released. *See* Gov't Code § 552.305(d); *see also* 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 under the Act in certain circumstances). We have received comments from the attorneys for Touchstone and Skilled. We have considered all of the submitted arguments and reviewed the submitted information. We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing that any person may submit comments stating why information should or should not be released).

Initially, we must address the GLO's obligations under the Act. Pursuant to section 552.301(b) of the Government Code, a governmental body must ask for the attorney general's decision and state the exceptions that apply within ten business days after receiving the request. *See id.* § 552.301(b). Additionally, under section 552.301(e), a governmental body receiving an open records request for information that it wishes to withhold pursuant to one of the exceptions to public disclosure is required to submit to this office within fifteen business days of receiving the 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 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. *See Gov't Code* § 552.301(e). You state that the GLO received the request on February 15, 2007. Accordingly, you were required to request a decision from us by March 2, 2007. However, you did not request a ruling from this office until March 14, 2007. Further, you did not submit the information required under section 552.301(e) by the fifteen day deadline. Consequently, we find that the GLO failed to comply with the procedural requirements of section 552.301.

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 requested information is public and must be released, unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *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 section 552.302); Open Records Decision No. 319 (1982). Generally, a governmental body may demonstrate a compelling reason to withhold information by a showing that the information is made confidential by another source of law or affects third party interests. *See Open Records Decision No. 630 (1994)*. Because the third party interests at issue can provide compelling reasons, we will address the arguments submitted by Touchstone and Skilled.

Skilled argues that a portion of its proposal is excepted from public disclosure under section 552.101 of the Government Code in conjunction with rule 507 of the Texas Rules of Evidence.¹ We note that this office generally does not address discovery and evidentiary rules that may or may not be applicable to information submitted to our office by a governmental body. *See Open Records Decision No. 416 (1984)* (finding that even if evidentiary rule specified that certain information may not be publicly released during trial, it would have no effect on disclosability under Act). However, the Texas Supreme Court has ruled that the Texas Rules of Civil Procedure and the Texas Rules of Evidence are "other law" that make information confidential for the purposes of section 552.022. *See Gov't*

¹Section 552.101 excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Gov't Code* § 552.101.

Code § 552.022 (enumerating several categories of information not excepted from required disclosure unless expressly confidential under other law); *see also In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001). In this instance, Skilled's information does not fall into one of the categories of information made expressly public by section 552.022 of the Government Code. Therefore, the Texas Rules of Evidence are not applicable. We also note that section 552.101 does not encompass civil discovery privileges. *See Open Records Decision No. 647 at 2* (1996). Accordingly, we conclude that the GLO may not withhold any portion of Skilled's information pursuant to section 552.101 of the Government Code in conjunction with the Texas Rules of Evidence.

Touchstone claims that its proposal should be withheld from disclosure under section 552.104 of the Government Code. Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104. However, section 552.104 is a discretionary exception that protects only the interests of a governmental body, as distinguished from exceptions which are intended to protect the interests of third parties. *See Open Records Decision Nos. 592* (1991) (statutory predecessor to section 552.104 designed to protect interests of a governmental body in a competitive situation, and not interests of private parties submitting information to the government), 522 (1989) (discretionary exceptions in general). As the GLO does not seek to withhold any information pursuant to section 552.104, the GLO may not withhold any of Touchstone's proposal pursuant to section 552.104 of the Government Code. *See Open Records Decision No. 592* (1991) (governmental body may waive section 552.104).

Both Touchstone and Skilled claim that portions of each company's proposal are excepted from disclosure under section 552.110 of the Government Code. Section 552.110 protects: (1) trade secrets, and (2) commercial or financial information the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. *See Gov't Code § 552.110(a), (b)*. Section 552.110(a) protects the property interests of private parties by excepting from disclosure trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *See id.* § 552.110(a). A "trade secret"

may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives [one] an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business in that it is not simply information as to single or ephemeral events in the conduct of the business, as for example the amount or other terms of a secret bid for a contract or the salary of certain employees. . . . A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as for example, a machine or formula for

the production of an article. It may, however, relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

There are six factors to be assessed in determining whether information qualifies as a trade secret:

- (1) the extent to which the information is known outside of [the company's] business;
- (2) the extent to which it is known by employees and others involved in [the company's] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and to [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing this information; and
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision No. 232 (1979). This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for exemption is made and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990). However, we cannot conclude that section 552.110(a) is applicable unless it has been shown that the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim. Open Records Decision No. 402 (1983).

Section 552.110(b) protects “[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained[.]” Gov’t Code § 552.110(b). This exception to disclosure requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. *Id.* § 552.110(b); *see also*

National Parks & Conservation Ass'n v. Morton, 498 F.2d 765 (D.C. Cir. 1974); Open Records Decision No. 661 (1999).

Touchstone claims that its ownership, operational, and financial information are excepted from public disclosure under section 552.110(a) as trade secrets. Similarly, Skilled claims that its operational plan, history of prior lawsuits, and cost proposal are excepted from public disclosure under section 552.110(a) as trade secrets. Upon review, we find that the GLO must withhold the information we have marked under section 552.110(a) of the Government Code. As to the remaining information at issue, however, we find that neither Touchstone nor Skilled has demonstrated that it meets the definition of a trade secret. Accordingly, the GLO may not withhold this information under section 552.110(a) of the Government Code.

Next, Touchstone claims that its ownership and financial information are excepted from public disclosure under section 552.110(b) of the Government Code. Skilled also claims that its history of prior lawsuits and cost proposal are excepted from public disclosure under section 552.110(b) of the Government Code. Upon review, we find that Touchstone and Skilled have demonstrated that the release of some of each company's information at issue would cause each company substantial competitive harm. Thus, the GLO must withhold the information we have marked under section 552.110(b) of the Government Code. As to the remaining information, however, Touchstone and Skilled have only made generalized allegations that the release of this information would result in substantial damage to the competitive position of each company. Thus, neither Touchstone nor Skilled has demonstrated that substantial competitive injury would result from the release of the remaining information. *See* Open Records Decision Nos. 509 at 5 (1988) (stating that because costs, bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts was entirely too speculative), 319 (1982). Accordingly, the GLO may not withhold the remaining information under section 552.110(b) of the Government Code.

In summary, the GLO must withhold the information we have marked under subsections 552.110(a) and 552.110(b) of the Government Code. As no other exceptions are raised against disclosure, the remaining information must be released.

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).

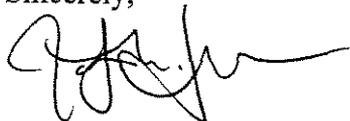
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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); *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 Office of the Attorney General 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. 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,



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Assistant Attorney General
Open Records Division

JNT/ma

Ref: ID# 278659

Enc. Submitted documents

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