



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 22, 2007

Ms. Noelle C. Letteri
Legal Services Division
Texas General Land Office
P.O. Box 12873
Austin, Texas 78711-2873

OR2007-07970

Dear Ms. Letteri:

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# 281849.

The Texas General Land Office (the "GLO") received a request for a specified contract and corresponding restrictive covenants. You claim that the submitted information is excepted from disclosure under section 552.104 of the Government Code. We have considered the exception you claim and reviewed the submitted information. We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we note that the requestor contends that she was not properly notified of the GLO's request for a ruling from this office as required by section 552.301(d)(2) of the Government Code. *See* Gov't Code § 552.301(d) (governmental body must provide requestor with copy of governmental body's written communication to attorney general asking for decision). Pursuant to section 552.302, a governmental body's failure to timely provide the requestor with a copy of its written communication to this office results in the presumption that the information is public.

The GLO states that it received the written request for information on April 3, 2007. The GLO's request for a decision from our office indicates it was hand delivered to this office

on April 18, 2007.¹ Further, the submitted information indicates the GLO simultaneously sent a copy of the request for a decision to the requestor. This office is unable to resolve disputes of fact in the open records ruling process. Accordingly, we must rely upon the facts alleged to us by the governmental body requesting our opinion, or upon those facts that are discernable from the documents submitted for our inspection. *See* Open Records Decision No. 522 at 4 (1990). Based on the submitted information, we find that the GLO complied with the procedural requirements of section 552.301 in requesting this ruling. Accordingly, we will address the GLO's argument against disclosure.

We note that the submitted information consists of a contract between the GLO and a private party that is subject to section 552.022 of the Government Code. Section 552.022(a)(3) provides for the required public disclosure of "information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body," unless the information is expressly confidential under other law. Gov't Code § 552.022(a)(3). You claim that the submitted information is excepted from disclosure under section 552.104. Section 552.104(b) provides that "[t]he requirement of Section 552.022 that a category of information listed under Section 552.022(a) is public information and not excepted from required disclosure under [the Act] does not apply to information that is excepted from required disclosure under this section." Gov't Code § 552.104(b). Accordingly, we will consider your arguments under section 552.104.

Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). This exception protects a governmental body's interests in connection with competitive bidding and in certain other competitive situations. *See* Open Records Decision No. 593 (1991) (construing statutory predecessor). This office has held that a governmental body may seek protection as a competitor in the marketplace under section 552.104 and avail itself of the "competitive advantage" aspect of this exception if it can satisfy two criteria. *See id.* First, the governmental body must demonstrate that it has specific marketplace interests. *See id.* at 3. Second, the governmental body must demonstrate a specific threat of actual or potential harm to its interests in a particular competitive situation. *See id.* at 5. Thus, the question of whether the release of particular information will harm a governmental body's legitimate interests as a competitor in a marketplace depends on the sufficiency of the governmental body's demonstration of the prospect of specific harm to its marketplace interests in a particular competitive situation. *See id.* at 10. A general allegation of a remote possibility of harm is not sufficient. *See* Open Records Decision No. 514 at 2 (1988).

You assert that the GLO has specific marketplace interests in the submitted information because the GLO is authorized by statute to participate in the real estate marketplace. *See* Nat. Res. Code chs. 32, 51. You inform us that the GLO entered into the contract at issue

¹ The GLO states that it was closed for business on April 6, 2007.

under its authority to sell land pursuant to Chapter 32, Subchapter D of the Texas Natural Resources Code and Chapter 51, Subchapters B and C of the Texas Natural Resources Code. You explain that the GLO “routinely participates in the real estate marketplace through purchasing and selling property in the best interest of the state.” Based on these representations, we find that you have demonstrated that the GLO has specific marketplace interests and may be considered a competitor in the marketplace for the purposes of section 552.104. *See* ORD 593 at 3.

You inform us that the submitted documents contain all of the terms of the real estate transaction at issue. You argue that release of information relating to the contract terms would negatively impact the GLO’s ability to compete in the real estate market as it would artificially create competition, resulting in higher prices and difficulty negotiating future contracts. Based on your representations, we find that you have demonstrated that release of the submitted information would result in specific harm to the GLO’s marketplace interests. *See id.* We therefore conclude that the GLO may withhold the submitted information under section 552.104 of the Government Code.

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).

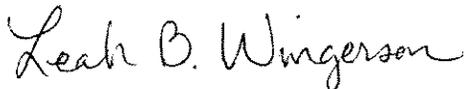
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records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



Leah B. Wingerson
Assistant Attorney General
Open Records Division

LBW/sdk

Ref: ID# 281849

Enc. Submitted documents

c: Ms. Cindy J. Crosby
Bickerstaff, Heath, Pollan & Caroom, L.L.P.
816 Congress Avenue, Suite 1700
Austin, Texas 78701-2443
(w/o enclosures)