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ATTORNEY GENERAL OF TEXAS

April 9, 2020

Ms. Hadassah Schloss
Director
Open Government
Texas General Land Office
P.O. Box 12873
Austin, Texas 78711-2873

OR2020-10647

Dear Ms. Schloss:

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# 821223 (GLO ID#s 20-0393 & 20-0402).

The Texas General Land Office ("GLO") received two requests from the same requestor for information regarding groundwater leases.¹ You state you released some information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.104 and 552.111 of the Government Code. You further state release of the submitted information may implicate the proprietary interests of Layne Water Midstream ("Layne"); Select Energy Services ("Select"); Stable Land Resources, LLC ("Stable Land"); Solaris Water Midstream; and Blackline Energy Services, LLC. Accordingly, you state, and provide documentation showing, GLO notified the third parties of the request for information and of the right to submit arguments to this office as to why the submitted information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 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 have received comments from Select and Stable Land.

¹ We note GLO sought and received clarification of the information requested. *See* Gov't Code § 552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify request); *see also* *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or overbroad request for information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

We have reviewed the submitted arguments and the submitted representative sample of information.²

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. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from the remaining third parties explaining why the submitted information should not be released. Therefore, we have no basis to conclude the remaining third parties have a protected proprietary interest in the submitted information. *See id.* § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3. Accordingly, GLO may not withhold the submitted information on the basis of any proprietary interest the remaining third parties may have in the information.

Initially, GLO states some of the submitted information was the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2018-03071 (2018). In that ruling, we determined GLO may withhold the information it marked under section 552.107(1) of the Government Code, may withhold Exhibit E under section 552.111 of the Government Code, may withhold Layne's information we marked under section 552.104(a) of the Government Code, and must release the remaining information. Section 552.007 of the Government Code provides, if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure unless its public release is expressly prohibited by law or the information is confidential by law. *See* Gov't Code § 552.007; Open Records Decision No. 518 at 3 (1989); *see also* Open Records Decision No. 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure under the Act, but it may not disclose information made confidential by law). Accordingly, pursuant to section 552.007, GLO may not withhold previously released information unless its release is expressly prohibited by law or the information is confidential by law. Although, GLO raises section 552.104 of the Government Code, this exception does not prohibit the release of information or make information confidential. *See* Gov't Code § 552.007; Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 592 (1991) (stating that governmental body may waive section 552.104). Thus, GLO may not now withhold any of the submitted information previously ordered released in Open Records Letter No. 2018-03071 under section 552.104 of the Government Code. You acknowledge, and we agree, the law has changed regarding section 552.104 of the Government Code. Therefore, because the law has changed with regard to a third party's right to assert section 552.104(a)

² We assume the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than that submitted to this office.

of the Government Code, GLO may not rely upon the prior ruling as a previous determination for the information withheld under section 552.104 and we will consider the arguments against its disclosure. With respect to the remaining information at issue, we have no indication there has been any change in the law, facts, or circumstances on which the previous ruling was based. Accordingly, GLO may rely on Open Records Letter No. 2018-03071 as a previous determination and withhold the remaining information in accordance with that ruling as it relates to sections 552.107 and 552.111 of the Government Code. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). We will also address the public availability of the remaining information, which was not at issue in the previous ruling.

Next, we note Select and Stable Land seek to withhold information not submitted to this office by GLO. By statute this office may only rule on the public availability of information submitted by the governmental body requesting the ruling. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested). Because this information was not submitted by GLO, this ruling does not address this information and is limited to the information submitted as responsive by GLO.³

Section 552.104(a) of the Government Code excepts from disclosure information that a governmental body demonstrates, if released, would “harm its interests by providing an advantage to a competitor or bidder in a particular ongoing competitive situation or in a particular competitive situation where the governmental body establishes the situation at issue is set to reoccur or there is a specific and demonstrable intent to enter into the competitive situation again in the future.” *Id.* § 552.104(a). The “test under section 552.104 is whether knowing another bidder’s [or competitor’s information] would be an advantage, not whether it would be a decisive advantage.” *Boeing Co. v. Paxton*, 466 S.W.3d 831, 841 (Tex. 2015). You explain release of the remaining information would hamper GLO’s ability to negotiate similar leases with other companies. Therefore, you assert GLO has specific marketplace interests in the information at issue because GLO must ensure that any transaction involving land produce the highest revenue possible. You further argue release of the information at issue would provide a competitive advantage to GLO in negotiating future leases in a new market, will cause severe harm, and hamper GLO commissioner’s efforts to act in the best interest of the State. Based upon your representations and our review, we find you have demonstrated GLO has specific marketplace interests and may be considered a “competitor” for purposes of section 552.104. We also find you have demonstrated release of the submitted information

³ As we are able to make this determination, we need not address Select or Stable Land’s arguments against disclosure of this information.

would give advantage to a competitor or bidder. Accordingly, GLO may withhold the remaining information under section 552.104(a) of the Government Code.⁴

In summary, for the submitted information that is identical to the information previously requested and ruled upon by this office, GLO may rely on Open Records Letter No. 2018-03071 as a previous determination and withhold the remaining information in accordance with that ruling as it relates to the information withheld under sections 552.107 and 552.111 of the Government Code. Accordingly, to the extent the remaining information at issue was not previously released pursuant to Open Records Letter No. 2018-03071, GLO may withhold the remaining information under section 552.104(a) of the Government Code.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,

Pearlie Gault
Attorney
Open Records Division

PG/eb

Ref: ID# 821223

Enc. Submitted documents

c: Requestor
(w/o enclosures)

5 Third Parties
(w/o enclosures)

⁴ As our ruling is dispositive we need not address GLO's remaining argument against disclosure of this information.