



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

June 23, 2016

Ms. Halfreda Anderson-Nelson
Public Information Officer
Dallas Area Rapid Transit
P.O. Box 660163
Dallas, Texas 75266-0163

OR2016-14343

Dear Ms. Anderson-Nelson:

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# 615456 (ORR # W000662-040416).

Dallas Area Rapid Transit ("DART") received a request for the final proposal and winning bid for a specified request for proposals. Although you take no position as to whether the submitted information is excepted under the Act, you state release of some of this information may implicate the proprietary interests of Herzog Transit Services, Inc. ("Herzog"). Accordingly, you state you notified Herzog of the request for information and of their 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 Herzog. We have considered the submitted arguments and reviewed the submitted information.

We note some of the submitted information may have been the subject of previous requests for information, in response to which this office issued Open Records Letter Nos. 2016-03523 (2016) and 2016-09476 (2016). In Open Record Letter No. 2016-03523, we determined (1) DART may withhold the evaluation materials we indicated under

section 552.111 of the Government Code, (2) DART may withhold the information we indicated under section 552.104 of the Government Code, (3) DART must withhold the information we marked and indicated under section 552.110(b) of the Government Code, and (4) DART must release the remaining information. Further, in Open Records Letter No. 2016-09476 we determined (1) to the extent the information is identical to the information previously submitted and ruled upon, DART must continue to rely on Open Records Letter No. 2016-03523 as a previous determination and withhold or release the information in accordance with that ruling; (2) DART may withhold the evaluation materials we indicated under section 552.111 of the Government Code, (3) DART may withhold the information we indicated under section 552.104 of the Government Code, and (4) DART must release the remaining information. We have no indication the law, facts, or circumstances on which the prior rulings were based have changed. Accordingly, to the extent the submitted information is identical to the information previously submitted and ruled on by this office, we conclude DART must continue to rely on Open Records Letter Nos. 2016-03523 and 2016-09476 as previous determinations and withhold or release the information in accordance with those rulings. *See* Open Records Decision No. 673 at 6-7 (2001) (discussing criteria for first type of previous determination). To the extent the submitted information is not subject to Open Records Letter Nos. 2016-03523 and 2016-09476, we will address Herzog's arguments against release of the submitted information.

Section 552.104(a) of the Government Code excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). In considering whether a private third party may assert this exception, the supreme court reasoned because section 552.305(a) of the Government Code includes section 552.104 as an example of an exception that involves a third party's property interest, a private third party may invoke this exception. *Boeing Co. v. Paxton*, 466 S.W.3d 831 (Tex. 2015). 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." *Id.* at 841. Herzog states it has competitors. In addition, Herzog states the release of its pricing information would reveal the "breakdown [of] every dollar [Herzog] will spend and where, including the price of equipment, manpower, overhead, etc." Herzog states release of these "confidential and proprietary figures . . . would give an advantage to [Herzog's] competition." For many years, this office concluded the terms of a contract and especially the pricing of a winning bidder are public and generally not excepted from disclosure. Gov't Code § 552.022(a)(3) (contract involving receipt or expenditure of public funds expressly made public); Open Records Decision Nos. 541 at 8 (1990) (public has interest in knowing terms of contract with state agency), 514 (1988) (public has interest in knowing prices charged by government contractors), 494 (1988) (requiring balancing of public interest in disclosure with competitive injury to company). *See generally* Freedom of Information Act Guide & Privacy Act Overview, 219 (2000) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). However, now, pursuant to *Boeing*, section 552.104 is not limited to only

ongoing competitive situations, and a third party need only show release of its competitively sensitive information would give an advantage to a competitor even after a contract is executed. *Boeing*, 466 S.W.3d at 841. After review of the information at issue and consideration of the arguments, we find Herzog has established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude DART may withhold the information we have indicated under section 552.104(a) of the Government Code.

Section 552.110(b) protects “[c]ommercial or financial information for which it is demonstrated based on specific factual evidence 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, substantial competitive injury would likely result from release of the information at issue. *Id.*; *see also* Open Records Decision No. 661 at 5 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, release of requested information would cause that party substantial competitive harm).

Herzog argues some of its information consists of commercial information, the release of which would cause the company substantial competitive harm under section 552.110(b) of the Government Code. Upon review, we find Herzog has demonstrated the information we have indicated constitutes commercial or financial information, the release of which would cause the company substantial competitive injury. Accordingly, DART must withhold this information, which we have indicated, under section 552.110(b) of the Government Code.

In summary, to the extent the submitted information is identical to the information previously submitted and ruled on by this office, we conclude DART must continue to rely on Open Records Letter Nos. 2016-03523 and 2016-09476 as previous determinations and withhold or release the information in accordance with those rulings. DART may withhold the information we have indicated under section 552.104(a) of the Government Code. DART must withhold the information we have indicated under section 552.110(b) of the Government Code. DART must release the remaining information.

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 http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml, or call the Office of the Attorney General’s Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for

providing public information under the Act may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in cursive script that reads "Katelyn Blackburn-Rader".

Katelyn Blackburn-Rader
Assistant Attorney General
Open Records Division

KB-R/bw

Ref: ID# 615456

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Third Party
(w/o enclsoures)