



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

July 26, 2016

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

OR2016-16808

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# 619901 (DART ORR# W000-755-051016).

Dallas Area Rapid Transit ("DART") received a request for information pertaining to a specified solicitation. You state you released some information to the requestor. You claim portions of the submitted information are excepted from disclosure under sections 552.103 and 552.111 of the Government Code. You also state release of the submitted information may implicate the interests of Accenture, LLP ("Accenture"); Infor; Init Innovations in Transportation; Mitac; SPX Corporation d/b/a Genfare ("Genfare"); Thales USA, Inc.; Trapeze Software Group Inc.; and Vix Technology ("Vix"). Accordingly, you notified these third parties of the request for information and of their right to submit arguments stating why their information should not be released. *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 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). We have received comments from Accenture, Genfare, Infor, and Vix. We have considered the submitted arguments and reviewed the submitted information.

Initially, you state some of the submitted information was the subject of previous requests for information, as a result of which this office issued Open Records Letter Nos. 2015-25535

(2015), 2016-00325 (2016), and 2016-07659A (2016). In response to Open Records Letter Nos. 2015-25535, 2016-00325, and 2016-07659A, Vix has filed a lawsuit against our office. *See Vix Technology (USA), Inc. v. Attorney Gen. of Tex., et al.*, No. D-1-GN-16-001972 (126th Dist. Ct., Travis County, Tex.). Accordingly, with regard to the information at issue in this lawsuit, we will allow the trial court to resolve the issue of whether the information that is the subject of the pending litigation must be released to the public.¹

With regard to any information in the current request that is identical to information previously ruled upon by this office and is not at issue in the aforementioned lawsuit, and with the exception of the information pertaining to Accenture that we ordered released, there is no indication the law, facts, and circumstances on which Open Records Letter Nos. 2015-25565, 2016-00325, and 2016-07659A were based have changed. Accordingly, with regard to any information in the current request that is identical to information previously ruled upon by this office and is not at issue in the aforementioned lawsuit, with the exception of the information pertaining to Accenture that we ordered released, we conclude DART must continue to rely on Open Records Letter Nos. 2015-25565, 2016-00325, and 2016-07659A as previous determinations and withhold or release the identical information in accordance with those rulings.² *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 information is or is not excepted from disclosure).

We note Accenture submitted arguments in response to the request at issue in Open Records Letter No. 2016-07659A. In that ruling we found DART must withhold some of Accenture's information at issue under sections 552.110(a) and 552.110(b) of the Government Code, but Accenture failed to demonstrate the applicability of section 552.110 of the Government Code to any of its remaining information at issue. Accordingly, we determined in our previous ruling DART must release, among other things, Accenture's remaining information at issue; however, any information protected by copyright may only be released in accordance with copyright law. 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

¹As we are able to make this determination, we need not address the submitted arguments against disclosure of this information.

²As we are able to make this determination, we need not address the submitted arguments against disclosure of this information.

Act, but it may not disclose information made confidential by law). Accordingly, pursuant to section 552.007, DART may not now withhold the previously released information, unless its release is expressly prohibited by law or the information is confidential by law. In this instance, Accenture has submitted further arguments against release of information that was not withheld in Open Records Letter No. 2016-07659A. Accenture claims these portions of its proposal are excepted under section 552.110 of the Government Code, which makes information confidential under the Act. Therefore, because circumstances have changed with respect to Accenture's information that was not withheld in Open Records Letter No. 2016-07659A, DART may not rely upon the prior ruling as a previous determination for this information, and we will address Accenture's arguments against release of this information. We will also consider the public availability of the remaining information to the extent the information at issue is not subject to litigation and was not previously ruled upon.

Section 552.111 of the Government Code excepts from disclosure “[a]n interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency[.]” Gov't Code § 552.111. This exception encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). The purpose of section 552.111 is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, writ ref'd n.r.e.); Open Records Decision No. 538 at 1-2 (1990).

In Open Records Decision No. 615, this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See* ORD 615 at 5. A governmental body's policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *Id.*; *see also City of Garland v. Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body's policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body's policy mission. *See* Open Records Decision No. 631 at 3 (1995).

Further, section 552.111 does not protect facts and written observations of facts and events severable from advice, opinions, and recommendations. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); *see* ORD 615 at 5. But if factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, the factual

information also may be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982).

You state some of the remaining information consists of DART's "source evaluation committee materials" pertaining to the evaluation of responses received for the specified solicitation. You explain evaluation of the responses is an internal function of DART's procurement department. You state the evaluation materials provide guidelines and recommendations for evaluating bidders, scoring recommendations, and opinions by evaluators regarding bids. You contend release of this information would reveal DART's process for procuring and evaluating bids. Based on your representations and our review, we conclude DART may withhold the information you indicated under section 552.111 of the Government Code.

We note 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) of the Government Code 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 only received comments from Accenture, Genfare, Infor, and Vix explaining why the submitted information should not be released. Therefore, we have no basis to conclude the remaining third parties have protected proprietary interests in the remaining 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, DART may not withhold the remaining information on the basis of any proprietary interest the remaining third parties may have in the information.

Section 552.110 of the Government Code 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 trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *Id.* § 552.110(a). The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts, which holds a trade secret to be:

any formula, pattern, device or compilation of information which is used in one's business, and which gives him 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. . . . A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] 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 776 (Tex. 1958). In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors.³ RESTATEMENT OF TORTS § 757 cmt. b. This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for the exception is made and no argument is submitted that rebuts the claim as a matter of law. *See* ORD 552 at 5. However, we cannot conclude section 552.110(a) is applicable unless it has been shown 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). We note pricing information pertaining to a particular contract is generally not a trade secret because it is "simply information as to single or ephemeral events in the conduct of the business," rather than "a process or device for continuous use in the operation of the business." RESTATEMENT OF TORTS § 757 cmt. b; *see also Huffines*, 314 S.W.2d at 776; Open Records Decision Nos. 255, 232 (1979), 217 (1978).

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.*; *see also* ORD 661 at 5.

³The Restatement of Torts lists the following six factors as indicia of whether information constitutes a trade secret:

- (1) the extent to which the information is known outside of [the company];
- (2) the extent to which it is known by employees and other 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 [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing the information;
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b; *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

As mentioned above, Accenture's remaining information was the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2016-07659A. In that prior ruling, we found DART must withhold some of Accenture's information at issue under sections 552.110(a) and 552.110(b) of the Government Code. However, we held Accenture failed to demonstrate any of the remaining information at issue meets the definition of a trade secret and did not demonstrate the necessary factors to establish a trade secret claim for this information. We also concluded Accenture failed to demonstrate the applicability of section 552.110(b) to any of its remaining information at issue. Since the issuance of the previous ruling on April 5, 2016, Accenture has not disputed this office's conclusion regarding the release of the information. In this regard, we find Accenture has not taken any measures to protect the information at issue in order for this office to conclude any portion of those documents now either qualifies as a trade secret or contains commercial or financial information, the release of which would cause Accenture substantial harm. *See* Gov't Code § 552.110; RESTATEMENT OF TORTS § 757 cmt. b; *see also* ORDs 661, 319 at 2, 306 at 2, 255 at 2. Accordingly, we conclude DART may not withhold any of Accenture's information that we previously ordered released in Open Records Letter No. 2016-07659A under section 552.110 of the Government Code.

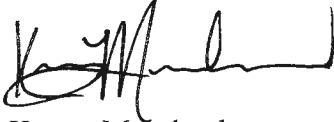
We note some of the remaining information may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; *see* Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

In summary, we will allow the trial court to resolve the issue of whether the information that is the subject of pending litigation must be released to the public. DART may withhold the information you indicated under section 552.111 of the Government Code. With regard to any information in the current request that is identical to information previously ruled upon by this office and is not at issue in the aforementioned lawsuit, with the exception of the information pertaining to Accenture that we ordered released, we conclude DART must continue to rely on Open Records Letter Nos. 2015-25565, 2016-00325, and 2016-07659A as previous determinations and withhold or release the identical information in accordance with those rulings. DART must release the remaining information; however, any information protected by copyright may only be released in accordance with copyright law.

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 black ink, appearing to read 'Kenny Moreland', written over a horizontal line.

Kenny Moreland
Assistant Attorney General
Open Records Division

KJM/som

Ref: ID# 619901

Enc. Submitted documents

c: Requestor
(w/o enclosures)

9 Third Parties
(w/o enclosures)