



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

March 9, 2017

Ms. Lori Fixley Winland
Counsel for the Camino Real Regional Mobility Authority
Locke Lord, LLP
600 Congress, Suite 2200
Austin, Texas 78701

OR2017-05036

Dear Ms. Winland:

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# 648444.

The Camino Real Regional Mobility Authority (the "authority"), which you represent, received a request for all emails between named individuals and entities during a specified time period and copy of a specified invoice.¹ You claim the submitted information is excepted from disclosure under section 552.108 of the Government Code. Additionally, you state release of some of the submitted information may implicate the proprietary interests of Paso Del Norte Trackworks ("Paso Del Norte"). Accordingly, you state, and provide documentation showing, you notified Paso Del Norte of the request for information and of its right to submit arguments to this office as to why the information at issue 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).

¹We note the authority 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 over-broad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

We have received comments from Paso Del Norte. We have considered the submitted arguments and reviewed the submitted representative sample of information.²

Initially, we note some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides, in relevant part, the following:

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

...
(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Gov't Code § 552.022(a)(3). The submitted information includes information in an account, voucher, or contract relating to the receipt or expenditure of funds by a governmental body that is subject to section 552.022(a)(3). The authority must release this information pursuant to section 552.022(a)(3), unless it is made confidential under the Act or other law. *See id.* § 552.022(a)(3). Although the authority raises section 552.108 of the Government Code for this information, section 552.108 is discretionary in nature and does not make information confidential under the Act. *See Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 177 at 3 (1977) (statutory predecessor to section 552.108 subject to waiver).* Therefore, the authority may not withhold any of the information subject to section 552.022(a)(3), which we have marked, under section 552.108. However, because section 552.136 of the Government Code makes information confidential for purposes of section 552.022, we will consider the applicability of this exception to the information subject to section 552.022.³ Further, as information encompassed by section 552.022 may be withheld under section 552.104, we will consider the argument under section 552.104 for the information subject to section 552.022(a)(3). *See Gov't Code § 552.104(b) (information protected by section 552.104 not subject to required public disclosure under section 552.022(a)).* Additionally, we will address the authority's argument under section 552.108 for the information that is not subject to section 552.022(a)(3).

²We 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 that those records contain substantially different types of information than that submitted to this office.

³The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).*

Section 552.108(a)(1) of the Government Code excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]” *Id.* § 552.108(a)(1). A governmental body claiming section 552.108(a)(1) must explain how and why this exception is applicable to the information at issue. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). Section 552.108 may be invoked by the proper custodian of information relating to a pending investigation or prosecution of criminal conduct. *See Open Records Decision No. 474 at 4-5 (1987)*. Where a governmental body has custody of information relating to a pending case of a law enforcement agency, the custodian of the records may withhold the information if it provides this office with a demonstration that the information relates to the pending case and a representation from the law enforcement agency that it wishes to have the information withheld. You state, and provide documentation showing, the El Paso Police Department (the “department”) objects to release of the information at issue because release would interfere with an active criminal investigation. Based upon these representations, we conclude release of the remaining information in Exhibit B and the remaining information you indicated in Exhibit E would interfere with the detection, investigation, or prosecution of crime. *See Houston Chronicle Publ’g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975) (court delineates law enforcement interests that are present in active cases), *writ ref’d n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). Thus, the authority may withhold the remaining information in Exhibit B and the remaining information you indicated in Exhibit E under section 552.108(a)(1) on behalf of the department.⁴

Paso Del Norte seeks to withhold its information under section 552.104(a) of the Government Code. Section 552.104(a) excepts from disclosure “information that, if released, would give advantage to a competitor or bidder.” Govt. Code § 552.104(a). 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. 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 only to ongoing competitive situations, and a third

⁴As our ruling is dispositive, we need not address the remaining argument against disclosure of this information.

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 831, 839. Paso Del Norte asserts it “would be damaged by a wide circulation of the requested information” because it would “give others a competitive advantage.” After review of the remaining information and consideration of the arguments, we conclude the authority may withhold the information we marked under section 552.104(a).⁵

Section 552.136(b) of the Government Code provides, “[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” Gov’t Code § 552.136(b). The authority must withhold the bank account numbers we marked under section 552.136 of the Government Code.

In summary, the authority may withhold the information not subject to section 552.022(a)(3) in Exhibit B and the information not subject to section 552.022(a)(3) you indicated in Exhibit E under section 552.108(a)(1) on behalf of the department. The authority may withhold the information we marked under section 552.104(a). The authority must withhold the types of information we marked under section 552.136 of the Government Code. The remaining information must be released.

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,



Emily Buchanan
Assistant Attorney General
Open Records Division

EB/eb

⁵As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

Ref: ID# 648444

Enc. Submitted documents

c: Requestor
(w/o enclosures)