



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

May 1, 2017

Mr. Terrance M. Garmon  
Assistant City Attorney  
Legal Department  
City of Tyler  
P.O. Box 2039  
Tyler, Texas 75710

OR2017-09190

Dear Mr. Garmon:

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# 655565 (LegalDesk No. EQX-374766).

The City of Tyler (the "city") received a request for all bid responses and scoring sheets pertaining to a specified request for proposals, as well as any correspondence between McDonald Transit Associates, Inc. ("McDonald") and the city's transit staff during the procurement period. You claim the submitted information is excepted from disclosure under section 552.104 of the Government Code. You also state release of this information may implicate the proprietary interests of the Alliance for Regional Mobility ("ARM") and McDonald. Accordingly, you have notified ARM and McDonald of the request and of their right to submit arguments to this office as to why their information should not be released. *See* Gov't Code § 552.305(d) (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances). We have received comments from ARM. We have considered the

submitted arguments and reviewed the submitted information, a portion of which is a representative sample.<sup>1</sup>

Initially, we must address the city's obligations under the Act. Section 552.301 of the Government Code prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. *See* Gov't Code § 552.301. Pursuant to section 552.301(e), a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) written comments stating the reasons why the claimed exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *Id.* § 552.301(e). The city received the request for information on February 6, 2017. We understand the city was closed for business on February 20, 2017. We note this office does not count the date the request was received or holidays for purposes of calculating a governmental body's deadlines under the Act. Thus, the city's fifteen-business-day deadline was February 28, 2017. We note the city timely submitted some of the responsive information, which we note consists of the responsive bid responses. However, the remaining information, which consists of a representative sample of the responsive correspondence between McDonald and the city's transit staff, was not submitted until March 2, 2017. *See id.* § 552.308 (describing rules for calculating submission dates of documents sent via first class United States mail). Consequently, we find the city failed to comply with the requirements of section 552.301(e) for the information not timely submitted.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless there is a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ). Because third-party interests can provide a compelling reason for non-disclosure, we will consider whether any of the information at issue may be withheld on behalf of any third party. However, we find you have failed to establish a compelling reason to address your argument under section 552.104 for the information that was not timely submitted. Further, we will consider your argument under section 552.104 for the timely-submitted information.

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<sup>1</sup>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 that those records contain substantially different types of information than that submitted to this office.

The city contends ARM marked some of its information as confidential when submitted to the city. However, information that is subject to disclosure under the Act may not be withheld simply because the party submitting it anticipates or requests that it be kept confidential. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot, through an agreement or contract, overrule or repeal provisions of the Act. *See* Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (“[T]he obligations of a governmental body under [the Act] cannot be compromised simply by its decision to enter into a contract.”), 203 at 1 (1978) (mere expectation of confidentiality by person supplying information does not satisfy requirements of statutory predecessor to section 552.110). Consequently, unless the information falls within an exception to disclosure, it must be released, notwithstanding any expectations or agreement specifying otherwise.

Next, we note an interested third party is allowed ten business days after the date of its receipt of the governmental body’s notice to submit its reasons, if any, as to why information relating to that party should not be released. *See* Gov’t Code § 552.305(d)(2)(B). As of the date of this letter, we have not received arguments from McDonald. Thus, McDonald has not demonstrated it has any protected proprietary interests in any of the submitted information. *See id.* § 552.110(a)-(b); 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, the city may not withhold the submitted information on the basis of any proprietary interest McDonald may have in the 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). 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 represent the submitted bids responses pertain to a competitive bidding situation. Further, you state the city has not yet awarded the bid, nor has the contract been finalized. Moreover, you inform us release of the submitted bids responses would “harm the [c]ity’s negotiating power and could potentially affect the costs and services of the contract.” After review of the information at issue and consideration of the arguments, we find the city has established the release of the information at issue would give an advantage to a competitor or bidder. Thus, we conclude the city may withhold the submitted bids responses under section 552.104(a) of the Government Code.<sup>2</sup>

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<sup>2</sup>As our ruling is dispositive, we need not address ARM’s arguments against disclosure of this information.

In summary, the city may withhold the submitted bids under section 552.104(a) of the Government Code. The city 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](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,



Britni Ramirez  
Assistant Attorney General  
Open Records Division

BR/som

Ref: ID# 655565

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

2 Third Parties  
(w/o enclosures)