



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

September 21, 2017

Mr. Paul D'Aloisio and Ms. Halfreda Anderson-Nelson
Senior Assistant General Counsel
Dallas Area Rapid Transit
P.O. Box 660163
Dallas, Texas 75266-0163

OR2017-11518B

Dear Mr. D'Aloisio and Ms. Anderson-Nelson:

This office issued Open Records Letter No. 2017-11518A (2017) on August 29, 2017. We have examined this ruling and determined we will correct the previously issued ruling. *See generally* Gov't Code § 552.011 (providing that Office of Attorney General may issue decision to maintain uniformity in application, operation, and interpretation of Public Information Act (the "Act")). Your request was assigned ID# 673597 (DART ORR# W001505-030817).

Dallas Area Rapid Transit ("DART") received a request for specified information pertaining to a specified request for proposals, including certain information regarding the awarded contract and the vendors that responded. You claim the submitted information is excepted from disclosure under section 552.104 of the Government Code. You also state release of the submitted information may implicate the interests of Ask in Tag, LLC; Electronic Data Magnetism, Inc.; InComm Holdings, Inc. ("InComm"); PayNearMe MT, Inc. ("PayNearMe"); and Ready Credit Corporation ("Ready"). 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 id.* § 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 InComm and PayNearMe. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note the requestor has asked DART to answer questions. The Act does not require a governmental body to answer general questions, perform legal research, or create new information in response to a request for information. *See* Open Records Decision Nos. 563 at 8 (1990), 555 at 1-2 (1990). However, the Act does require the governmental body to make a good faith effort to relate a request to information that the governmental body holds or to which it has access. *See* Open Records Decision Nos. 563 at 8, 561 at 8-9 (1990), 555 at 1-2, 534 at 2-3 (1989). We assume DART has made a good-faith effort to do so.

Next, we note 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. 2016-19028 (2016). Additionally, you state 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. 2016-22590 (2016). In Open Records Letter No. 2016-19028, we determined DART may withhold the information indicated by InComm under section 552.104(a) of the Government Code and must release the remaining responsive information; however, any information protected by copyright may only be released in accordance with copyright law. In Open Records Letter No. 2016-22590, we determined DART may withhold the information indicated by PayNearMe and Ready under section 552.104(a) of the Government Code and must release the remaining responsive information; however, any information protected by copyright may only be released in accordance with copyright law. We note you now seek to withhold under section 552.104 of the Government Code information which may have been previously ordered released. Section 552.007 of the Government Code provides that, 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 under 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, DART may not now withhold any previously released information unless its release is expressly prohibited by law or the information is confidential under law. Although you now raise section 552.104 of the Government Code for the information at issue, this section does not prohibit the release of information or make information confidential. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions in general), 663 at 5 (1999) (waiver of discretionary exceptions), 592 (1991) (stating that governmental body may waive section 552.104). Thus, DART may not now withhold any of the previously released information under section 552.104 of the Government Code. Furthermore, there is no indication the law, facts, and circumstances on which most of the prior rulings were based have changed. Accordingly, for the requested information that is identical to the information previously requested and ruled upon by this office, we conclude DART must continue to rely on Open Records Letter Nos. 2016-19028 and 2016-22590 as previous determinations and withhold

or release the identical information in accordance with those rulings.¹ *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 address the submitted arguments for the remaining information not encompassed by Open Records Letter Nos. 2016-19028 and 2016-22590.

We must address DART'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. Pursuant to section 552.301(b), the governmental body must ask for the attorney general's decision and state the exceptions that apply within ten business days after receiving the request. *See* Gov't Code § 552.301(a), (b). You state DART received the request for information on March 7, 2017. Accordingly, DART's ten-business-day deadline was March 21, 2017. Although you timely requested a ruling from this office, you did not raise section 552.104 of the Government Code until after the ten-business-day deadline passed. Consequently, we find DART failed to comply with the procedural requirements of section 552.301 of the Government Code.

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). By failing to timely raise section 552.104 of the Government Code, we find DART has failed to establish a compelling reason to address its claim under this section. However, we note third party interests can provide a compelling reason to overcome the presumption of openness against disclosure of the information at issue. Accordingly, we will consider whether the remaining information must be withheld under the Act based on third-party interests.

Next, 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 InComm and PayNearMe explaining why their 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

¹As our ruling is dispositive, we need not address the arguments against disclosure of this information.

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 552.104(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). 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. InComm and PayNearMe state they have competitors. In addition, InComm and PayNearMe state release of their information at issue would give advantage to their competitors or other bidders. After review of the information at issue and consideration of the arguments, we find InComm and PayNearMe have established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude DART may withhold the remaining information pertaining to InComm and PayNearMe under section 552.104(a) of the Government Code.²

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, DART must continue to rely on Open Records Letter Nos. 2016-19028 and 2016-22590 as previous determinations and withhold or release the identical information in accordance with those rulings. DART may withhold the information pertaining to InComm and PayNearMe under section 552.104(a) of the Government Code. DART must release the remaining information; however, any information protected by copyright may only be released in accordance with copyright law.

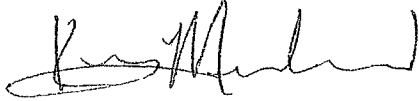
This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

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/>

²As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

[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 in a cursive style.

Kenny Moreland
Assistant Attorney General
Open Records Division

KJM/gw

Ref: ID# 673597

Enc. Submitted documents

c: Requestor
(w/o enclosures)

5 Third Parties
(w/o enclosures)

