KEN PAXTON
ATTORNEY GENERAL OF TEXAS

January 28, 2019

Ms. Tangerla Williams
Termporary Assistant General Counsel
Dallas Area Rapid Transit
P.O. Box 660163
Dallas, Texas 75266-0163

OR2019-02422

Dear Ms. Williams:

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# 747871 (DART ORR #s W003304-103118 & W003385-112818).

Dallas Area Rapid Transit ("DART") received two requests from different requestors for all information, including any proposals submitted to DART, relating to a specified request for qualifications. DART claims some of the submitted information is excepted from disclosure under section 552.111 of the Government Code. Additionally, DART states release of this information may implicate the proprietary interests of Ecolane USA, Inc. ("Ecolane"); GIRO, Inc. ("GIRO"); HB Software Solutions ("HBSS"); Routematch Software, Inc. ("Routematch"); StrataGen; TSS Paratransit ("TSS"); Trapeze Software Group, Inc. ("Trapeze"); and Via Mobility, LLC ("Via"). Accordingly, DART states it notified the third parties of the request for information and of their 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). We have received arguments from Ecolane, GIRO, HBSS, Routematch, TSS, Trapeze, and Via. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note the second requestor only seeks the proposals related to the specified request for qualifications. Thus, any additional information is not responsive to the second

request. This ruling does not address the public availability of non-responsive information and DART is not required to release non-responsive information to the second requestor.

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) to submit its reasons, if any, as to why requested information relating to it should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from StrataGen. Therefore, we have no basis to conclude StrataGen has a protected proprietary interest in the submitted 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 responsive information on the basis of any proprietary interest StrataGen may have in it.

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. GIRO, Routematch, TSS, and Via each state they have competitors. In addition, GIRO, Routematch, TSS, and Via argue release of the information at issue would give an advantage to their respective competitors. After review of the information at issue and consideration of the arguments, we find GIRO, Routematch, TSS, and Via have 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 marked under section 552.104(a) of the Government Code.[1]

Ecolane, GIRO, HBSS, and Trapeze claim portions of their respective information are subject to section 552.110 of the Government Code. Section 552.110 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

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

> 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. [2] 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).

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* ORD 661 at 5-6.

Ecolane, GIRO, HBSS, and Trapeze argue the information at issue consists of commercial and financial information, the release of which would cause the companies substantial

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[2]The 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* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

competitive harm under section 552.110(b) of the Government Code. Upon review, we find GIRO, HBSS, and Trapeze have demonstrated some of the information at issue, including GIRO's client information and the pricing information for HBSS, consists of commercial or financial information, the disclosure of which would cause the respective companies substantial competitive harm. Thus, DART must withhold GIRO's client information, which we marked, to the extent this information is not publicly available on the company's website, the pricing information for HBSS, and the additional information we marked under section 552.110(b) of the Government Code.[3] However, to the extent GIRO's client information is publicly available on the company's website, DART may not withhold such information under section 552.110(b). Moreover, we find Ecolane, GIRO, HBSS, and Trapeze have not made the specific factual or evidentiary showing required by section 552.110(b) that release of the remaining responsive information at issue would cause the respective companies substantial competitive harm. *See* ORD 319 at 3 (statutory predecessor to section 552.110 generally not applicable to information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing). Therefore, DART may not withhold the remaining responsive information at issue under section 552.110(b).

Ecolane, GIRO, HBSS, and Trapeze assert portions of the remaining responsive information constitute trade secrets under section 552.110(a) of the Government Code. Upon review, we find Trapeze has established a *prima facie* case some of its information, including its client information, constitutes trade secrets. Accordingly, DART must withhold the client information we marked pertaining to Trapeze to the extent the client information is not publicly available on Trapeze's website, as well as the remaining information we marked under section 552.110(a) of the Government Code. To the extent Trapeze's client information is publicly available on the company's website, DART may not withhold such information under section 552.110(a). Upon review, we find Ecolane and HBSS have failed to demonstrate the information at issue meets the definition of a trade secret. We also find Ecolane and HBSS have not demonstrated the necessary factors to establish a trade secret claim for this information. *See* ORDs 402 (section 552.110(a) does not apply unless information meets definition of trade secret and necessary factors have been demonstrated to establish trade secret claim), 319 at 2. Consequently, DART may not withhold any of the remaining responsive information at issue under section 552.110(a).

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*

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[3]As our ruling is dispositive, we need not consider the remaining arguments against disclosure of this information.

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).

DART seeks to withhold Exhibit K under section 552.111 of the Government Code. However, upon review we find DART has failed to demonstrate this information consists of advice, recommendations, opinions, and other material reflecting the policymaking processes of DART. Accordingly, DART may not withhold this information under section 552.111.

We note some of the remaining information appears to be subject to copyright law. 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 may withhold the information we marked under section 552.104(a) of the Government Code. DART must withhold GIRO's client information, which we marked, to the extent this information is not publicly available on the company's website, the pricing information for HBSS, and the additional information we marked under section 552.110(b) of the Government Code. DART must withhold the client information we marked pertaining

to Trapeze to the extent the client information is not publicly available on Trapeze's website, as well as the remaining information we marked under section 552.110(a) of the Government Code. DART must release the remaining responsive 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,

Cole Hutchison
Assistant Attorney General
Open Records Division

CH/mo

Ref: ID# 747871

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Third party
(w/o enclosures)