



KEN PAXTON  
ATTORNEY GENERAL OF TEXAS

July 29, 2019

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

OR2019-20684

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# 777701.

Dallas Area Rapid Transit ("DART") received a request for the proposals of the winning bidders for Solicitation# P-2038267. Although you take no position as to whether the submitted information is excepted under the Act, you state release of the submitted information may implicate the proprietary interests of 22<sup>nd</sup> Century Technologies, Inc. ("22<sup>nd</sup> Century") and Peak Performers. Accordingly, you state, and provide documentation showing, you notified these third parties of the request for information and of their right to submit arguments to this office as to why the submitted information 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 comments from 22<sup>nd</sup> Century and Peak Performers. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note both 22<sup>nd</sup> Century and Peak Performers seek to withhold information not submitted to this office by DART. By statute, this office may only rule on the public availability of information submitted by the governmental body requesting the ruling. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested). Because this information was not submitted DART, this

ruling does not address this information and is limited to the information submitted as responsive by DART.<sup>1</sup>

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). In considering whether a private third party may assert this exception, the supreme court reasoned because section 552.305(a) of the Government Code includes section 552.104 as an example of an exception that involves a third party’s property interest, 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. 22<sup>nd</sup> Century and Peak Performers state they have competitors. In addition, 22<sup>nd</sup> Century states release of some of its information at issue would allow 22<sup>nd</sup> Century’s competitors to have an unfair advantage, which would limit fair competition and cause serious harm and disruption to the company. Peak Performers asserts that an entity gaining knowledge of Peak Performers’ information at issue could use this information to its own benefit, substantially weakening the effectiveness and uniqueness of Peak Performers’ services while improving the entity’s own. 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 to only ongoing competitive situations, and a third 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 831, at 831, 842. After review of the information at issue and consideration of the arguments, we find 22<sup>nd</sup> Century and Peak Performers have established the release of their information at issue, which we indicated, would give advantage to a competitor or bidder. Thus, we conclude DART may withhold the information we indicated under section 552.104(a) of the Government Code.<sup>2</sup>

22<sup>nd</sup> Century also claims some of its remaining information is excepted from disclosure under section 552.110 of the Government Code, which 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. 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. *See Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.

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<sup>1</sup>As our ruling is dispositive, we need not address the arguments against disclosure of this information by 22<sup>nd</sup> Century and Peak Performers.

<sup>2</sup> As we are able to make this determination, we need not address 22<sup>nd</sup> Century’s and Peak Performers’ remaining arguments for this information.

1957); *see also* Open Records Decision No. 552 (1990). Section 757 provides that a trade secret is:

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 Huffines*, 314 S.W.2d at 776. 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.<sup>1</sup> 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. *See* 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 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 5-6.

22<sup>nd</sup> Century asserts portions of its information constitute trade secrets under section 552.110(a) of the Government Code. Upon review, we conclude 22<sup>nd</sup> Century failed to establish a *prima facie*

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<sup>1</sup>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 also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

case that the information at issue meets the definition of a trade secret. We further find 22<sup>nd</sup> Century failed to demonstrate the necessary factors to establish a trade secret claim for its information. See ORDs 402, 319 at 2 (information relating to organization, personnel, market studies, professional references, qualifications, experience, and pricing not excepted under section 552.110). Therefore, none of 22<sup>nd</sup> Century information may be withheld under section 552.110(a) of the Government Code.

22<sup>nd</sup> Century also contends some of its information is commercial or financial information, the release of which would cause substantial competitive harm to the company. Upon review, we find 22<sup>nd</sup> Century failed to establish any of the remaining information constitutes commercial or financial information the disclosure of which would cause the company substantial competitive harm. See Gov't Code § 552.110(b). Therefore, DART may not withhold any of the remaining information at issue under section 552.110(b) of the Government Code.


Lastly, the submitted information contains a bank account number. Section 552.136 of the Government Code states that “[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. DART must therefore withhold the bank account number we've indicated under section 552.136.

In summary, DART may withhold the information we indicated under section 552.104 of the Government Code. DART must withhold the bank account number we've indicated under section 552.136. DART 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 <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,

  
Michael Pearle  
Assistant Attorney General  
Open Records Division

MP/mo

Ref: ID# 777701

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

Third Parties  
(w/o enclosures)