



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

September 10, 2019

Mr. Robert Ash
City of El Paso Employees Retirement Trust
1039 Chelsea Street
El Paso, Texas 79903

OR2019-25280

Dear Mr. Ash:

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# 785511.

The City of El Paso Employees Retirement Trust (the "trust") received two requests from different requestors for information pertaining to a specified request for proposals. The trust states it will release some information to the requestor. Although the trust takes no position as to whether the submitted information is excepted under the Act, the trust states release of the submitted information may implicate the proprietary interests of Prestige Consulting Services ("Prestige") and The Studer Group, L.L.C. ("Studer"). Accordingly, the trust states it notified Prestige and Studer of the request for information and of their rights 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). The trust informs us Studer does not object to the release of its information. The trust has provided us with comments from Prestige. We have reviewed the submitted information and the submitted arguments.

Prestige argues its information was marked "confidential" when it was submitted to the trust. However, information is not confidential under the Act simply because the party submitting the information anticipates or requests that it be kept confidential. *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. Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541

at 3 (1990) (“[T]he obligations of a governmental body under [the predecessor to 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 Gov’t Code § 552.110). Consequently, unless the information falls within an exception to disclosure, the trust must release it, notwithstanding any expectations or agreement specifying otherwise.

Prestige asserts portions of the submitted information are protected under section 552.104 of the Government Code. Section 552.104(a) 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. Prestige informs us it has competitors. In addition, Prestige indicates release of the information at issue would provide an advantage to its competitors. After review of the information at issue and consideration of the arguments, we find Prestige has established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude the trust may withhold the information we have indicated under section 552.104(a) of the Government Code.¹

We note some of the materials at issue 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, the trust may withhold the information we have indicated under section 552.104(a) of the Government Code. The trust must release the remaining information; however, any information that is subject to copyright may be released only in accordance with copyright law.

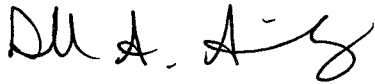
This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

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 <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG’s Open

¹ As our ruling is dispositive, we need not address Prestige’s remaining arguments against disclosure of this information.

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,

A handwritten signature in black ink, appearing to read "Gerald Arismendez". The signature is fluid and cursive, with the first name "Gerald" and last name "Arismendez" clearly distinguishable.

Gerald Arismendez
Assistant Attorney General
Open Records Division

GAA/jxd

Ref: ID# 785511

Enc. Submitted documents

c: 2 Requestors
(w/o enclosures)

Third Party
(w/o enclosures)