



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

May 13, 2020

Mr. Pedro Alanis
Interim Executive Director
San Antonio Housing Trust
2515 Blanco Road
San Antonio, Texas 78212

OR2019-36559A

Dear Mr. Alanis:

This office issued Open Records Letter No. 2019-36559 (2019) on December 30, 2019. 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"), chapter 552 of the Government Code). Consequently, this decision serves as the correct ruling and is a substitute for the decision issued on December 30, 2019. Your request was assigned ID# 801604.

The San Antonio Housing Trust (the "trust") received a request for all agreements, contracts, pro formas, and financial documents for every development project by the trust. You state the trust has released some of the requested information. You argue some of the requested information is not subject to the Act. Additionally, you state, although the trust takes no position with respect to whether some of the requested information is excepted from disclosure, its release may implicate the interests of third parties. Accordingly, you state, and provide documentation demonstrating, the trust notified Athena Domain, Inc. ("Athena"); HomeSpring Realty Partners, Hogan Commercial, and HomeSpring Residential Services LLC d/b/a Hogan Properties Company, Inc.; LDG Development, Inc.; Mission DG, Ltd.; The NRP Group ("NRP"); Pedcor Investments LLC ("Pedcor"); and Versa Development, LLC ("Versa"), 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 reviewed your arguments and the submitted information.¹ We have also received and considered the arguments submitted by Athena, NRP, Pedcor, and Versa.

The Act defines “governmental body,” in pertinent part, as “the part, section, or portion of an organization, corporation, commission, committee, institution, or agency that spends or that is supported in whole or in part by public funds[.]” Gov’t Code § 552.003(1)(A)(xii). “Public funds” means “funds of the state or of a governmental subdivision of the state.” *Id.* § 552.003(5). The Texas Supreme Court has defined “‘supported in whole or in part by public funds’ to include only those private entities or their sub-parts sustained, at least in part, by public funds, meaning they could not perform the same or similar services without the public funds.” *Greater Houston P’ship v. Paxton*, 468 S.W.3d 51, 63 (Tex. 2015). Thus, section 552.003(1)(A)(xii) encompasses only those private entities that are dependent on public funds to operate as a going concern, *see id.* at 61, and only those entities acting as the functional equivalent of the government, *see id.* at 62. Upon review, we find the trust, Athena, NRP, Pedcor, and Versa have failed to demonstrate the trust’s entities at issue do not fall within the definition of a “governmental body” under section 552.003 of the Government Code. Therefore, we find the requested information at issue is public information subject to release under the Act.

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 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, this office has not received comments from the remaining third parties explaining why their information should not be released to the requestor. Thus, we have no basis to conclude the release of the information would implicate the interests of the remaining third parties, and none the information may be withheld on that basis. *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.

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

¹ We note third party interests can provide a compelling reason to overcome the presumption of openness caused by a failure to comply with section 552.301. *See* Gov’t Code § 552.302; Open Records Decision No. 150 at 2 (1977). Because third party interests are at stake in this instance, we will consider the arguments against disclosure of the submitted information and need not consider whether the trust complied with the procedural requirements of section 552.301 of the Government Code in requesting a decision from this office. *See* Gov’t Code § 552.301(e).

information] would be an advantage, not whether it would be a decisive advantage.” *Boeing*, 466 S.W.3d at 841. Athena, NRP, Pedcor, and Versa state their companies have competitors. In addition, Athena, NRP, Pedcor, and Versa state release of the information at issue would provide their competitors with a substantial advantage in future bidding processes. 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, 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 at 831, 839. After review of the information at issue and consideration of the arguments, we find Athena, NRP, Pedcor, and Versa have established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude the trust may withhold the submitted information under section 552.104(a).² The trust must release the remaining requested 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,

Lindsay E. Hale
Assistant Attorney General
Open Records Division

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

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Enc. Submitted documents

c: Requestor
(w/o enclosures)

7 Third Parties
(w/o enclosures)