



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

March 23, 2020

Ms. Cristina C. Doss
Senior Assistant General Counsel
Dallas Area Rapid Transit
P.O. Box 660163
Dallas, Texas 75266-0163

OR2020-08988

Dear Ms. Doss:

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# 818126 (ORR Woo4107-070819).

Dallas Area Rapid Transit ("DART") received a request for contracts pertaining to the supply of and facility maintenance for natural gas, compressed natural gas, and renewable gas. You indicate DART does not have information pertaining to contracts for compressed natural gas.¹ 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 third parties.² Accordingly, you state, and provide documentation showing, you notified Element Markets Renewable Energy, LLC ("EMRE") and Transtar Energy d/b/a Clean Energy ("Clean Energy") of the request for information and of their right to submit arguments to this office as to why the submitted information should not be

¹ We note the Act does not require a governmental body to disclose information that did not exist at the time the governmental body received the request for information. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Attorney General Opinion H-90 (1973); Open Records Decision Nos. 452 at 2-3 (1986), 342 at 3 (1982), 87 (1975); *see also* Open Records Decision Nos. 572 at 1 (1990), 555 at 1-2 (1990), 416 at 5 (1984).

² We note, and DART acknowledges, DART did not comply with section 552.301 of the Government Code in requesting a ruling from this office. *See* Gov't Code § 552.301(b), (e). Nonetheless, because the interest of a third party can provide a compelling reason to overcome the presumption of openness, we will consider third party interests for the submitted information. *See id.* §§ 552.007, .302, .352.

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 Clean Energy. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note portions of the submitted information were the subjects of previous requests for information, in response to which this office issued Open Records Letter Nos. 2020-05471 (2020) and 2017-20995 (2017). In Open Records Letter No. 2020-05471, we ruled DART may continue to rely on Open Records Letter No. 2019-18194 (2019) as a previous determination and withhold or release the information subject to that ruling in accordance with that ruling and DART must release the remaining information. In Open Records Letter No. 2017-20995, we ruled DART may not withhold any of Clean Energy's information at issue under section 552.110 of the Government Code, and the submitted information must be released. We note, however, Clean Energy now seeks to withhold some of the information ruled upon in Open Records Letter No. 2017-20995 under section 552.104 of the Government Code. Section 552.007 of the Government Code provides, 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 by 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 of the submitted information previously ordered released in Open Records Letter No. 2017-20995, unless its release is expressly prohibited by law or the information is confidential by law. Although Clean Energy raises section 552.104 of the Government Code, this exception does not prohibit the release of information or make information confidential. *See* Gov't Code § 552.007; Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 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 submitted information previously ordered released in Open Records Letter No. 2017-20995, which we have indicated, under section 552.104 of the Government Code. We have no indication the law, facts, or circumstances on which the prior rulings were based have changed. Accordingly, DART may continue to rely on Open Records Letter No. 2020-05471 as a previous determination and withhold or release the information subject to that ruling, which we indicated, in accordance with that ruling. In addition, DART must rely on Open Records Letter No. 2017-20995 and release the information we indicated. However, we will address Clean Energy's arguments against release of the remaining information, which was not at issue in Open Records Letter Nos. 2020-05471 and 2017-20995.

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 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 EMRE explaining why its information should

not be released to the requestor. Thus, we have no basis to conclude the release of the remaining information would implicate the interests of EMRE, and none of the remaining 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 exempts 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. Clean Energy states it has competitors. In addition, Clean Energy release of portions of its information would provide its competitors with an advantage. 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 at 831, 839. After review of the information at issue and consideration of the arguments, we find Clean Energy has established the release of the information it seeks to withhold 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.³

In summary, DART may continue to rely on Open Records Letter No. 2020-05471 as a previous determination and withhold or release the information subject to that ruling, which we indicated, in accordance with that ruling. DART must rely on Open Records Letter No. 2017-20995 and release the information we indicated. DART may withhold the information we marked under section 552.104 of the Government Code. 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.

³ As our ruling on this information is dispositive, we need not address Clean Energy’s remaining arguments against disclosure.

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,

Jennifer Copeland
Assistant Attorney General
Open Records Division

JC/gw

Ref: ID# 818126

Enc. Submitted documents

c: Requestor
(w/o enclosures)

c: 2 Third Parties
(w/o enclosures)