



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

September 18, 2020

Ms. Sol M. Cortez  
Senior Assistant City Attorney  
City of El Paso  
P.O. Box 1890  
El Paso, Texas 77950-1890

OR2020-23632

Dear Ms. Cortez:

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# 842605 (City Case No. 20-1044-1515).

The City of El Paso (the "city") received a request for information pertaining to a specified bidding situation, excluding information pertaining to the requestor's company. You claim the submitted information is excepted from disclosure under section 552.104 of the Government Code. You also state you notified First Transit, Inc. ("FT") and MTM Transit, LLC ("MTM"), formerly Ride Right, LLC, 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 FT and MTM. We have considered the submitted arguments and reviewed the submitted information.

We note the information at issue was the subject of a previous request for a ruling, as a result of which this office issued Open Records Letter No. 2020-03643 (2020). In that ruling, we determined the city (1) may withhold certain information under section 552.104(a) of the Government Code; (2) must withhold certain information under section 552.110(b) of the Government Code; (3) must withhold certain information under section 552.101 of the Government Code in conjunction with common-law privacy; (4) must withhold certain information under section 552.130 of the Government Code; (5) must withhold certain information under section 552.136 of the Government Code; and (6) must release the remaining information. 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. You raise section 552.104 of the Government Code for the submitted information; however, we note section 552.104 does not prohibit the release of information or make information confidential. *See id.* § 552.104. Thus, with respect to the information released pursuant to Open Records Letter No. 2020-03643, the city may not now withhold the previously released information under section 552.104. Additionally, FT raises section 552.110 of the Government Code for its information. Because information subject to section 552.110 is deemed confidential by law, we will consider FT's argument under section 552.110 for any previously released information.

With respect to certain information pertaining to FT that was withheld in the previous ruling, the relevant laws have changed since the previous ruling was issued. Therefore, the city may not rely on Open Records Letter No. 2020-03643 as a previous determination and withhold that information in accordance with the previous ruling. *See* Open Records Decision No. 673 at 6-7 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes information is or is not excepted from disclosure). However, we will consider FT's arguments under sections 552.104 and 552.110 for the information at issue that was previously withheld. With respect to the remaining information at issue, we have no indication there has been any change in the law, facts, or circumstances on which the previous ruling was based. Accordingly, the city must rely on Open Records Letter No. 2020-03643 as a previous determination and withhold the information at issue in accordance with that ruling as it relates to MTM's information under section 552.110 of the Government Code and the information withheld under section 552.101 of the Government Code in conjunction with common-law privacy and sections 552.130 and 552.136 of the Government Code. *See id.*

Next, we note you have submitted the requested information on a disc, portions of which are in a format we are unable to view. The city must submit information in a manner that enables this office to determine whether the information comes within the scope of an exception to disclosure. As this office cannot review all of the files on the submitted disc, we conclude you have failed to comply with the requirements of section 552.301 of the Government Code with respect to this information. *See* Gov't Code § 552.301(e)(1)(D). Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301 results in the presumption the information is public and must be released, unless there is a compelling reason to withhold the information. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ). Although the interest of a third party can provide a compelling reason to overcome the presumption of openness, because this office is unable to review the files at issue, we have no basis for finding the information excepted from disclosure. Therefore, we have no choice but to order the city to release the information at issue, which we indicated, pursuant to section 552.302. However, we will address arguments for the remaining submitted information, which we are able to view.

FT raises section 552.104 of the Government Code for a portion of its information. Section 552.104 excepts from disclosure information “if a governmental body demonstrates that release of the information would harm its interests by providing an advantage to a competitor or bidder in a particular ongoing competitive situation or in a particular competitive situation where the governmental body establishes the situation at issue is set to reoccur or there is a specific and demonstrable intent to enter into the competitive situation again in the future.” Gov’t Code § 552.104(a) (emphasis added). In *Boeing Co. v. Paxton*, 466 S.W.3d 831 (Tex. 2015), the Texas Supreme Court held section 552.104 does not preclude third parties from raising section 552.104 as an exception to disclosure. *See Boeing*, 466 S.W.3d at 842. However, the Eighty-sixth Legislature has amended section 552.104 since the issuance of *Boeing*. *See* Act of May 25, 2019, 86th Leg., R.S., S.B. 943, § 3. Section 552.104 now expressly limits the protections of section 552.104 to governmental bodies. Gov’t Code § 552.104(a). Therefore, we do not address FT’s arguments under section 552.104.

FT also raises section 552.110 of the Government Code for some of its information at issue.<sup>1</sup> Section 552.110(b) states, “[e]xcept as provided by [s]ection 552.0222, information is [excepted from required disclosure] if it is demonstrated based on specific factual evidence that the information is a trade secret.” *See id.* § 552.110(b). Section 552.110(a) defines a trade secret as all forms and types of information if:

- (1) the owner of the trade secret has taken reasonable measures under the circumstances to keep the information secret; and
- (2) the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information.

*Id.* § 552.110(a). Section 552.110(c) of the Government Code states:

Except as provided by Section 552.0222, commercial 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 is [excepted from required disclosure].

*Id.* § 552.110(c). Additionally, we note section 552.0222(b) lists certain types of information to which section 552.110 does not apply. *See id.* § 552.0222(b). Upon review, we find FT has demonstrated portions of the information at issue constitute trade secrets. Accordingly, to the extent FT’s customer information is not publicly available on its website, the city must withhold FT’s customer information under section 552.110(b) of the Government Code. Additionally, we find FT has demonstrated portions of its information, which we marked, constitute commercial or financial information, the release of which would cause substantial competitive harm. Thus, the city must withhold the information we marked under section 552.110(c) of the Government Code. However, we

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<sup>1</sup> Although FT raises former sections 552.110(a) and 552.110(b) of the Government Code in its brief, we understand FT to raise current sections 552.110(b) and 552.110(c) of the Government Code based on the substance of its arguments.

find some of the remaining information at issue is subject to section 552.0222(b) and may not be withheld on the basis of section 552.110 of the Government Code. Additionally, we find FT has failed to provide specific factual evidence demonstrating any portion of the rest of the remaining information at issue is a trade secret or constitutes commercial or financial information, the release of which would result in substantial competitive harm. Therefore, the city may not withhold any of the remaining information at issue under section 552.110 of the Government Code.

In summary, the city must rely on Open Records Letter No. 2020-03643 as a previous determination and withhold the information at issue in accordance with that ruling as it relates to MTM's information under section 552.110 of the Government Code and the information withheld under section 552.101 of the Government Code in conjunction with common-law privacy and sections 552.130 and 552.136 of the Government Code. To the extent FT's customer information is not publicly available on the company's website, the city must withhold FT's customer information under section 552.110(b) of the Government Code. The city must withhold the information we marked under section 552.110(c) of the Government Code. The city 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,

Emily Kunst  
Assistant Attorney General  
Open Records Division

EK/jm

Ref: ID# 842605

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

2 Third Parties  
(w/o enclosures)