



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

September 23, 2020

Ms. Jacqueline E. Hojem
Public Information Officer
Metro Transit Authority of Harris County
P.O. Box 61429
Houston, Texas 77208-1429

OR2020-24046

Dear Ms. Hojem:

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# 844035 (MTA TPIA No. 2020-0487).

The Metropolitan Transit Authority of Harris County (the "authority") received a request for information related to request for proposals number 4019000111. Although you take no position as to whether the submitted information is excepted under the Act, you state release of this information may implicate the proprietary interests of Cubic Transportation Systems, Inc. ("Cubic"); Clever Devices, Ltd. ("Clever"); EastBanc Technologies, LLC ("EastBanc"); and Swiftly, Inc. ("Swiftly"). 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 information at issue 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 each of the interested third parties.¹ We have considered the submitted arguments and reviewed the submitted information.

Initially, we note Swiftly argues against disclosure of information not submitted to this office for review. This ruling does not address information beyond what the authority has submitted to us for our review. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from attorney general must submit a copy of specific information requested). Accordingly, this ruling is limited to the information the authority submitted as responsive to the request for information.

¹ Although Clever raises section 552.131 for some of its information at issue, Clever provides no arguments explaining how this exception is applicable to the information at issue. Accordingly, we do not address Clever's assertion of this exception. *See id.* § 552.305(d)(2)(B).

Cubic and Clever raise section 552.104 of the Government Code for some of their 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.” *Id.* § 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 Cubic’s or Clever’s arguments under section 552.104.

Section 552.110(c) of the Government Code states:

(c) 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). Clever, Cubic, and Swiftly argue their information contains commercial or financial information subject to section 552.110(c).² Upon review, we find Cubic and Swiftly have demonstrated portions of the information at issue constitute commercial or financial information, the release of which would cause substantial competitive harm. Accordingly, the authority must withhold the information we have marked, and, to the extent the customer information is not publicly available on Cubic’s or Swiftly’s respective websites, the authority must withhold their customer information under section 552.110(c).³ However, we 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(c). Additionally, we find Clever, Cubic, and Swiftly have failed to provide specific factual evidence demonstrating any portion of the rest of the remaining information at issue constitutes commercial or financial information, the release of which would result in substantial competitive harm. Therefore, the authority may not withhold any of the remaining information at issue under section 552.110(c) of the Government Code.

Section 552.110(b) of the Government Code states, “[e]xcept as provided by [s]ection 552.0222, information is [excepted from required disclosure] if it is demonstrated based on

² Although Cubic cites to subsection 552.110(b) of the Government Code, we note the Eighty-sixth Legislature amended section 552.110 effective January 1, 2020. *See* Act of May 25, 2019, 86th Leg., R.S., S.B. 943, § 3. Accordingly, we understand Cubic to raise subsection 552.110(c) for the information at issue.

³ As our ruling is dispositive, we need not address the remaining argument against disclosure of this information.

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). As noted above, section 552.0222(b) lists certain types of information to which section 552.110 does not apply. *See id.* § 552.0222(b). Clever and Swiftly argue portions of the remaining information contain trade secrets subject to section 552.110(b). However, we 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(b). Additionally, we find Clever and Swiftly have failed to provide specific factual evidence demonstrating any portion of the rest of the remaining information at issue is a trade secret. Therefore, the authority may not withhold any of the remaining information at issue under section 552.110(b) of the Government Code.

Section 552.1101 of the Government Code provides, in relevant part:

(a) Except as provided by Section 552.0222, information submitted to a governmental body by a vendor, contractor, potential vendor, or potential contractor in response to a request for a bid, proposal, or qualification is excepted from the requirements of Section 552.021 if the vendor, contractor, potential vendor, or potential contractor that the information relates to demonstrates based on specific factual evidence that disclosure of the information would:

(1) reveal an individual approach to:

(A) work;

(B) organizational structure;

(C) staffing;

(D) internal operations;

(E) processes; or

(F) discounts, pricing methodology, pricing per kilowatt hour, cost data, or other pricing information that will be used in future solicitation or bid documents; and

(2) give advantage to a competitor.

Id. § 552.1101(a). Additionally, we note sections 552.0222(b) and 552.1101(b) list certain types of information to which section 552.1101(a) does not apply. *See id.* §§ 552.0222(b), .1101(b). EastBanc asserts disclosure of its information would reveal an individual approach to organizational structure, staffing, internal operations, discounts and pricing methodology and give advantage to a competitor. Upon review, we find some of the information at issue is subject to section 552.0222(b) or section 552.1101(b) and may not be withheld on the basis of section 552.1101(a). *See id.* (listing certain types of information not excepted under section 552.1101). Additionally, we find EastBanc has failed to provide specific factual evidence demonstrating any portion of the remaining information at issue is subject to section 552.1101(a). Therefore, the authority may not withhold any of the remaining information at issue under section 552.1101(a) of the Government Code.

Clever also raises section 552.101 of the Government Code for a portion of its information. Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” *Id.* § 552.101. However, Clever has not pointed to any confidentiality provision, nor are we aware of any, that would make any of its remaining information at issue confidential for purposes of section 552.101. *See, e.g.,* Open Records Decision Nos. 611 at 1 (1992) (common-law privacy), 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality). Therefore, the authority may not withhold any of Clever’s information under section 552.101 of the Government Code.

Swiftly also raises section 552.102(a) of the Government Code as an exception to disclosure of portions of its information. Section 552.102(a) excepts from disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]” Gov’t Code § 552.102(a). None of Swiftly’s remaining information consists of information in the personnel file of a governmental employee. Therefore, we find no portion of Swiftly’s remaining information is subject to section 552.102(a) of the Government Code, and the authority may not withhold it on that basis.

Swiftly also raises section 552.137 of the Government Code. Section 552.137 excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body,” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *Id.* § 552.137(a)-(c). Section 552.137 is not applicable to an institutional e-mail address, an Internet website address, the general e-mail address of a business, an e-mail address of a person who has a contractual relationship with a governmental body, an e-mail address provided by a vendor or vendor’s agent who seeks to contract with a governmental body, or a e-mail contained in a response to a request for bids or proposals. *See id.* § 552.137(c). The remaining information either does not consist of e-mail addresses or consists of e-mail addresses that are specifically excluded by section 552.137(c). *See id.* Thus, the authority may not withhold any of the remaining information at issue on that basis.

In summary, the authority must withhold the information we marked and, to the extent the customer information is not publicly available on Cubic’s or Swiftly’s respective websites,

the authority must Cubic's and Swiftly's customer information under section 552.110(c) of the Government Code. The authority 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,

Erin Groff
Assistant Attorney General
Open Records Division

EMG/gw

Ref: ID# 844035

Enc. Submitted documents

c: Requestor
(w/o enclosures)

4 Third Parties
(w/o enclosures)