



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

January 18, 2022

Mr. Gil R. Garcia
Senior Assistant General Counsel
Dallas Area Rapid Transit
P.O. Box 660163
Dallas, Texas 75266-0163

OR2022-01415

Dear Mr. Garcia:

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# 923286 (ORR No. W005918-093021).

Dallas Area Rapid Transit ("DART") received a request for information pertaining to six specified solicitations. Although DART takes no position as to whether the submitted information is excepted under the Act, DART states release of the submitted information may implicate the proprietary interests of numerous third parties. Accordingly, DART states, and provides documentation showing, it notified these third parties 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 received comments from AECOM Technical Services, Inc. ("AECOM"); Archer Western Herzog ("Archer"); Arredondo, Zepeda & Brunz, LLC ("AZB"); Atkins North America, Inc. ("Atkins"); Atlas Technical Consultants, Inc. ("ATC"); Austin Bridge & Road, LP and Austin / Carcon ("ABR"); Bowman Engineering & Consulting, Inc. ("Bowman"); DDC Public Affairs ("DDC"); Jacobs Engineering Group, Inc. ("Jacobs"); Kiewit Infrastructure South Co. ("Kiewit"); VAI Architects, Inc. ("VAI"); Vertex Engineering, Inc. ("VRX"); Walter P. Moore and Associates, Inc. ("WPM"); and WSP USA, Inc. ("WSP"). We have reviewed the submitted arguments and the submitted information.

Initially, we note Archer, Bowman, WSP, and VAI argue against the release of information that was not submitted by DART. This ruling does not address information that was not submitted by DART and is limited to the information DART has submitted for our review.¹ *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from attorney general must submit copy of specific information requested).

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) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See id.* § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from any remaining third party explaining why the submitted information should not be released. Therefore, we have no basis to conclude any remaining third party has a protected proprietary interest in the submitted information. *See, e.g., id.* § 552.110 (requiring the provision of specific factual evidence demonstrating the applicability of the exception). Accordingly, DART may not withhold the submitted information on the basis of any proprietary interest any remaining third party may have in the information.

DDC raises section 552.101 of the Government Code for the submitted 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, DDC has not pointed to any confidentiality provision, nor are we aware of any, that would make any of the submitted information 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, DART may not withhold any of the information at issue under section 552.101 of the Government Code.

Archer, ATC, ABR, AZB, and Kiewit raise section 552.104 of the Government Code. 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

¹ As we are able to make this determination, we need not address the arguments against disclosure of this information.

552.104 to governmental bodies. Gov't Code § 552.104(a). Therefore, we do not address the third parties' arguments under section 552.104 of the Government Code.

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). AECOM, Atkins, ABR, Bowman, DDC, Jacobs, Kiewit, VAI, WPM, and WSP argue some of the information at issue consists of commercial or financial information subject to section 552.110(c). Upon review, we find AECOM, Atkins, ABR, DDC, Jacobs, Kiewit, VAI, WPM, and WSP demonstrated portions of the information at issue constitute commercial or financial information, the release of which would cause substantial competitive harm. Accordingly, DART must withhold the information we indicated under section 552.110(c) of the Government Code; however, to the extent the customer information at issue is made available to the public by the respective companies, including but not limited to on their websites or social media accounts, it may not be withheld under section 552.110(c).² 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. Additionally, we find AECOM, Atkins, ABR, Bowman, DDC, Jacobs, Kiewit, VAI, WPM, and WSP 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

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

of which would result in substantial competitive harm. Therefore, DART may not withhold any of the remaining information at issue under section 552.110(c) of the Government Code.

AECOM, ATC, Atkins, ABR, Bowman, DDC, Jacobs, Kiewit, VAI, VRX, WPM, and WSP argue some of the remaining information at issue consists of trade secrets subject to section 552.110(b). Upon review, we find ATC and VRX have demonstrated portions of the information at issue constitute trade secrets. Accordingly, DART must withhold the information we have indicated under section 552.110(b) of the Government Code; however, to the extent the customer information at issue is made available to the public by ATC or VRX, including but not limited to on their respective websites or social media accounts, it may not be withheld under section 552.110(b).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(b). Additionally, we find AECOM, ATC, Atkins, ABR, Bowman, DDC, Jacobs, Kiewit, VAI, VRX, WPM, and WSP have failed to provide specific factual evidence demonstrating any portion of the rest of the remaining information at issue is a trade secret. Therefore, DART 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

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

(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), (b). Additionally, we note section 552.0222(b) lists certain types of information to which section 552.1101(a) does not apply. *See id.* § 552.0222(b). AECOM, Atkins, ATC, Bowman, DDC, Jacobs, Kiewit, VAI, VRX, WPM, and WSP argue section 552.1101 is applicable to some of the remaining information. Upon review, 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 552.1101(a). *See id.* § 552.0222(b). Additionally, we find AECOM, Atkins, ATC, Bowman, DDC, Jacobs, Kiewit, VAI, VRX, WPM, and WSP failed to provide specific factual evidence demonstrating any portion of the rest of the remaining information at issue is subject to section 552.1101(a). Therefore, DART may not withhold any of the remaining information at issue under section 552.1101(a) of the Government Code.

Bowman argues some of its information meets the definition of a trade secret found in section 134A.002(6) of the Texas Uniform Trade Secrets Act (the “TUTSA”), chapter 134A of the Civil Practice and Remedies Code, which was added by the Eighty-third Texas Legislature. Section 552.101 of the Government Code also encompasses information made confidential by other statutes. Section 134A.002 provides, in relevant part, the following:

(6) “Trade secret” means information, including a formula, pattern, compilation, program, device, method, technique, process, financial data, or list of actual or potential customers or suppliers, that:

(A) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and

(B) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Civ. Prac. & Rem. Code § 134A.002(6). We note the legislative history of the TUTSA indicates it was enacted to provide a framework for litigating trade secret issues and provide injunctive relief or damages in uniformity with other states. Senate Research Center, Bill Analysis, S.B. 953, 83rd Leg., R.S. (2013) (enrolled version). Section 134A.002(6)’s

definition of trade secret expressly applies to the TUTSA only, not the Act, and does not expressly make any information confidential. *See* Civ. Prac. & Rem. Code § 134A.002(6)); *see also id.* § 134A.007(d) (TUTSA does not affect disclosure of public information by governmental body under the Act). *See* Open Records Decision Nos. 658 at 4 (1998), 478 at 2 (1987), 465 at 4-5 (1987). Confidentiality cannot be implied from the structure of a statute or rule. *See* ORD 465 at 4-5. Accordingly, DART may not withhold any portion of Bowman's information under section 552.101 of the Government Code in conjunction with section 134A.002(6) of the TUTSA.

Section 552.136(b) of the Government Code provides, "[n]otwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." Gov't Code § 552.136(b); *see id.* § 552.136(a) (defining "access device"). This office has concluded insurance policy numbers constitute access device numbers for purposes of section 552.136. Open Records Decision No. 684 (2009). Accordingly, DART must withhold the bank account numbers, routing numbers, and insurance policy numbers in the remaining information under section 552.136 of the Government Code.

We note some of the remaining information may be subject to copyright law. 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, DART must withhold the information we indicated under section 552.110(c) of the Government Code; however, to the extent the customer information at issue is made available to the public by the respective companies, including but not limited to on their websites or social media accounts, it may not be withheld under section 552.110(c). DART must withhold the information we have indicated under section 552.110(b) of the Government Code; however, to the extent the customer information at issue is made available to the public by ATC or VRX, including but not limited to on their respective websites or social media accounts, it may not be withheld under section 552.110(b). DART must withhold the bank account numbers, routing numbers, and insurance policy numbers in the remaining information under section 552.136 of the Government Code. DART must release the remaining information; however, any information protected by copyright may only be released 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 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/jxd

Ref: ID# 923286

Enc. Submitted documents

c: Requestor
(w/o enclosures)

12 Third Parties
(w/o enclosures)