



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

June 30, 2022

Mr. Jeff Giles
Senior Assistant General Counsel
Dallas Area Rapid Transit
P.O. Box 660163
Dallas, Texas 75266-0163

OR2022-18992

Dear Mr. Giles:

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# 956833 (ORR# W006366-041522).

Dallas Area Rapid Transit ("DART") received a request for three categories of information pertaining to a specified request for proposals. You state DART will release some information. Although you take no position as to whether the submitted information is excepted from disclosure under the Act, you state release of the submitted information may implicate the proprietary interests of twenty-five third parties. Accordingly, you state, and provide documentation showing, you notified these third parties of the request for information and of the 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 AECOM Technical Services, Inc. ("AECOM"); The Boston Consulting Group, Inc. ("BCG"); The North Highland Company, LLC ("Highland"); KPMG LLP ("KPMG"); McKinsey & Company ("McKinsey"); and TelTech Communications, LLC ("TelTech"). We have considered the submitted arguments and reviewed the submitted information.

Initially, 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* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from any remaining notified third party explaining why the submitted

information should not be released. Therefore, we have no basis to conclude any remaining notified 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 notified third party may have in the information.

Next, we note some of the requested information is subject to a previous request for information, in response to which this office issued Open Records Letter No. 2022-04525 (2022). In Open Records Letter No. 2022-04525, we determined DART must: (1) withhold the information we marked 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 Deloitte, including but not limited to on its website or social media accounts, it may not be withheld under section 552.110(c) of the Government Code; (2) withhold all visible license plates in the remaining information under section 552.130 of the Government Code; and (3) release the remaining information. Accordingly, for the requested information that is identical to the information previously requested and ruled upon by this office, we conclude DART must continue to rely on Open Records Letter No. 2022-04525 as a previous determination and withhold or release the identical information in accordance with that ruling. *See* Open Records Decision No. 673 (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).

AECOM, BCG, and Highland raise section 552.104 of the Government Code for portions 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.” 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 AECOM’s, BCG’s, and Highland’s arguments under section 552.104.

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 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:

(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). AECOM, BCG, Highland, KPMG, and McKinsey argue some of their information consists of trade secrets subject to section 552.110(b) and commercial or financial information subject to section 552.110(c). Upon review, we find AECOM, BCG, Highland, KPMG, and McKinsey have demonstrated portions of the information at issue constitute trade secrets and commercial or financial information, the release of which would cause substantial competitive harm. Accordingly, DART must withhold the information we marked under section 552.110(c) of the Government Code; however, to the extent the customer info at issue is made available to the public by AECOM, BCG, KPMG, and McKinsey, including but not limited to on their website or social media accounts, it may not be withheld under 552.110(c).¹ 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, BCG, Highland, KPMG, and McKinsey have 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, DART may not withhold any of the remaining information at issue under section 552.110 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:

¹ In this instance, as our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

- (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.

(b) The exception to disclosure provided by Subsection (a) does not apply to:

- (1) information in a voucher or contract relating to the receipt or expenditure of public funds by a governmental body; or
- (2) communications and other information sent between a governmental body and a vendor or contractor related to the performance of a final contract with the governmental body or work performed on behalf of the governmental body.

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, BCG, Highland, KPMG, and McKinsey assert disclosure of some of their information would reveal an individual approach to work, organizational structure, staffing, internal operations, processes, and pricing information and give advantage to a competitor. Upon review, we find AECOM, BCG, Highland, KPMG, and McKinsey have demonstrated the applicability of section 552.1101(a) to some of the information at issue. Accordingly, DART must withhold the information we marked under section 552.1101(a) of the Government Code.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 552.1101(a). *See id.* § 552.0222(b) (listing certain types of information not excepted under section 552.1101). Additionally, we find AECOM, BCG, Highland, KPMG, and McKinsey have 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).

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

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” *Id.* § 552.101. Section 552.101 encompasses the doctrine of constitutional privacy. Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual’s interest in avoiding disclosure of personal matters. Open Records Decision No. 455 at 4 (1987). The first type protects an individual’s autonomy within “zones of privacy” which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual’s privacy interests and the public’s need to know information of public concern. *Id.* The scope of information protected is narrower than that under the common law doctrine of privacy; the information must concern the “most intimate aspects of human affairs.” *Id.* at 5 (quoting *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)). After review of the information at issue, we find McKinsey has not demonstrated any portion of its information falls within the zones of privacy or implicates an individual’s privacy interests for purposes of constitutional privacy. Therefore, DART may not withhold any of McKinsey’s remaining information at issue under section 552.101 on the basis of constitutional privacy.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. Upon review, we find McKinsey has not demonstrated any of its information at issue is highly intimate or embarrassing and not of legitimate public concern. Thus, DART may not withhold any portion of McKinsey’s remaining information under section 552.101 in conjunction with common-law privacy.

BCG also raises section 552.113 of the Government Code, which protects certain geological, geophysical, and other information regarding the exploration or development of natural resources.³ See Gov’t Code § 552.113; see generally Open Records Decision No. 627 (1994). Upon review, however, we find BCG has not demonstrated this exception is applicable to any of its information. Accordingly, DART may not withhold any of BCG’s remaining information at issue under section 552.113 of the Government Code.

Section 552.136 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.”⁴ Gov’t Code § 552.136(b); see *id.* § 552.136(a) (defining “access device”). This office has determined

³ Although BCG does not raise section 552.113 of the Government Code in its brief, we understand BCG to raise this exception based on its markings.

⁴ The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. See Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

insurance policy numbers are access device numbers for purposes of section 552.136. *See* Open Records Decision No. 684 at 9 (2009). Accordingly, DART must withhold the submitted bank account and insurance policy numbers under section 552.136 of the Government Code.

We note some of the materials at issue may be protected by copyright. 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 continue to rely on Open Records Letter No. 2022-04525 as a previous determination and withhold or release the identical information in accordance with that ruling. DART must withhold the information we marked under section 552.110(c) of the Government Code; however, to the extent the customer info at issue is made available to the public by AECOM, BCG, KPMG, and McKinsey, including but not limited to on their website or social media accounts, it may not be withheld under 552.110(c). DART must withhold the information we marked under section 552.1101(a) of the Government Code. DART must withhold the submitted bank account and insurance policy numbers under section 552.136 of the Government Code. DART must release the remaining information; however, any information that is subject to copyright may be released only 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,

Colin Henry
Attorney
Open Records Division

CEH/jxd

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Ref: ID# 956833

Enc. Submitted documents

c: Requestor
(w/o enclosures)

25 Third Parties
(w/o enclosures)