



ATTORNEY GENERAL OF TEXAS  
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January 27, 2010

Mr. Hyattye Simmons  
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OR2010-01313

Dear Mr. Simmons:

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# 368415 (ORR#6975).

The Dallas Area Rapid Transit ("DART") received a request for responses associated with a specified Request for Information.<sup>1</sup> You claim the submitted information is excepted from disclosure under sections 552.101, 552.104, and 552.110 of the Government Code. You also state release of the information may implicate the proprietary interests of third parties. Accordingly, you state you have notified the interested third parties of the request and of their right to submit arguments to this office as to why the requested information should not be released.<sup>2</sup> See Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory

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<sup>1</sup>As you have not submitted a copy of the correct request, we take our description from your brief.

<sup>2</sup>The interested third parties are: HART; 3i Construction, L.L.C.; ACS Infrastructure Development Inc.; Mansur Plumber; Alternate Concepts, Inc.; Aon Construction Services Group; A. P. Engineering Consultant, Inc.; Archer Western Contractors, Ltd.; Balfour Beatty Capital, Inc. ("Balfour"); Bombardier Transportation; Brookville Equipment; Cintra Concesiones de Infraestructuras de Transporte, S.A. ("Cintra"); Criado & Associates, Inc.; Cyber Group, Inc.; DeShazo, Tang & Associates, Inc.; Dykema Gossett, P.L.L.C.; Elite Project Solutions, L.L.C.; Enterprise Concrete Production, L.L.C.; Entrust One Facility Services, Inc.; Excelsior Partners, L.L.C.; Faithful + Gould ("FG"); Fluor Enterprises, Inc.; Free Lancer Construction; Frees and Nichols, Inc.; Global Via Infraestructuras, S.A.; Goldman, Sachs & Co.; Halcrow, Inc.; Herzog Contracting Corp.; HOK Overview; Infrastructure Management Group, Inc. ("Infrastructure"); J.P. Morgan; Kiewit Texas Construction, L.P.; KPMG, L.L.P. ("KPMG"); Lea + Elliott, Inc.; Link America, Inc.; Lockwood, Andrews & Newman, Inc.; Mathews Southwest; Mayer Brown, L.L.P.; McKinsey & Company ("McKinsey"); NextGen Energy Tech; Parson Brinskerhoof; Rabe-Kistner Infrastructure, Inc.; Reyes Group, LTD.; Siebert, Brandford, Shank & Co., L.L.C.; Siemens; Stacy and Witbeck, Inc.; The Land Endowment Advisory Group; The Solis Group; URS Corporation ("URS"); and Wilbur Smith Associates.

predecessor to section 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances). We have received comments from McKinsey, Cintra, Infrastructure, FG, URS, KPMG, and Balfour. We have considered the submitted arguments and reviewed the submitted information.

Initially, we must address DART's obligations under the Act. Section 552.301 of the Government Code describes the procedural obligations placed on a governmental body that receives a written request for information it wishes to withhold. Pursuant to section 552.301(e), a governmental body receiving an open records request for information that it wishes to withhold pursuant to one of the exceptions to public disclosure is required to submit to this office within fifteen business days of receiving the request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. Gov't Code § 552.301(e). As of the date of this letter, the submitted information reflects you have not submitted a copy of the correct written request for information. Consequently, we find DART has failed to comply with the procedural requirements of section 552.301 of the Government Code.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *City of Dallas v. Abbott*, 279 S.W.3d 806, 811 (Tex. App.—Amarillo 2007, pet. granted); *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 (Tex. App.—Austin 1990, no writ); *see also* Open Records Decision No. 630 (1994). Normally, a compelling reason exists when third-party interests are at stake or when information is confidential under other law. Open Records Decision No. 150 (1977). You assert the submitted information is excepted from disclosure under section 552.104 of the Government Code. However, this section is discretionary in nature and serves only to protect a governmental body's interests. As such, it is waived by a government body's failure to comply with section 552.301. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions in general), 592 at 8 (1991) (statutory predecessor to section 552.104 subject to waiver). Thus, the submitted information may not be withheld under section 552.104 of the Government Code. However, because sections 552.101 and 552.110, as well as third party interests, can provide compelling reasons to withhold information, we will consider whether the submitted information is excepted from disclosure under the Act.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't

Code § 552.101. You argue the submitted information is confidential pursuant to section 3-203.15(3)(a)(iii) of DART's Procurement Regulations, which provides in relevant part:

(3) Offerors shall be accorded fair and equal treatment with respect to any opportunity for discussions and revisions of proposals. The Contracting Officer should establish procedures and schedules for conducting discussions. Those aspects of proposals which are unclear, improperly substantiated, or fail to meet the requirements of the solicitation must be discussed with offerors. If during discussions there is a need for any substantial clarification of or change in the Request for Proposals, the Request shall be amended to incorporate such clarification or change. Any substantial oral clarification of a proposal shall be reduced to writing by the offeror. In conducting discussions, the Contracting Officer and other Authority representative involved shall not engage in—

...

(c) auction techniques, such as—

...

(iii) otherwise furnishing information about other offeror's prices.

Dallas Area Rapid Transit Authority, Procurement Regulations § 3-203.15(3)(a)(iii) (1986). We note DART is a regional transportation authority organized under chapter 452 of the Transportation Code. *See Williams v. Dallas Area Rapid Transit*, 242 F.3d 315, 317 (5th Cir. 2001). You state DART has the authority to promulgate procurement procedures, guidelines, and rules pursuant to section 452.106 of the Transportation Code. The relevant language of section 452.106 reads as follows:

(a) The executive committee may adopt and enforce procurement procedures, guidelines, and rules:

(1) defining the terms in and implementing Sections 452.107 and 452.108(a) and (b); or

(2) covering:

(A) the appointment of contracting officers;

(B) the solicitation for and award of contracts, including the electronic transmission of bids and proposals and the use of the reverse auction procedure, as defined by Section 2155.062, Government Code;

(C) the resolution of protests and contract disputes;

(D) foreign currency transactions and conversions and foreign exchange rate management; or

(E) other aspects of the procurement process for domestic and international contracts.

*See* Transp. Code § 452.106(a); *see also id.* §§ 452.001(1), (5) (defining “authority” and “executive committee” for purposes of chapter 452), .053 (providing that the executive committee is responsible for the management, operation, and control of an authority), .054 (listing general powers of an authority for purposes of chapter 452). In general, section 552.101 only excepts information from disclosure where the express language of a statute makes certain information confidential or states that information shall not be released to the public. *See* Open Records Decision Nos. 658 at 4 (1998) (statutory confidentiality provision must be express, and confidentiality requirement will not be implied from statutory structure), 478 at 2 (1987) (statutory confidentiality requires express language making certain information confidential or stating that information shall not be released to public). Absent a specific grant of authority from the Legislature to promulgate a rule requiring confidentiality, an agency rule or regulation cannot make information confidential for purposes of section 552.101. *See Indus. Found., v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976); Open Records Decision Nos. 484 (1987), 479 (1987), 393 (1983). The plain language of section 3-203.15(3)(a)(iii) does not expressly make information confidential for purposes of section 552.101 of the Government Code. Section 3-203.15(3)(a)(iii) only provides certain individuals shall not engage in auction techniques, such as furnishing information about offerors’ prices during proposal discussions. Accordingly, we determine the submitted information is not confidential pursuant to section 3-203.15(3)(a)(iii) of DART’s procurement regulations, and DART may not withhold any portion of the submitted information pursuant to section 552.101 on that basis. We now turn to the arguments submitted by McKinsey, Cintra, Infrastructure, FG, URS, KPMG, and Balfour.

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, only McKinsey, Cintra, Infrastructure, FG, URS, KPMG, and Balfour have submitted comments to this office. Thus, none of the remaining third parties have submitted to this office any reasons explaining why their information should not be released. On behalf of these third parties, you assert the submitted information is excepted under section 552.110 of the Government Code. However, we note section 552.110 is designed to protect the interests of third parties, not the interests of a governmental body. Because we have not received comments from the remaining third parties, we have no basis to conclude that any of them have protected proprietary interests in the submitted information. *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. Accordingly, DART may not withhold any portion of the submitted information on the basis of any proprietary interests these third parties may have in the information.

FG argues, among other things, the information FG submitted to DART is confidential because it is subject to confidentiality agreements. We note information is not confidential under the Act simply because the party that submitted the information anticipated or requested that it be kept confidential. *See Indus. Found.*, 540 S.W.2d at 677. In other words, a governmental body cannot overrule or repeal provisions of the Act by agreement or contract. *See Attorney General Opinion JM-672* (1987); *Open Records Decision Nos. 541 at 3* (1990) (“[T]he obligations of a governmental body under [the Act] cannot be compromised simply by its decision to enter into a contract.”), 203 at 1 (1978) (mere expectation of confidentiality by person supplying information does not satisfy requirements of statutory predecessor to section 552.110). Thus, DART must release FG’s information unless it falls within the scope of an exception to disclosure, notwithstanding any expectation or agreement to the contrary. *See Open Records Decision No. 470 at 2* (1987).

Next, we understand McKinsey to claim submitted information pertaining to its employees’ work history is excepted under section 552.101 in conjunction with common-law privacy. This section encompasses the doctrine of common-law privacy, which protects information that (1) contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person and (2) is not of legitimate concern to the public. *See Indus. Found.*, 540 S.W.2d at 685. To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *See id.* at 681-82. We note education, prior employment, and personal information are not ordinarily private information subject to section 552.101. *See Open Records Decision Nos. 554* (1990), 448 (1986). Upon review, we find McKinsey has failed to demonstrate any of the information at issue is intimate or embarrassing and of no legitimate public interest. Accordingly, DART may not withhold any of it under section 552.101 of the Government Code in conjunction with common-law privacy.

Infrastructure raises section 552.104 of the Government Code for its submitted information. Section 552.104 excepts from disclosure “information that, if released, would give advantage to a competitor or bidder.” Gov’t Code § 552.104. Section 552.104 is a discretionary exception that protects only the interests of a governmental body, as distinguished from exceptions which are intended to protect the interests of third parties. *See ORD 592* (statutory predecessor to section 552.104 designed to protect interests of a governmental body in a competitive situation, and not interests of private parties submitting information to the government), 522 (1989) (discretionary exceptions in general). Because DART has waived its claim under section 552.104, none of the submitted information may be withheld under that exception.

McKinsey, Cintra, Infrastructure, FG, URS, KPMG, and Balfour claim that their information is excepted from disclosure under section 552.110 of the Government Code. Section 552.110 protects the proprietary interests of private parties with respect to two types of information: “[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision” and “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.” Gov’t Code § 552.110(a)-(b).

The Supreme Court of Texas has adopted the definition of a “trade secret” from section 757 of the Restatement of Torts, which holds a “trade secret” to be

any formula, pattern, device or compilation of information which is used in one’s business, and which gives [one] an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business, as, for example, the amount or other terms of a secret bid for a contract or the salary of certain employees . . . . A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as, for example, a machine or formula for the production of an article. It may, however, relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978). In determining whether particular information constitutes a trade secret, this office considers the Restatement’s definition of trade secret as well as the Restatement’s list of six trade secret factors.<sup>3</sup> RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* ORD 232. This office will accept a private person’s claim for exception as valid under section 552.110(a) if the person establishes a *prima facie* case for the exception and no one submits an argument that rebuts the claim as a matter of law. ORD 552. However, we cannot conclude section 552.110(a) is applicable unless it has been shown that the information meets the

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<sup>3</sup>The following are the six factors that the Restatement gives as indicia of whether information constitutes a trade secret: (1) the extent to which the information is known outside of the company; (2) the extent to which it is known by employees and others involved in the company’s business; (3) the extent of measures taken by the company to guard the secrecy of the information; (4) the value of the information to the company and its competitors; (5) the amount of effort or money expended by the company in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2.

definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim. Open Records Decision No. 402 (1983). We note pricing information pertaining to a particular contract is generally not a trade secret because it is "simply information as to single or ephemeral events in the conduct of the business," rather than "a process or device for continuous use in the operation of the business." RESTATEMENT OF TORTS § 757 cmt. b (1939); *see Huffines*, 314 S.W.2d at 776; Open Records Decision Nos. 319 at 3, 306 at 3.

Section 552.110(b) protects "[c]ommercial 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[.]" Gov't Code § 552.110(b). This exception to disclosure requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. *Id.*; *see also* ORD 661 at 5-6.

Infrastructure asserts release of its information could deter vendors from competing for government contracts, so as to lessen competition for such contracts and deprive governmental entities in future procurements. In advancing these arguments, Infrastructure appears to rely on the test pertaining to the applicability of the section 552(b)(4) exemption under the federal Freedom of Information Act to third-party information held by a federal agency, as announced in *National Parks*. The *National Parks* test provides that commercial or financial information is confidential if disclosure of information is likely to impair a governmental body's ability to obtain necessary information in the future. *National Parks*, 498 F.2d at 770. Although this office once applied the *National Parks* test under the statutory predecessor to section 552.110, that standard was overturned by the Third Court of Appeals when it held *National Parks* was not a judicial decision within the meaning of former section 552.110. *See Birnbaum v. Alliance of Am. Insurers*, 994 S.W.2d 766 (Tex. App.—Austin 1999, pet. denied). Section 552.110(b) now expressly states the standard to be applied and requires a specific factual demonstration that the release of the information in question would cause the business enterprise that submitted the information substantial competitive harm. *See* ORD 661 at 5-6 (discussing enactment of section 552.110(b) by Seventy-sixth Legislature). The ability of a governmental body to continue to obtain information from private parties is not a relevant consideration under section 552.110(b). *Id.* Therefore, in making our determinations under section 552.110, we will consider only the interests of the third parties in their information.

Upon review of the submitted arguments and information, we conclude McKinsey and FG have established a *prima facie* case that their client information, which we have marked, constitutes trade secret information. However, we conclude that McKinsey, Infrastructure, FG, URS, and Balfour have failed to demonstrate any portion of the remaining information constitutes a trade secret. Accordingly, DART must only withhold the information we have marked pursuant to section 552.110(a) of the Government Code.

Upon review of the remaining arguments, we find McKinsey, Cintra, Infrastructure, FG, URS, KPMG and Balfour have failed to demonstrate that release of any of the remaining

information would cause them substantial competitive harm. *See* ORD 661. Further, we note information pertaining to employee qualifications is not typically excepted from disclosure under section 552.110(b). *See* ORD 319 (finding information relating to organization and personnel, market studies, professional references, qualifications, and experience not ordinarily excepted under section 552.110). Consequently, none of the remaining information may be withheld under section 552.110(b) of the Government Code.

Cintra also raises section 552.131 of the Government Code for its information, which provides in part:

(a) Information is excepted from [required public disclosure] if the information relates to economic development negotiations involving a governmental body and a business prospect that the governmental body seeks to have locate, stay, or expand in or near the territory of the governmental body and the information relates to:

(1) a trade secret of the business prospect; or

(2) 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.

(b) Unless and until an agreement is made with the business prospect, information about a financial or other incentive being offered to the business prospect by the governmental body or by another person is excepted from [required public disclosure].

Gov't Code § 552.131(a)-(b). Section 552.131(a) excepts from disclosure only "trade secret[s] of [a] business prospect" and "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." *Id.* Thus, the protection provided by section 552.131(a) is co-extensive with that afforded by section 552.110. *See id.* § 552.110(a)-(b). Because Cintra did not make the specific factual or evidentiary showing required under section 552.110(b) that release of the remaining information would result in substantial competitive harm, we conclude that none of its information may be withheld pursuant to section 552.131(a). Further, we note section 552.131(b) is designed to protect the interests of governmental bodies, not third parties. As DART does not assert section 552.131(b) as an exception to disclosure, we conclude that none of the information at issue is excepted under section 552.131(b) of the Government Code.

We note a portion of the remaining information 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. Attorney General Opinion JM-672 (1987). A governmental

body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* 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. *See* Open Records Decision No. 550 (1990).

In summary, DART must withhold the information we have marked under section 552.110(a) of the Government Code. The remaining information must be released, but any information that is 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 [http://www.oag.state.tx.us/open/index\\_orl.php](http://www.oag.state.tx.us/open/index_orl.php), or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



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CA/rl

Ref: ID# 368415

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