



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 6, 2010

Mr. Hyattye O. Simmons
General Counsel
Dallas Area Rapid Transit
P. O. Box 660163
Dallas, Texas 75266-0163

OR2010-06539

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# 378423 (DART ORR #7220).

Dallas Area Rapid Transit ("DART") received a request for the following five categories of information pertaining to solicitation number P-1017000 for vanpool services: (1) the proposal submitted by EAN Holdings, LLC ("Enterprise"); (2) Enterprise's response to supplemental information requested by DART; (3) Enterprise's Best and Final Offer; (4) the awarded contract between DART and Enterprise, and (5) DART's total scores and scoring sheets for each company that responded to the solicitation, as well as the methodology DART used in awarding Enterprise the contract. You claim the submitted information is excepted from disclosure under sections 552.101 through 552.148 of the Government Code. You also state release of this information may implicate the proprietary interests of Enterprise. Accordingly, you state DART notified Enterprise of this request for information and of Enterprise's right to submit arguments to this office as to why its requested information should not be released. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Act in certain circumstances). We have considered the submitted arguments and reviewed the submitted information. We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

Initially, we note the submitted proposal was the subject of a previous request received by DART, as a result of which this office issued Open Records Letter No. 2010-02687 (2010). In that ruling we concluded DART may withhold Enterprise's proposal under

section 552.104 of the Government Code. However, since the issuance of Open Records Letter No. 2010-02687, the contract award for solicitation number P-1017000 has been executed. *See* Open Records Decision Nos. 306 (1982), 184 (1978) (section 552.104 no longer applicable when bidding has been completed and contract is in effect). Accordingly, the facts and circumstances have changed with regards to the submitted proposal since the issuance of the previous ruling, and DART may not continue to rely on Open Records Letter No. 2010-02687 as a previous determination for this information. *See* Open Records Decision No. 673 (2001).

Next, we note that, pursuant to section 552.301(e) of the Government Code, a governmental body is required explain why the stated exceptions apply that would allow the information at issue to be withheld. *See* Gov't Code § 552.301(e)(1)(A). As of the date of this letter, you have not submitted to this office any comments explaining why the stated exceptions apply. Consequently, we find DART failed to establish the applicability of its claimed discretionary exceptions to disclosure, and no information may be withheld on the basis of those exceptions. DART has also failed to demonstrate how any of the submitted information is confidential for purposes of the mandatory exceptions it claimed. However, the Office of the Attorney General will address any applicable mandatory exceptions along with Enterprise's arguments. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

Enterprise claims portions of its proposal, four of its answers to DART's supplemental information request, its best and final offer price, and portions of the awarded contract are excepted under section 552.110 of the Government Code.¹ Section 552.110 protects the proprietary interests of private parties by excepting from disclosure two types of information: (1) "[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision," and (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." *See* Gov't Code § 552.110(a)-(b).

Section 552.110(a) protects trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *Id.* § 552.110(a). The Texas Supreme Court 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 him 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

¹Although Enterprise initially argued that the portions of the submitted proposal, supplemental information request answers, and contract that pertain to minority business subcontractors should be withheld under section 552.110, it withdrew its arguments for such information in a letter to this office dated April 8, 2010.

differs from other secret information in a business . . . in that it is not simply information as to a single or ephemeral event in the conduct of the business A trade secret is a process or device for continuous use in the operation of the business [It may] 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). This office will accept a private person's claim for exception as valid under section 552.110(a) if that person establishes a *prima facie* case for the exception, and no one submits an argument that rebuts the claim as a matter of law. *See* Open Records Decision No. 552 at 5 (1990). However, we cannot conclude section 552.110(a) is applicable unless it has been shown the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim.² Open Records Decision No. 402 (1983).

Section 552.110(b) 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. *See* Open Records Decision No. 661 at 5-6 (1999) (for information to be withheld under commercial or financial information prong of section 552.110, business must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue).

Enterprise claims portions of its proposal are trade secrets that should be protected by section 552.110(a). Specifically, Enterprise raises section 552.110(a) for the portions of its proposal that contain: financial information, references, employee data, the Technical Proposal, and forms that would be used to implement performance under the DART contract. Having reviewed Enterprise's arguments, we find it has shown how most of its references are trade secrets. We have marked the references in Enterprise's proposal which DART must withhold under section 552.110(a) of the Government Code. However, Enterprise has made

²The Restatement of Torts lists the following six factors 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; *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

the remaining listed references publicly available on its website, and has failed to demonstrate how information it has published on its website is a trade secret. *See* ORD 402. Enterprise also does not explain how the submitted financial information meets the definition of a trade secret. *Id.* The remaining information in the proposal is tailored to specifically address solicitation number P-1017000, discusses Enterprise's qualifications for the contract, or relates to personnel and staffing details. Section 552.110 is generally not applicable to these types of information. *See* Restatement of Torts § 757 cmt. b.; Open Records Decision No. 319 at 3 (1982) (statutory predecessor to section 552.110 generally not applicable to information relating to organization and personnel, market studies, professional references, and qualifications and experience). Enterprise also asserts its answers to questions 3, 4, 5, and 7 of DART's supplemental information request should be withheld as trade secrets. Enterprise explains its answers to questions 3, 4, 5, and 7 describe processes it has developed for use with its various vanpool clients. Upon review, we agree Enterprise's answers to questions 3, 4, and 5, as well as most of its answer to question 7, reveal methodologies that are trade secrets. We have marked this information, which DART must withhold under section 552.110(a). However, Enterprise does not explain how the remaining portion of its answer to question 7, which has been tailored for this solicitation, could meet the definition of a trade secret. *See* ORD 402; Restatement of Torts § 757 cmt. b. Although Enterprise also argues its final offer and the pricing portions of its executed contract with DART should be withheld as a trade secret, pricing information pertaining to a particular solicitation or 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." *See* Restatement of Torts § 757 cmt. b (1939); *Huffines*, 314 S.W.2d at 776; ORD 319 at 3, 306 at 3. Thus, no pricing information may be withheld under section 552.110(a). Enterprise next claims the Statement of Work portion of the submitted contract is a trade secret. However, as with the Technical Proposal portion of its response to the solicitation, the Statement of Work section of the contract has been tailored for Enterprise's work with DART, and thus is not protectable as a trade secret. *See* Restatement of Torts § 757 cmt. b.

Enterprise raises section 552.110(b) for the remaining submitted references, but does not provide any arguments explaining how release of references published on its website could result in substantial damage to the company's competitive position. Enterprise also raises section 552.110(b) for the Technical Proposal portion of its proposal, the forms in Appendix B of its proposal, the remaining portion of its answer to question 7 from DART's supplemental information request, and the Statement of Work section of the submitted contract. As noted above, however, this information specifically pertains to solicitation number P-1017000 or to Enterprise's contract with DART. Enterprise has not explained how the release of information pertaining to a particular contract with a governmental body will likely result in competitive injury to the company. *See* Open Records Decision No. 509 at 5 (1988) (because costs, bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts is too speculative). Enterprise also raises section 552.110(b) for its best offer and for the pricing information in its contract with DART. However, pricing information of a winning bidder is generally not excepted under section 552.110(b), because this office

considers the prices charged in government contract awards to be a matter of strong public interest. *See* Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors); *see generally* Freedom of Information Act Guide & Privacy Act Overview, 219 (2000) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). Accordingly, DART may not withhold any pricing information under section 552.110(b). Furthermore, Enterprise has made only conclusory allegations that release of the submitted financial information and employee data would result in substantial damage to the company's competitive position. Thus, Enterprise has not made the specific factual or evidentiary showing required by section 552.110(b) that substantial competitive injury would result from the release of any of the remaining information. *See* ORD Nos. 661 at 5-6, 509 at 5. Accordingly, DART may not withhold any of Enterprise's remaining information under section 552.110(b).

Section 552.136 states that "[n]otwithstanding any other provision of this chapter, 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). Section 552.136(a) defines "access device" as "a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to . . . obtain money, goods, services, or another thing of value [or] initiate a transfer of funds other than a transfer originated solely by paper instrument." *Id.* § 552.136(a). Upon review, we conclude the bank account number we have marked must be withheld under section 552.136.³

Finally, we note the remaining information contains documents 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 materials that are subject to copyright protection 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 marked under section 552.110(a) of the Government Code, as well as the account number we marked under section 552.136 of the Government Code. The remaining information must be released, but any copyrighted information must be released in accordance with copyright law.

³We note this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including bank account numbers under section 552.136 of the Government Code, without the necessity of requesting an attorney general decision.

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, 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,



Bob Davis
Assistant Attorney General
Open Records Division

RSD/eeg

Ref: ID# 378423

Enc. Submitted documents

cc: Requestor
(w/o enclosures)

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