



ATTORNEY GENERAL OF TEXAS  
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April 24, 2012

Mr. Hyattye O. Simmons  
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OR2012-05854

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# 451323 (DART ORR# 8795).

Dallas Area Rapid Transit ("DART") received a request for all proposals submitted for a specified job, excluding two named third parties; and debriefing comments provided by DART to each group that submitted a proposal for a specified project.<sup>1</sup> You state you have no information responsive to a portion of the request.<sup>2</sup> You claim the submitted information is excepted from disclosure under sections 552.101 and 552.104 of the Government Code. Additionally, you state release of the submitted information may implicate the proprietary interests of several third parties. Accordingly, you state, and provide documentation showing, you notified Zachry Flatiron Transit Constructors ("Zachry"); Kiewit Infrastructure South Co. and Kiewit, Stacy and Witbeck, Reyes, Parsons (collectively, "KSWRP"); Airlink

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<sup>1</sup>We note DART received clarification of the information requested. *See* Gov't Code § 552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify request).

<sup>2</sup>The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990), 452 at 3 (1986), 362 at 2 (1983).

Constructors (“Airlink”); Transit Air Connectors (“Transit”); and AHC3 of the request for information and of their rights 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 Transit and KSWRP. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note the requestor excludes all financial information, pricing, and statement of qualification packets from the scope of the request. Accordingly, these types of information are not responsive to the request for information. This ruling does not address the public availability of any information that is not responsive to the request and DART is not required to release that information in response to the request.

Section 552.101 of the Government Code excepts from public disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This section encompasses information protected by other statutes. DART and KSWRP raise section 552.101 in conjunction with section 271.196 of the Local Government Code. We note section 271.196, contained in subchapter J of chapter 271 of the Local Government Code, was repealed by the Eighty-second Legislature effective September 1, 2011. Act of May 30, 2011, 82nd Leg., R.S., ch. 1129, § 5.01, 2011 Tex. Gen. Laws 2901, 2925. However, subchapter J was continued in effect for a contract or construction project for which a governmental entity first advertised or requested bids or proposals prior to the effective date of House Bill 628. Act of May 30, 2011, 82nd Leg., R.S., ch. 1129, § 6.01, 2011 Tex. Gen. Laws 2901, 2925. You inform this office the specified project was first advertised prior to September 1, 2011. Thus, we will consider the submitted arguments under section 271.196.

Section 271.196 of the Local Government Code provides, in relevant part,

(a) Unless a stipend is paid under Subsection (c), the design-build firm retains all rights to the work product submitted in a proposal. The local governmental entity may not release or disclose to any person, including the successful offeror, the work product contained in an unsuccessful proposal. The local governmental entity shall return all copies of the proposal and other information submitted to an unsuccessful offeror. The local governmental entity or its agents may not make use of any unique or nonordinary design element, technique, method, or process contained in the unsuccessful proposal that was not also contained in the successful proposal at the time of the original submittal, unless the entity acquires a license from the unsuccessful offeror.

...

(c) The local governmental entity may offer an unsuccessful design-build firm that submits a response to the entity's request for additional information under Section 271.193 a stipend for preliminary engineering costs associated with the development of the proposal. The stipend must be one-half of one percent of the contract amount and must be specified in the initial request for proposals. If the offer is accepted and paid, the local governmental entity may make use of any work product contained in the proposal, including the techniques, methods, processes, and information contained in the proposal. The use by the local governmental entity of any design element contained in an unsuccessful proposal is at the sole risk and discretion of the entity and does not confer liability on the recipient of the stipend under this subsection.

(d) Notwithstanding other law, including Chapter 552, Government Code, work product contained in an unsuccessful proposal submitted and rejected under this subchapter is confidential and may not be released unless a stipend offer has been accepted and paid as provided by Subsection (c).

Local Gov't Code § 271.196(a), (c)-(d); *see also id.* § 271.181(3) (defining "design-build firm"), .182(b) (subchapter J applies to local governmental entity with population of 100,000 or more within its geographic boundaries or service area). A "local governmental entity" includes any "special district or authority authorized by law to enter into a public works contract for a civil works project." *Id.* § 281.181(6). A "civil works project" includes transit projects. *Id.* § 271.181(2)(A). You state DART is a regional transit authority under chapter 452 of the Transportation Code and contracts with companies to design-build construction for commuter rails. *See* Transp. Code ch. 452; *see also id.* §§ 452.055(a) (an authority may contract with any person), .107(a) (except in limited circumstances, authority may not award contract for construction, services, or property, other than real property, except through solicitation of competitive sealed bids or proposals).

DART informs us it has not paid a stipend under subsection 271.196(c) to any unsuccessful offeror who submitted a proposal for the specified transit project. DART further informs us it returned the proposals of the unsuccessful offerors after the contract at issue was awarded to KSWRP. However, DART and KSWRP assert portions of the submitted debriefing notes consist of work product information that is confidential pursuant to section 271.196(d). We note KSWRP is the successful offeror for the specified transit project. As noted above, section 271.196(d) applies to work product contained in unsuccessful proposals. *Id.* § 271.196(d). Thus, we find KSWRP's proposal is not an unsuccessful proposal for purposes of section 271.196. Accordingly, no portion of KSWRP's information may be withheld under section 552.101 of the Government Code on that basis. Further, we note much of the information at issue consists of DART's opinions on the strengths and weaknesses of the submitted proposals. We find DART's opinions do not constitute work product contained in an unsuccessful proposal for purposes of section 271.196, and DART may not withhold its opinion information under section 552.101 of the Government Code

on that basis. However, to the extent the debriefing notes contain the work product of an unsuccessful offeror that was obtained from an unsuccessful proposal, DART must withhold such information under section 552.101 of the Government Code in conjunction with section 271.196(d) of the Local Government Code.

DART, KSWRP, and Transit each argue the remaining information is excepted from disclosure under section 552.104 of the Government Code. We note, however, section 552.104 protects only the interests of a governmental body and does not protect the interests of a third party; therefore, we will not consider KSWRP or Transit's claims under section 552.104. *See* Open Records Decision No. 592 at 9 (1991). However, we will address DART's claim under section 552.104 for the 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(a). The purpose of section 552.104 is to protect a governmental body's interests in competitive bidding situations. *See* ORD 592. Moreover, section 552.104 requires a showing of some actual or specific harm in a particular competitive situation; a general allegation that a competitor will gain an unfair advantage will not suffice. Open Records Decision No. 541 at 4 (1990). Generally, section 552.104 does not except information from disclosure after bidding is completed and the contract has been executed. *See* Open Records Decision No. 541 (1990). However, in Open Records Decision No. 541, this office stated the predecessor to section 552.104 may protect information after bidding is complete if the governmental body demonstrates public disclosure of the information will allow competitors to undercut future bids, and the governmental body solicits bids for the same or similar goods or services on a recurring basis. *See id.* at 5 (recognizing limited situation in which statutory predecessor to section 552.104 continued to protect information submitted by successful bidder when disclosure would allow competitors to accurately estimate and undercut future bids); *see also* Open Records Decision No. 309 (suggesting that such principle will apply when governmental body solicits bids for same or similar goods or services on recurring basis).

In this instance, you inform us the remaining responsive information relates to a contract that has already been awarded. Thus, the remaining information does not pertain to a current competitive bidding situation. You contend release of the remaining responsive information would allow future contractors to tailor their bids to specific evaluation criteria, which would be detrimental to DART. You do not explain DART has a history of soliciting bids for similar projects, nor do you explain DART plans to solicit bids for such projects on a regular basis, such that a pattern of recurrence could be shown regarding the solicitation of bids for these projects. Thus, we find you have failed to demonstrate how the remaining responsive information pertains to same or similar goods or services for which DART solicits bids on a recurring basis. You further argue release of DART's procurement department's debriefing criteria form (the "form") would undermine the quality of future proposals. Upon review, we find you have not demonstrated how the form pertains to same or similar goods or services for which DART solicits bids on a recurring basis. Accordingly, we find you have failed to demonstrate the applicability of section 552.104 to any of the remaining responsive

information, and DART may not withhold the remaining responsive information under section 552.104 of the Government Code.

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 Gov't Code* § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from Zachry, Airlink, or AHC3 explaining why the submitted information should not be released. Therefore, we have no basis to conclude Zachry, Airlink, or AHC3 has a protected proprietary interest 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 of the responsive information on the basis of any proprietary interest Zachry, Airlink, or AHC3 may have in the information.

Next, KSWRP and Transit argue portions of their information are excepted from disclosure under section 552.110 of the Government Code. Section 552.110 protects (1) trade secrets and (2) commercial or financial information the disclosure of which 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 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 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 . . . . 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 776 (Tex. 1958). 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). This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for the exception is made and no argument is submitted that rebuts the claim as a matter of law. *See* ORD 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. 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 also Huffines*, 314 S.W.2d at 776; Open Records Decision Nos. 255, 232 (1979), 217 (1978).

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.

KSWRP and Transit assert portions of their information constitute trade secrets under section 552.110(a) of the Government Code. Upon review, we conclude KSWRP and Transit have failed to establish a *prima facie* case that any portion of their information meets the definition of a trade secret. We further find neither KSWRP nor Transit has demonstrated the necessary factors to establish a trade secret claim for their information. *See*

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<sup>3</sup>The 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 other 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, 255 at 2 (1980).

ORD 402. Therefore, none of KSWRP's or Transit's information may be withheld under section 552.110(a).

KSWRP and Transit further argue portions of their information consist of commercial information the release of which would cause substantial competitive harm under section 552.110(b) of the Government Code. Upon review, we find KSWRP and Transit have made only conclusory allegations that the release of any of their information would result in substantial harm to their competitive position. *See* Open Records Decision Nos. 661 (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), 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), 319 at 3 (information relating to organization and personnel, professional references, market studies, and qualifications are not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Further, the terms of a contract with a governmental body are generally not excepted from public disclosure. *See* Gov't Code § 552.022(a)(3) (contract involving receipt or expenditure of public funds expressly made public); ORD 541 at 8 (public has interest in knowing terms of contract with state agency). Accordingly, none of KSWRP's or Transit's information may be withheld under section 552.110(b).

KSWRP also asserts portions of its information are excepted under section 552.111 of the Government Code. This section excepts from disclosure "[a]n interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency[.]" Gov't Code § 552.111. This section incorporates the deliberative process and attorney work product privileges. *See City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); Open Records Decision Nos. 677 at 4-8 (2002), 615 at 2 (1993). However, section 552.111 is a discretionary exception that is designed to protect only the interests of governmental bodies rather than third parties. As such, section 552.111 may be raised or waived by a governmental body at its discretion. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475 (Tex. App.—Dallas 1999, no pet.) (noting that section 552.007 provides that governmental body may choose not to raise exception and may voluntarily disclose information that is not confidential by law); *Birnbaum v. Alliance of American Insurers*, 994 S.W.2d 766, 776 (Tex. App.—Austin 1999, pet. denied) (noting that government agency may waive permissive exception and release information unless release is expressly prohibited by law or information is confidential under law); Open Records Decision Nos. 663 (1999) (section 552.111 may be waived by governmental body), 522 at 4 (1990) (discretionary exceptions in general). Because DART has not raised section 552.111, we find section 552.111 is inapplicable to the submitted information, and no portion of KSWRP's information may be withheld on that basis.

In summary, to the extent the debriefing notes contain the work product of an unsuccessful offeror that was obtained from an unsuccessful proposal, DART must withhold such information under section 552.101 of the Government Code in conjunction with section 271.196(d) of the Local Government Code. The remaining responsive information must be released.

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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CVMS/som

Ref: ID# 451323

Enc. Submitted documents

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