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January 29, 2014

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OR2014-01667

Dear Ms. Anderson-Nelson:

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# 511061 (DART ORR Nos. 10301, 10302, and 10303).

Dallas Area Rapid Transit ("DART") received three requests from the same requestor for Form 60s, including the Form 60s of two named companies and any of their subcontractors during specified time periods, Form 60s for companies or subsidiaries run by a named individual during a specified time period, and Form 60s for all current DART contractors and subcontractors as of October 1, 2013. Although you take no position as to the public availability of the submitted information, you state its release may implicate the proprietary interests of third parties. You state you notified the third parties of the requests and of their right to submit arguments to this office as to why their information should not be released.¹ See Gov't Code § 552.305(d); see also Open Records Decision No. 542 (1990) (determining

¹The third parties notified pursuant to section 552.305 are: APM & Associates; Aguirre Roden Corporation; Arredondo, Zepeda & Brunz, LLC ("AZB"); Blue Alliance Partners ("Blue"); Bowman Engineering & Consulting; Bridgefarmer & Associates; Inc.; Campos Engineering, Inc. ("Campos"); CPY, Inc. ("CPY"); Dal-Tech Engineering, Inc.; Dikita Enterprises of Texas, Inc. ("Dikita"); EJES Incorporated; Halfff Associates, Inc. ("Halfff"); HDR Engineering, Inc.; HNTB Corporation ("HNTB"); Jerry Haynes Electric Co.; Kiewit Infrastructure; Kimberly-Horn & Associates; Legacy Resources Group; Lockwood, Andrews & Newman, Inc. ("LAN"); Mas-Tek Engineering & Associates, Inc.; Omega Engineer, Inc.; Parsons Brinckerhoff ("PB"); South Oak Cliff Transit Partners; Stantee Consulting Services ("Stantee"); Telvent USA; URS Corporation ("URS"); Walter P. Moore & Associates ("Walter").

that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure in certain circumstances). We received comments from AZB, Blue, Campos, CPY, Dikita, Halff, HNTB, LAN, PB, Stantee, URS, and Walter. We have considered the submitted arguments and reviewed the submitted information. We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we note the requests are for Form 60s. To the extent the submitted information does not consist of Forms 60s or attachments submitted with Form 60s, such information is not responsive to the instant requests. This ruling does not address the public availability of any information that is not responsive to the requests and DART is not required to release such information in response to the requests.

Next, you acknowledge, and we agree, DART has not complied with the time periods prescribed by section 552.301 of the Government Code in seeking an open records decision from this office for the first and second requests. *Id.* § 552.301. When a governmental body fails to comply with the procedural requirements of section 552.301, the information at issue is presumed public and must be released unless there is a compelling reason to withhold it. *See id.* § 552.302; *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, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); *see also* Open Records Decision No. 630 (1994). Generally, a governmental body may demonstrate a compelling reason to withhold information by a showing the information is made confidential by another source of law or affects third party interests. *See* Open Records Decision No. 150 at 2 (1977). Because third party interests are at stake in this instance, we will consider whether the information at issue must be withheld under the Act.

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 the remaining third parties explaining why their submitted information should not be released. Therefore, we have no basis to conclude these third parties have 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 the submitted information on the basis of any proprietary interest the remaining third parties may have in the information.

PB seeks to withhold information DART has not submitted for our review. This ruling does not address information beyond what DART has submitted to us for our review. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from attorney general must submit a copy of specific information requested). Accordingly, this ruling is limited to the information DART submitted as responsive to the requests for information. *See id.*

Blue and Walter raise section 552.104 of the Government Code for their information. Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." *Id.* § 552.104. We note section 552.104 protects the interests of governmental bodies, not third parties. *See* Open Records Decision No. 592 at 8 (1991) (purpose of section 552.104 is to protect governmental body's interest in competitive bidding situation). As DART does not argue section 552.104 is applicable, we will not consider the claims under this section. *See id.* (section 552.104 may be waived by governmental body). Therefore, DART may not withhold any of the submitted information under section 552.104 of the Government Code.

AZB, Blue, Campos, CPY, Dikita, Half, HNTB, LAN, PB, Stantee, URS, and Walter argue portions of their information are protected under section 552.110 of the Government Code, which 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. 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. *See Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1957); *see also* ORD 552 at 5. Section 757 provides a trade secret is

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 Huffines*, 314 S.W.2d at 776. 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.² RESTATEMENT OF TORTS § 757 cmt. b. This office must accept a claim 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. 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. *See* Open Records Decision No. 402 (1983).

Section 552.110(b) of the Government Code excepts from disclosure “[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). 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 requested information. *See* ORD 661 at 5-6 (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

Having considered the submitted arguments and reviewed the information at issue, we find AZB, Blue, Campos, CPY, Dikita, Halff, HNTB, LAN, PB, Stantee, URS, and Walter have failed to demonstrate that any of their information meets the definition of a trade secret nor have they demonstrated the necessary factors to establish a trade secret claim. *See* Gov’t Code § 552.110(a). Accordingly, DART may not withhold any of the responsive information under section 552.110(a) of the Government Code.

PB also contends portions of its information are excepted under section 552.110(b) of the Government Code because release of the information at issue would harm DART’s ability and the ability of other governmental entities to obtain competitively priced bids in response to future contract negotiations. In advancing this argument, PB relies 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

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 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; *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

National Parks & Conservation Association v. Morton, 498 F.2d 765 (D.C. Cir. 1974). 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 future. *National Parks*, 498 F.2d at 765. 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, we will consider only PB's interest in its information.

AZB, Blue, Campos, CPY, Dikita, HNTB, LAN, PB, Stantee, URS, and Walter also claim some of their information constitutes commercial information that, if released, would cause the companies substantial competitive harm. Upon review, we find AZB, Blue, Campos, CPY, Dikita, HNTB, LAN, PB, Stantee, URS, and Walter have not made the specific factual or evidentiary showing required by section 552.110(b) that release of any of their responsive information would cause the companies substantial competitive harm. 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 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 (statutory predecessor to section 552.110 generally not applicable to information relating to organization and personnel, market studies, professional references, and qualifications and experience). In this instance, DART informs this office that the companies at issue, which have completed Form 60s, were the winners of the respective contracts. We note the pricing information of a winning bidder, such as AZB, Blue, Campos, CPY, Dikita, HNTB, LAN, PB, Stantee, and Moore, is generally not excepted from disclosure under section 552.110(b). 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 Dep't of Justice Guide to the Freedom of Information Act 344-345 (2009) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). Consequently, DART may not withhold any of the responsive information under section 552.110(b) of the Government Code.

Section 552.101 of the Government Code excepts “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. Section 552.101 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. This office has found that financial information relating only to an individual ordinarily satisfies the first requirement of the test for common-law privacy, but that there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. *See* Open Records Decision No. 545 (1990) (finding financial information pertaining to receipt of funds from governmental body or debts owed to governmental body not protected by common-law privacy), 523 (1989). However, we note an individual’s name, address, and telephone number are generally not private information under common-law privacy. *See* Open Records Decision No. 554 at 3 (1990) (disclosure of person’s name, address, or telephone number not an invasion of privacy).

Campos, Halff, PB, Stantee, and URS argue information pertaining to their employees is protected by common-law privacy. We note some of the remaining companies also have submitted salary information of their employees who are identified in their proposals. Upon review, we find that the salary information pertaining to identified private employees satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Therefore, DART must withhold the salary information we have marked pursuant to section 552.101 of the Government Code in conjunction with common-law privacy.³ However, upon review, we find the companies have not demonstrated how the remaining information they seek to withhold is highly intimate or embarrassing and not of legitimate public concern. Thus, none of the remaining responsive information may be withheld under section 552.101 in conjunction with common-law privacy.

Section 552.102(a) of the Government Code excepts from disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” Gov’t Code § 552.102(a). We understand Halff to assert the privacy analysis under section 552.102(a) is the same as the common-law privacy test under section 552.101 of the Government Code, which is discussed above. *See Indus. Found.*, 540 S.W.2d at 685. In *Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.—Austin 1983, writ ref’d n.r.e.), the court of appeals ruled the privacy test under section 552.102(a) is the same as the *Industrial Foundation* privacy test. However, the Texas Supreme Court has expressly disagreed with *Hubert’s* interpretation of section 552.102(a),

³As our ruling for this information is dispositive, we need not address the remaining argument against its disclosure.

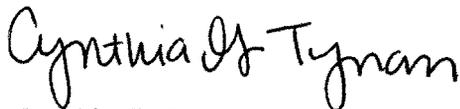
and held the privacy standard under section 552.102(a) differs from the *Industrial Foundation* test under section 552.101. *See Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 354 S.W.3d 336 (Tex. 2010). The Supreme Court also considered the applicability of section 552.102(a) and held it excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *See id.* at 348. Upon review, we find none of the remaining responsive information at issue is subject to section 552.102(a) of the Government Code, and none of it may be withheld on that basis.

In summary, DART must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. DART must release the remaining responsive information.

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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



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CGT/akg

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