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ATTORNEY GENERAL OF TEXAS

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Ms. Halfreda Anderson Nelson
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OR2015-06481A

Dear Ms. Nelson:

This office issued Open Records Letter No. 2015-06481A (2015) on October 13, 2015. Since that date, Dallas Area Rapid Transit ("DART") informs us that, at the time of its request for a decision, DART failed to submit the requested third party proposals for review and did not notify the third parties at issue of the request. Thus, we must address the interests of the third parties whose proposals are at issue. Consequently, this decision serves as the corrected ruling and is a substitute for the decision issued on October 13, 2015. *See generally* Gov't Code § 552.011 (providing that Office of Attorney General may issue decision to maintain uniformity in application, operation, and interpretation of Public Information Act ("Act")). This ruling was assigned ID# 596497 (DART ORR 11344).

DART received a request for information pertaining to request for proposals ("RFP") number P-2006400 North Texas Commuter Rail Alliance Positive Train Control. You claim the submitted information is excepted from disclosure under sections 552.104 and 552.111 of the Government Code. You also state release of this information may implicate the proprietary interests of third parties. Accordingly, you state, and provide documentation showing, you notified Herzog Technologies, Inc. ("Herzog") and Parsons Transportation Group, Inc. ("Parsons") of the request for information and of their 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 Herzog and Parsons. We have considered the submitted arguments and reviewed the submitted information.

Initially, we must address DART's procedural obligations under section 552.301 of the Government Code when requesting a decision from this office under the Act. Pursuant to section 552.301(e), a governmental body must submit to this office within fifteen business days of receiving an open records request (1) 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. *See id.* § 552.301(e). You state DART received the request for information on January 13, 2015. Accordingly, DART's fifteen-business-day deadline under section 552.301(e) was February 4, 2015. However, DART did not submit the proposals at issue until August 11, 2015. Consequently, we find DART failed to comply with section 552.301 of the Government Code with respect to the submitted proposals.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301 results in the legal presumption the requested information is public and must be released unless a compelling reason exists to withhold the information from disclosure. *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 compelling reason to withhold information exists where some other source of law makes the information confidential or where third party interests are at stake. Open Records Decision No. 150 at 2 (1977). Section 552.104 is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions in general), 663 at 5 (1999) (untimely request for decision resulted in waiver of discretionary exceptions), 592 (1991) (governmental body may waive statutory predecessor to section 552.104). Thus, in failing to comply with the procedural requirements of section 552.301, DART has waived its claim under section 552.104 with regard to the submitted proposals. Accordingly, DART may not withhold the submitted proposals under section 552.104 of the Government Code based on DART's interests. However, because third party interests can provide compelling reasons to withhold information, we will consider whether the submitted proposals may be withheld on the basis of the third parties' interests.

Section 552.104(a) of the Government Code excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). The "test under section 552.104 is whether knowing another bidder's [or competitor's information] would be an advantage, not whether it would be a decisive advantage." *Boeing Co. v. Paxton*, 466 S.W.3d 831 (Tex. 2015).

You state DART issued the specified RFP and subsequently canceled it without an award being made. You assert release of the submitted information "would give a competitive

advantage to a future bidder if the solicitation were issued again.” Upon review, we find you have failed to demonstrate release of the timely submitted information would give advantage to a competitor or bidder. Accordingly, none of the information at issue may be withheld under section 552.104 of the Government Code based on DART’s interests.

Next, Herzog claims section 552.104 of the Government Code for its Audited Financial Statement. Herzog states it has competitors. In addition, Herzog states that if released, the Audited Financial Statements would give advantage to Herzog’s competition and its competitors “could easily calculate [Herzog’s] overhead costs and underbid [Herzog.]” After review of the information at issue and consideration of the arguments, we find Herzog has established the release of its Audited Financial Statements would give advantage to a competitor or bidder. Thus, we conclude DART may withhold Herzog’s Audited Financial Statements under section 552.104(a).

Next, Parsons claims its information is excepted 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(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. *See Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1957); *see also* ORD 552. Section 757 provides that 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.¹ 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. However, we cannot conclude that section 552.110(a) is applicable unless it has been shown that 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) 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 (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).

Upon review, we find Parsons has established some of its submitted information, which we have marked, and its customer information constitute trade secrets. Therefore, DART must withhold the information we have marked and Parsons’ customer information under section 552.110(a) of the Government Code; however, to the extent the customer information at issue is publicly available on Parsons’ website, it may not be withheld under section 552.110(a). However, Parsons has failed to demonstrate that any of the remaining information it seeks to withhold meets the definition of a trade secret, nor has Parsons demonstrated the necessary factors to establish a trade secret claim for this information. *See* Open Records Decision No. 319 at 3 (1982) (information relating to organization and personnel, professional references, market studies, qualifications, and pricing are not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Thus,

¹The 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 (1982), 255 at 2 (1980).

none of Parsons' remaining information at issue may be withheld under section 552.110(a) of the Government Code.

Upon review of Parsons' arguments under section 552.110(b), we find Parsons has established that its pricing information, which we have marked, constitutes commercial or financial information, the release of which would cause the company substantial competitive injury. Therefore, DART must withhold the information we have marked under section 552.110(b) of the Government Code. However, we find Parsons has failed to make the specific factual or evidentiary showing required by section 552.110(b) that release of any of its remaining information would cause the company substantial competitive harm under section 552.110(b) of the Government Code. *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). Accordingly, none of Parsons' remaining information may be withheld under section 552.110(b).

Section 552.111 of the Government Code 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 exception encompasses the deliberative process privilege. *See Open Records Decision No. 615* at 2 (1993). The purpose of section 552.111 is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, writ ref’d n.r.c.); *Open Records Decision No. 538* at 1-2 (1990).

In *Open Records Decision No. 615* (1993), this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined that section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See ORD 615* at 5. A governmental body’s policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *Id.*; *see also City of Garland v. Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body’s policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body’s policy mission. *See Open Records Decision No. 631* at 3 (1995). Additionally, section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001,

no pet.); ORD 615 at 4-5. But if factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, the factual information also may be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982).

Section 552.111 can also encompass communications between a governmental body and a third party, including a consultant or other party with a privity of interest. *See id.* (section 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process). For section 552.111 to apply, the governmental body must identify the third party and explain the nature of its relationship with the governmental body. Section 552.111 is not applicable to a communication between the governmental body and a third party unless the governmental body establishes it has a privity of interest or common deliberative process with the third party. *See id.* We note a governmental body does not have a privity of interest or common deliberative process with a private party with which the governmental body is engaged in contract negotiations. *See id.* (section 552.111 not applicable to communication with entity with which governmental body has no privity of interest or common deliberative process).

You seek to withhold the timely submitted information under section 552.111 of the Government Code. You state the information at issue consists of advice, opinion, and recommendations related to policymaking matters of DART. You further state the information at issue relates to communications between DART employees reflecting the deliberative and policymaking processes in ranking responsive bid proposals. Based on your representations and our review, we find DART has demonstrated the submitted score sheets, which we have marked, consist of advice, opinions, or recommendations on policymaking matters of DART. Thus, DART may withhold the information we have marked under section 552.111 of the Government Code. However, the remaining communications at issue were sent to or received from third parties whom you have not demonstrated share a privity of interest or common deliberative process with DART. Thus, we find you have failed to demonstrate the remaining information at issue consists of advice, opinions, or recommendations on policymaking matters for purposes of section 552.111. Accordingly, the remaining information at issue may not be withheld under section 552.111 of the Government Code.

We note some of the remaining information consists of a personal e-mail address subject to section 552.137 of the Government Code.² Section 552.137 excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body,” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov’t Code § 552.137(a)-(c). The e-mail address at issue is not a type specifically excluded by

²The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

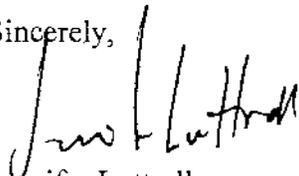
section 552.137(c). Accordingly, DART must withhold the e-mail address we have marked under section 552.137 of the Government Code, unless the owner of the e-mail address affirmatively consents to its disclosure.

In summary, DART may withhold Herzog's Audited Financial Statements under section 552.104(a) of the Government Code. DART must withhold the information we have marked and Parsons' customer information under section 552.110(a) of the Government Code; however, to the extent the customer information at issue is publicly available on Parsons' website, it may not be withheld under section 552.110(a) of the Government Code. DART must withhold the information we have marked under section 552.110(b) of the Government Code. DART may withhold the information we have marked under section 552.111 of the Government Code. DART must withhold the e-mail address we have marked under section 552.137 of the Government Code, unless the owner of the e-mail address affirmatively consents to its disclosure. The remaining 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.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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Open Records Division

JL/akg

Ref: ID# 583605

Enc. Submitted documents

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