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May 14, 2015

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OR2015-09408

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# 563657 (DART ORR No. 11395).

Dallas Area Rapid Transit ("DART") received a request for specified information submitted in response to DART solicitation nos. C-2005220, P-1017757-01, and 1013219.¹ We understand DART does not have information responsive to a portion of the request.² Although you do not take any position as to whether the submitted information is excepted from disclosure under the Act, you state, and provide documentation showing, you notified third parties of the request for information and of their right to submit arguments to this

¹We note DART sought and 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); *see also* *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or over-broad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

²We note the Act does not require a governmental body to release information that did not exist when it received a request or create responsive information. *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), 555 at 1 (1990), 452 at 3 (1986).

office as to why the submitted information should not be released.³ See Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in certain circumstances). We have received comments from Bowman, Halff, Laguarda.Low, LAN, LEA, and LTK. We have considered the submitted arguments and reviewed the submitted information.

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) of the Government Code 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 the submitted information should not be released. Therefore, we have no basis to conclude these third parties 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 the submitted information on the basis of any proprietary interest these third parties may have in the information.

We note LAN objects to disclosure of information DART has not submitted to this office for review. This ruling does not address information that was not submitted by DART and is limited to the information DART has submitted for our review. See Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested).

Bowman asserts some of its information is subject to 6103(a) of title 26 of the United States Code. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."

³The notified third parties are: Huitt-Zollars, Inc.; Lina T. Ramey & Associates, Inc.; Hill International, Inc.; TEI Construction & Engineering, Inc.; PB Americas, Inc. d/b/a Parsons Brickerhoff Americas, Inc.; Arrendondo, Zepeda, & Brunz, Inc.; EJES, Inc.; KAI Alliance LC d/b/a/ KAI Texas, L.C.; Nathan D. Maier Consulting Engineers, Inc.; Lockwood, Andrews, & Newman, Inc. ("LAN"); Chaing, Patel, & Yerby, Inc.; AGUIRRE, Inc.; APM & Associates, Inc.; URS Corporation, Nevada Corporation; TRC Companies, Inc.; Kwame Building Group, Inc.; PBS&J; Earth Tech, Inc.; Laguarda.Low Architects, L.L.C. ("Laguardra.Low"); AECOM Technical Services, Inc.; APM & Associates; Bowman Engineering & Consultants, Inc. ("Bowman"); Campos Engineering, Inc.; CH2M Hill, Inc.; CMTS, L.L.C.; DAL-Tech Engineering, Inc.; Telvent USA, L.L.C.; Halff Associates, Inc. ("Halff"); Hayden Consultants, Hill International, Inc.; IEA, Inc.; Jacobs Engineering Group, Inc.; Kimley-Horn & Associates, Inc.; Lea+ Elliot, Inc. ("LEA"); LTK Engineering Services ("LTK"); Paragon Project Resources, Inc.; PSA Constructors, Inc.; Urban Engineers, Inc.; URS; VAI Architects, Inc.; and Walter P. Moore & Associates, Inc.

Id. § 552.101. Section 552.101 encompasses section 6103(a) of title 26 of the United States Code, which makes tax return information confidential. Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision No. 600 (1992) (W-4 forms). Section 6103(b) defines the term “return information” as a taxpayer’s “identity, the nature, source, or amount of his income[.]” *See* 26 U.S.C. § 6103(b)(2)(A). Federal courts have construed the term “return information” expansively to include any information gathered by the Internal Revenue Service regarding a taxpayer’s liability under title 26 of the United States Code. *See Mallas v. Kolak*, 721 F. Supp. 748, 754 (M.D.N.C. 1989), *aff’d in part*, 993 F.2d 1111 (4th Cir. 1993). Upon review, we find Bowman failed to demonstrate any of its information is subject to section 6103(a). Accordingly, DART may not withhold this information under section 552.101 of the Government Code in conjunction with section 6103 of title 26 of the United States Code.

We understand Halff to argue some of its information is subject to common-law privacy. Section 552.101 of the Government Code also 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. *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 personal financial information not relating to a financial transaction between an individual and a governmental body is generally highly intimate or embarrassing. *See* Open Records Decision Nos. 600 (1992), 545 (1990). However, we note common-law privacy protects the interests of individuals, not those of corporate and other business entities. *See* Open Records Decision Nos. 620 (1993) (corporation has no right to privacy), 192 (1978) (right to privacy is designed primarily to protect human feelings and sensibilities, rather than property, business, or other pecuniary interests); *see also Rosen v. Matthews Constr. Co.*, 777 S.W.2d 434 (Tex. App.—Houston [14th Dist.] 1989) (corporation has no right to privacy (citing *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950))), *rev’d on other grounds*, 796 S.W.2d 692 (Tex. 1990). Upon review, we find the information we have marked satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, DART must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. However, we find none of the remaining information to be highly intimate or embarrassing information and not of legitimate public concern. Accordingly, DART may not withhold any of the remaining information under section 552.101 of the Government Code in conjunction with common-law privacy.

Halff also raises section 552.102(a) of the Government Code for its information. Section 552.102(a) 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). The Texas Supreme Court held section 552.102(a) excepts from disclosure

the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 354 S.W.3d 336 (Tex. 2010). Upon review, we find none of Halfff's information is subject to section 552.102(a) and, thus, it may not be withheld on that basis.

Section 552.110 of the Government Code 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. Gov't Code § 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.⁴ RESTATEMENT OF TORTS § 757 cmt. b. This

⁴The 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).

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 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).

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 (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).

Bowman, Halff, and LAN assert portions of the submitted information constitute trade secret information under section 552.110(a) of the Government Code. Upon review, we conclude Bowman, Halff, and LAN have failed to establish a *prima facie* case that any portion of their information meets the definition of a trade secret. We further find Bowman, Halff, and LAN have not demonstrated the necessary factors to establish a trade secret claim for their information. *See* ORD 402. Therefore, DART may not withhold any of the information at issue under section 552.110(a) of the Government Code.

Bowman, LAN, LTK, and LEA argue portions of the submitted information consist of financial and commercial information the release of which would cause substantial competitive harm under section 552.110(b) of the Government Code. Upon review, we find LTK has demonstrated its customer reference information constitutes commercial or financial information the release of which would cause the company substantial competitive harm. Accordingly, DART must withhold the information we have marked under section 552.110(b); however, to the extent the customer information is publicly available on LTK’s website, it may not be withheld under section 552.110(b) of the Government Code.⁵ Upon review, we find Bowman, LAN, and LEA have failed to demonstrate the release of any of the remaining information at issue would result in substantial harm to their competitive positions. *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

⁵As our ruling is dispositive for this information, we need not address the remaining argument against its disclosure.

give competitor unfair advantage on future contracts is too speculative), 319 at 3 (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). Accordingly, DART may not withhold any of the remaining information under section 552.110(b) of the Government Code.

Bowman and LTK raise section 552.136 of the Government Code for some of their remaining information. Section 552.136 provides, “[n]otwithstanding any other provision of [the Act], 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). An access device number is one that may be used to 1) obtain money, goods, services, or another thing of value, or 2) initiate a transfer of funds other than a transfer originated solely by a paper instrument, and includes an account number. *See id.* § 552.136(a) (defining “access device”). Upon review, we find DART must withhold the information we have marked under section 552.136 of the Government Code. However, we find none of the remaining information is subject to section 552.136 and, thus, may not be withheld on that basis.

LTK raises section 552.137 of the Government Code for some of its remaining information. 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 id.* § 552.137(a)-(c). We note subsection 552.137(c) provides subsection 552.137(a) does not apply to an e-mail address provided to a governmental body by a vendor who seeks a contractual relationship with the governmental body or to an email address contained in a response to a request for bids or proposals. *Id.* § 552.137(c)(2)-(3). Upon review, we find LTK has failed to demonstrate how subsection 552.137(a) applies to any of the information at issue. Thus, DART may not withhold any of the information at issue under section 552.137 of the Government Code.

We note some of the materials at issue 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. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; *see* Open Records Decision No. 109 (1975). 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.

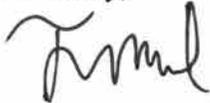
In summary, DART must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. DART must withhold the information we have marked under section 552.110(b) of the Government Code; however, to the extent the customer information is publicly available on LTK’s website, it

may not be withheld under section 552.110(b) of the Government Code. DART must withhold the information we have marked under section 552.136 of the Government Code. The remaining information must be released; however, any information that is subject to copyright may be released only 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.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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TN/cbz

Ref: ID# 563657

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