



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

September 14, 2015

Ms. Kerri L. Butcher
Chief Counsel
Capital Metropolitan Transportation Authority
2910 East Fifth Street
Austin, Texas 78702

OR2015-19067

Dear Ms. Butcher:

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# 577323.

The Capital Metropolitan Transportation Authority (the "authority") received two requests from different requestors for information related to request for proposals number 131771, including proposal responses, pricing and evaluation documentation, and contracts. You state the authority will provide some of the requested information to the respective requestors. Although you take no position with respect to the public availability of the submitted information, you state release of this information may implicate the proprietary interests of Maruti Fleet & Management, LLC ("Maruti"); McDonald Transit Associates, Inc. ("McDonald"); MV Transportation ("MV"); and National Express Transit Corporation ("NETC"). Accordingly, you state, and provide documentation showing, the authority notified these parties 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 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under the circumstances). We have received comments from MV. We have considered the submitted arguments and reviewed the submitted information.

We note most of the submitted information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2015-16875 (2015). In that ruling, we held the authority 1) may withhold MV's Labor Relations Plan and Employee Handbook under section 552.104(a) of the Government Code; 2) must withhold

certain information under section 552.101 of the Government Code in conjunction with common-law privacy; 3) must withhold certain insurance policy numbers under section 552.136 of the Government Code; and 4) must release the remaining information, but may only release any copyrighted information in accordance with copyright law. We have no indication the law, facts, or circumstances on which the prior ruling was based have changed. Accordingly, the authority must continue to rely on Open Records Letter No. 2015-16875 as a previous determination and withhold and release the information at issue in accordance with that ruling.¹ See Open Records Decision No. 673 at 6-7 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes information is or is not excepted from disclosure).

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) 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 Maruti, McDonald, or NETC explaining why the information at issue should not be released. Therefore, we have no basis to conclude Maruti, McDonald, and NETC have protected proprietary interests in the remaining 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, the authority may not withhold the remaining information on the basis of any proprietary interests Maruti, McDonald, or NETC may have in the information.

MV, the winning bidder, asserts a portion of its information is excepted from disclosure under section 552.104 of the Government Code. Section 552.104(a) excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). In considering whether a private third party may assert this exception, the supreme court reasoned because section 552.305(a) of the Government Code includes section 552.104 as an example of an exception that involves a third party's property interest, a private third party may invoke this exception. *Boeing Co. v. Paxton*, No. 12-1007, 2015 WL 3854264, at *7 (Tex. June 19, 2015). 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." *Id.* at *9. MV states it has competitors. In addition, MV states it regularly competes in government procurements and the release of its cost breakdown information would give advantage to its competitors because the competitors could tailor their own bid responses to compete against MV more effectively. For many

¹As our ruling is dispositive for this information, we need not address the raised arguments its against disclosure.

years, this office concluded the terms of a contract and especially the pricing of a winning bidder are public and generally not excepted from disclosure. Gov't Code § 552.022(a)(3) (contract involving receipt or expenditure of public funds expressly made public); Open Records Decision Nos. 541 at 8 (1990) (public has interest in knowing terms of contract with state agency), 514 (1988) (public has interest in knowing prices charged by government contractors), 494 (1988) (requiring balancing of public interest in disclosure with competitive injury to company); *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). However, now, pursuant to *Boeing*, section 552.104 is not limited to only ongoing competitive situations, and a third party need only show release of its competitively sensitive information would give an advantage to a competitor even after a contract is executed. *Boeing*, 2015 WL 3854264, at *1, *8. After review of the information at issue and consideration of the arguments, we find MV has established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude the authority may withhold MV's cost breakdown information, which we have indicated, under section 552.104(a) of the Government Code.

In summary, the authority must continue to rely on Open Records Letter No. 2015-16875 as a previous determination and withhold and release the information at issue in accordance with that ruling. The authority may withhold the information we have indicated under section 552.104(a) of the Government Code. The authority must release the remaining 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,



Joseph Behnke
Assistant Attorney General
Open Records Division

JB/som

Ref: ID# 577323

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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