



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

July 6, 2016

Ms. Halfreda Anderson-Nelson  
Public Information Officer  
Dallas Area Rapid Transit  
P.O. Box 660163  
Dallas, Texas 75266-0163

OR2016-09476A

Dear Ms. Anderson-Nelson:

This office issued Open Records Letter No. 2016-09476 (2016) to Dallas Area Rapid Transit (“DART”) on April 27, 2016. In correspondence dated June 3, 2016, you submitted to this office third-party information that you assert is responsive to the request for information, but that DART failed to submit with its initial request for a ruling under the Public Information Act (the “Act”), chapter 552 of the Government Code. Based on this, we have determined the prior ruling should be corrected for purposes of due process. *See Gov’t Code* §§ 552.306, 552.352. Accordingly, we hereby withdraw the prior ruling. This decision is substituted for Open Records Letter No. 2016-09476 and serves as the correct ruling. *See generally* Gov’t Code § 552.011 (Office of Attorney General may issue decision to maintain uniformity in application, operation, and interpretation of the Act). This ruling was assigned ID# 621901 (ORR Nos. W000508-020316 and W000576-030816).

DART received two requests from different requestors for information pertaining to a specified request for proposals. You claim some of the submitted information is excepted from disclosure under section 552.111 of the Government Code. You also state you notified Transdev North America; Bombardier Mass Transit Corporation (“Bombardier”); and Herzog Transit Services, Inc. (“Herzog”), of the requests 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 Bombardier and Herzog. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note some of the submitted information may have been the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2016-03523 (2016). In that ruling, we determined DART (1) may withhold the evaluation materials we indicated under section 552.111 of the Government Code, (2) may withhold the information we indicated under section 552.104 of the Government Code, (3) must withhold the information we marked and indicated under section 552.110(b) of the Government Code, and (4) must release the remaining information. However, we note Bombardier did not raise section 552.104 in its comments to our office for Open Records Letter No. 2016-03523 and now seeks to withhold some of the submitted information under section 552.104 of the Government Code. Section 552.007 of the Government Code provides, if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure unless its public release is expressly prohibited by law or the information is confidential by law. *See* Gov't Code § 552.007; Open Records Decision No. 518 at 3 (1989); *see also* Open Records Decision No. 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure under the Act, but it may not disclose information made confidential by law). Accordingly, pursuant to section 552.007, DART may not now withhold any of Bombardier's information previously ordered released in Open Records Letter No. 2016-03523 unless its release is expressly prohibited by law or the information is confidential by law. Although Bombardier raises section 552.104 of the Government Code, this exception does not prohibit the release of information or make information confidential. *See* Gov't Code § 552.007; Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 592 (1991) (stating that governmental body may waive section 552.104). Thus, DART may not now withhold any of Bombardier's information that was previously ordered released in Open Records Letter No. 2016-03523 under section 552.104 of the Government Code. We have no indication the law, facts, or circumstances on which the prior ruling was based have changed. Accordingly, to the extent the submitted information is identical to the information previously submitted and ruled on by this office, we conclude DART must rely on Open Records Letter No. 2016-03523 as a previous determination and withhold or release the information in accordance with that ruling. *See* Open Records Decision No. 673 at 6-7 (2001) (discussing criteria for first type of previous determination). To the extent the submitted information is not subject to Open Records Letter No. 2016-03523, we will address the submitted arguments against release of the submitted information.

Next, we must next address DART's obligations under section 552.301 of the Government Code, which prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Pursuant to section 552.301(e), a governmental body must submit to this office within fifteen business days of receiving an open records request a copy of the specific information requested or

representative samples, labeled to indicate which exceptions apply to which parts of the documents. *See* Gov't Code § 552.301(e)(1)(D). DART received the request for information on February 3, 2016. You inform us DART was closed for business on February 15, 2016. Thus, DART's fifteen-business-day deadline under section 552.301(e) was February 25, 2016. However, DART did not submit some of the responsive information until June 3, 2016. *See id.* § 552.308(a)(1) (describing rules for calculating submission dates of documents sent via first class United States mail, common or contract carrier, or interagency mail). Therefore, DART failed to comply with the procedural requirements mandated by section 552.301(e) for this information.

A governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See* Gov't Code § 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 (Tex. App.—Austin 1990, no writ); *see also* Open Records Decision No. 630 (1994). The presumption that information is public under section 552.302 can generally be overcome by demonstrating the information is confidential by law or third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3, 325 at 2 (1982). Accordingly, because third-party interests are at stake, we will consider the public availability of the information submitted on June 3, 2016, as well as the remaining information that was timely submitted.

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.e.); Open Records Decision No. 538 at 1-2 (1990).

In Open Records Decision No. 615, 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 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).

Further, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); *see* ORD 615 at 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).

You state a portion of the submitted information consists of DART's "source evaluation committee materials" and evaluation criteria related to the responses received for the specified request for proposals. You state the materials contain scoring recommendations and opinions of evaluators and provide guidelines and recommendations for evaluating bidders. You argue release of this information would reveal discussions of DART's internal techniques, recommended strategy, and procurement process and prevent open discussion of such matters by DART evaluators. Based on your representations and our review, we conclude DART may withhold this information, which you have indicated, under section 552.111 of the Government Code.

We note an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice to submit its reasons, if any, as to why information relating to that party should not be released. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have only received comments from Bombardier and Herzog explaining why their information should not be released. Therefore, we have no basis to conclude the remaining third party has a protected proprietary interest in the submitted information. *See id.* § 552.110(a)-(b); 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 portion of the submitted information on the basis of any proprietary interest the remaining third party may have in it.

We note Bombardier raises section 552.101 of the Government Code. This section excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. We note, however, Bombardier has not pointed to any law, nor are we aware of any, that would make any of its information confidential for purposes of section 552.101. *See, e.g.,* Open Records Decision Nos. 611 at 1 (1992) (common-law privacy), 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality). Therefore, none of Bombardier's information may be withheld under section 552.101 of the Government Code.

Section 552.104(a) of the Government Code exempts 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*, 466 S.W.3d 831 (Tex. 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 841. Herzog states it has competitors. In addition, Herzog states the release of its pricing information would reveal the “breakdown [of] every dollar [Herzog] will spend and where, including the price of equipment, manpower, overhead, etc.” Herzog states release of these “confidential and proprietary figures . . . would give an advantage to [Herzog’s] competition.” Bombardier also states it has competitors. Bombardier states the release of its technical data would demonstrate the process it uses to perform its operation and maintenance work. Bombardier states disclosure of its information would result in Bombardier losing its competitive advantage in the market, undermining key competitive strategies it has created. For many 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*, 466 S.W.3d at 841. After review of the information at issue and consideration of the arguments, we find Bombardier and Herzog have established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude DART may withhold the information we have indicated under section 552.104(a) of the Government Code.

In summary, to the extent the submitted information is identical to the information previously submitted and ruled on by this office, DART must rely on Open Records Letter No. 2016-03523 as a previous determination and withhold or release the information in accordance with that ruling. To the extent the submitted information is not subject to Open Records Letter No. 2016-03523, DART may withhold the information you indicated under section 552.111 of the Government Code, may withhold the information we indicated under section 552.104(a) of the Government Code, and 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](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,

A handwritten signature in black ink, appearing to read "Claire V. Morris Sloan". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Claire V. Morris Sloan  
Assistant Attorney General  
Open Records Division

CVMS/som

Ref: ID# 621901

Enc. Submitted documents

c: 2 Requestors  
(w/o enclosures)

3 Third Parties  
(w/o enclosures)