



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

June 15, 2016

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

OR2016-13619

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# 614971 (DART ORR# W000652-040116 and W000727-042816).

Dallas Area Rapid Transit ("DART") received two requests from different requestors for proposals submitted for a specified contract, as well as the awarded contract, addendums, and invoices. You state DART has released some responsive information. Although you take no position as to whether the submitted information is excepted under the Act, you state release of this information may implicate the proprietary interests of fourteen third parties.¹ Accordingly, you state, and provide documentation showing, you notified the third parties 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 Oriental,

¹The third parties are 21st Century Janitorial Services, Inc.; Advanced Building Group; All Janitorial Professional Services, Inc.; Apogee Technical Services, Inc.; Corpcare, Inc.; D&A Building Services, Inc.; Eko & Sons, LLC d/b/a Solid Lines; Entrust One Facility Services, Inc.; Kemp & Sons General Services, Inc.; Miracle Cleaning Business; Oriental Building Services, Inc. ("Oriental"); ServiceMaster Clean by Eagle Maintenance Co., Inc. ("ServiceMaster"); Triad Commercial Services, Ltd. ("Triad"); and Unicare Building Maintenance, Inc. ("Unicare").

ServiceMaster, Triad, and Unicare. We have considered the submitted arguments and reviewed the submitted information.

Initially, 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) 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 only received comments from Oriental, ServiceMaster, Triad, and Unicare explaining why the submitted information should not be released. Therefore, we have no basis to conclude any of the remaining 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 any of the information at issue on the basis of any proprietary interest any of the remaining third parties may have in it.

ServiceMaster and Triad both argue their information should be excepted from disclosure because it was marked confidential when it was submitted to DART. However, information is not confidential under the Act simply because the party submitting the information to a governmental body anticipates or requests that it will be kept confidential. *Indus. Found v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot, through an agreement or contract, overrule or repeal provisions of the Act. Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) (“[T]he obligations of a governmental body under [the predecessor to the Act] cannot be compromised simply by its decision to enter into a contract.”), 203 at 1 (1978) (mere expectation of confidentiality by person supplying information does not satisfy requirements of statutory predecessor to section 552.110). Consequently, DART must release the information at issue unless it falls within an exception to disclosure, notwithstanding any expectations or agreement specifying otherwise.

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). 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. Oriental and Unicare state they have competitors. In addition, Oriental states release of the information at issue would enable its competitors to adjust their future bids to be more competitive and potentially outbid Oriental. Unicare states release of its information would

cause the company financial harm and be very damaging to the company's future. After review of the information and consideration of the arguments, we find Oriental and Unicare 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 Oriental has indicated and Unicare's information under section 552.104(a) of the Government Code.²

Triad also states it has competitors. In addition, Triad seeks to withhold the terms of the contract. 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 831, 839. After review of the information at issue and consideration of the arguments, we find Triad has established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude DART may also withhold Triad's information under section 552.104(a) of the Government Code.³

ServiceMaster generally raises section 552.101 of the Government Code for its information. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. However, ServiceMaster has not pointed to any confidentiality provision, and we are not aware of any, that would make this 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, DART may not withhold any of ServiceMaster's information under section 552.101 of the Government Code.

We note some of the remaining information is subject to section 552.130 of the Government Code, which provides information relating to a motor vehicle operator's license, driver's license, motor vehicle title or registration, or personal identification document issued by an

²As our ruling is dispositive, we do not address the other arguments to withhold this information.

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agency of this state or another state or country is excepted from public release.⁴ *See* Gov't Code § 552.130(a). DART must withhold the motor vehicle record information we have marked under section 552.130 of the Government Code.

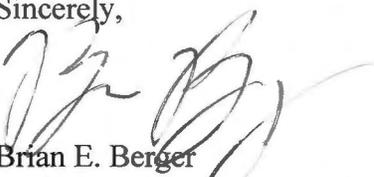
Section 552.136 of the Government Code states "Notwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." *Id.* § 552.136(b); *see id.* § 552.136(a) (defining "access device"). This office has determined an insurance policy number is an access device number for the purposes of section 552.136. *See* Open Records Decision No. 684 (2009). Upon review, we find DART must withhold the information we have marked under section 552.136 of the Government Code.

In summary, DART may withhold the information Oriental has indicated, Triad's information, and Unicare's information under section 552.104(a) of the Government Code. DART must withhold the motor vehicle record information we have marked under section 552.130 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.

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,



Brian E. Berger
Assistant Attorney General
Open Records Division

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⁴The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

Ref: ID# 614971

Enc. Submitted documents

c: 2 Requestors
(w/o enclosures)

12 Third Parties
(w/o enclosures)