



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

June 4, 2010

Mr. Hyatt O. Simmons  
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OR2010-08128

Dear Mr. Simmons:

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# 381557 (DART ORR #7264).

Dallas Area Rapid Transit ("DART") received a request for the following four categories of information pertaining to request for proposals number P-1017480 for DART table top and full scale police exercises: (1) the request for proposals to include any amendments or modifications; (2) all documents submitted by offerors; (3) all documents referencing or related to the evaluation process of all proposals submitted; and (4) all documents notifying offerors of the decision to award any contracts relating to the request for proposals. You state that you have released some of the requested information to the requestor. Although you raise no exceptions to disclosure of the submitted information, you indicate release of this information may implicate the proprietary interests of third parties.<sup>1</sup> Thus, pursuant to section 552.305 of the Government Code, DART has notified the interested third parties of the request and of their right to submit arguments to this office explaining why their

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<sup>1</sup> Although you raise sections 552.101, 552.110, 552.113, and 552.131 of the Government Code in your brief, you make no arguments explaining the applicability of these exceptions to the submitted information. Therefore, we assume you have withdrawn these exceptions.

information should not be released.<sup>2</sup> *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); *see also* Open Records Decision No. 542 (1990) (determining that 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 representatives of CHR and Tran. We have considered the submitted arguments and reviewed the submitted information.

Next, we must 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(b) of the Government Code, the governmental body must request a ruling from this office and state the exceptions to disclosure that apply within ten business days after receiving the request. *See* Gov't Code § 552.301(b). In this instance, you state DART received the request for information on March 10, 2010. Accordingly, DART's ten-day deadline was March, 24, 2010. However, you did not seek an attorney general's decision until March 31, 2010. Thus, we find DART failed to comply with the procedural requirements of section 552.301.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason 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 (Tex. App.—Austin 1990, no writ); *see also* Open Records Decision No. 630 (1994). A compelling reason exists when third-party interests are at stake or when information is confidential by law. Open Records Decision No. 150 (1977). Because third party interests can provide compelling reasons to overcome this presumption, we will consider whether or not the submitted information is excepted from disclosure under the Act.

We note an interested third party is allowed ten business days from the date of its receipt of the governmental body's notice under section 552.305 of the Government Code to submit its reasons, if any, as to why information relating to the third party should not be released. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this decision, this office has received no correspondence from IEM; O'Gara Training and Services, LLC; Blueline Risk Mitigation; or Tetra Tech, Inc. Thus, because these third parties have not demonstrated that any of their requested information is proprietary for the purposes of the Act, DART may not withhold any of their information on that basis. *See id.* § 552.110(a)-(b); Open Records Decision Nos. 552 at 5 (1990), 661 at 5-6 (1999).

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<sup>2</sup>The interested third parties are IEM; O'Gara Training and Services, LLC; Blueline Risk Mitigation; Tetra Tech, Inc.; CHR Solutions, Inc. ("CHR"); and Tran Systems ("Tran").

We note CHR raises section 552.101 of the Government Code for its submitted information. This section excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. Section 552.101 protects information that is considered to be confidential under other constitutional, statutory, or decisional law. *See* Open Records Decision Nos. 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality), 611 at 1 (1992) (common-law privacy). However, CHR has not directed our attention to any law under which any of its information is considered to be confidential for the purposes of section 552.101. We therefore conclude that DART may not withhold any of the submitted information under section 552.101 of the Government Code.

Tran claims that portions of its submitted information are excepted from disclosure under section 552.104 of the Government Code, which excepts from required public disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104. We note, however, that section 552.104 only protects the interests of a governmental body and is not designed to protect the interests of private parties that submit information to a governmental body. *See* Open Records Decision No. 592 at 8-9 (1991). In this instance, DART has not argued that the release of any portion of the submitted information would harm its interests in a particular competitive situation under section 552.104. Because DART has not submitted any arguments under section 552.104, we conclude that DART may not withhold any portion of the submitted information under section 552.104 of the Government Code.

CHR claims its proposal is excepted from disclosure under section 552.110 of the Government Code. Section 552.110 protects the proprietary interests of private parties by excepting from disclosure two types of information: (1) "[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision," and (2) "commercial 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." *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 a "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 a single or ephemeral event 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 763, 776 (Tex. 1958). This office will accept a private person's claim for exception as valid under section 552.110(a) if that person establishes a *prima facie* case for the exception, and no one submits an argument that rebuts the claim as a matter of law. *See* Open Records Decision No. 552 at 5 (1990). 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.<sup>3</sup> Open Records Decision No. 402 (1983).

Section 552.110(b) 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. *See* Open Records Decision No. 661 at 5-6 (1999) (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).

CHR claims its proposal is a trade secret that should be protected by section 552.110(a). Having reviewed CHR's arguments, we find it has shown that the identity of some of its clients are trade secrets. We have marked the clients in CHR's proposal that DART must withhold under section 552.110(a) of the Government Code. However, CHR has made the remaining listed clients publicly available on its website, and has failed to demonstrate how information it has published on its website is a trade secret. *See* ORD 402. The remaining information in the proposal is tailored to specifically address solicitation number P-1017480, discusses CHR's qualifications for the contract, or relates to personnel and staffing details. Section 552.110 is generally not applicable to these types of information. *See* Restatement

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<sup>3</sup>The 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 others 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).

of Torts § 757 cmt. b.; Open Records Decision No. 319 at 3 (1982) (statutory predecessor to section 552.110 generally not applicable to information relating to organization and personnel, market studies, professional references, and qualifications and experience). Accordingly, none of CHR's remaining information may be withheld under section 552.110(a).

CHR raises section 552.110(b) for its remaining information. However, we find that CHR has made only conclusory allegations that release of the remaining information would result in substantial damage to the company's competitive position. Thus, CHR has not made the specific factual or evidentiary showing required by section 552.110(b) that substantial competitive injury would result from the release of any of the remaining information. *See* ORD Nos. 661 at 5-6, 509 at 5. Accordingly, DART may not withhold any of CHR's remaining information under section 552.110(b).

CHR claims some of its remaining information is subject to section 552.117 of the Government Code. Section 552.117(a)(1) of the Government Code excepts from disclosure the current and former home addresses, telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a)(1). Whether a particular piece of information is protected under section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). We note, however, that section 552.117 only applies to records that the governmental body holds in its capacity as an employer. *See* Gov't Code § 552.117 (providing that employees of governmental entities may protect certain personal information in the hands of their employer). In this instance, the information at issue under section 552.117 is not contained in records that DART holds in its capacity as an employer. Thus, none of the remaining information may be withheld under section 552.117 of the Government Code.

CHR also asserts that some of its information is subject to section 552.1175 of the Government Code, which provides, in part:

(a) This section applies only to:

(1) peace officers as defined by Article 2.12, Code of Criminal Procedure[.]

(b) Information that relates to the home address, home telephone number, or social security number of [a peace officer as defined by article 2.12 of the Code of Criminal Procedure], or that reveals whether the individual has family members is confidential and may not be disclosed to the public under this chapter if the individual to whom the information relates:

(1) chooses to restrict public access to the information; and

(2) notifies the governmental body of the individual's choice on a form provided by the governmental body, accompanied by evidence of the individual's status.

*Id.* § 552.1175(a)(1), (b). We have marked the personal information of an individual in the remaining information. If this individual is a licensed peace officer and elects to restrict access to her information in accordance with section 552.1175(b), DART must withhold the marked information under section 552.1175. If this individual is not a licensed peace officer or if no election is made, DART may not withhold the individual's personal information under section 552.1175.

CHR claims that portions of its remaining information are confidential under section 552.128 of the Government Code. Section 552.128 is applicable to "[i]nformation submitted by a potential vendor or contractor to a governmental body in connection with an application for certification as a historically underutilized or disadvantaged business under a local, state, or federal certification program[.]" *Id.* § 552.128(a). However, CHR does not indicate it submitted its proposal in connection with an application for certification under such a program. Moreover, section 552.128(c) states that

[i]nformation submitted by a vendor or contractor or a potential vendor or contractor to a governmental body in connection with a specific proposed contractual relationship, a specific contract, or an application to be placed on a bidders list . . . is subject to required disclosure, excepted from required disclosure, or confidential in accordance with other law.

*Id.* § 552.128(c). In this instance, CHR submitted its proposal to DART in connection with a specific proposed contractual relationship with DART. We therefore conclude that DART may not withhold any portion of CHR's proposal under section 552.128 of the Government Code.

CHR asserts that portions of its remaining information are excepted under section 552.131 of the Government Code. Section 552.131 relates to economic development information and provides in part:

(a) Information is excepted from [required public disclosure] if the information relates to economic development negotiations involving a governmental body and a business prospect that the governmental body seeks to have locate, stay, or expand in or near the territory of the governmental body and the information relates to:

(1) a trade secret of the business prospect; or

(2) commercial 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.

(b) Unless and until an agreement is made with the business prospect, information about a financial or other incentive being offered to the business prospect by the governmental body or by another person is excepted from [required public disclosure].

Gov't Code § 552.131. Section 552.131(a) excepts from disclosure only "trade secret[s] of [a] business prospect" and "commercial 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." *Id.* This aspect of section 552.131 is co-extensive with section 552.110 of the Government Code. *See id.* § 552.110(a)-(b). Because we have already disposed of CHR's claims under section 552.110, DART may not withhold any of the remaining information under section 552.131(a) of the Government Code.

We note that section 552.131(b) is designed to protect the interests of governmental bodies, not third parties. As DART does not assert section 552.131(b) as an exception to disclosure, we conclude that no portion of the submitted information is excepted under section 552.131(b) of the Government Code.

Section 552.136 states that "[n]otwithstanding any other provision of this chapter, 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."<sup>4</sup> *Id.* § 552.136(b). Section 552.136(a) defines "access device" as "a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to . . . obtain money, goods, services, or another thing of value [or] initiate a transfer of funds other than a transfer originated solely by paper instrument." *Id.* § 552.136(a). Upon review, we conclude the bank account numbers we have marked must be withheld under section 552.136.<sup>5</sup>

CHR asserts that some of its remaining information is excepted under section 552.147 of the Government Code, which provides that "[t]he social security number of a living person is

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<sup>4</sup>The 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).

<sup>5</sup>We note this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including bank account numbers under section 552.136 of the Government Code, without the necessity of requesting an attorney general decision.

excepted from" required public disclosure under the Act. However, upon review, we find that none of CHR's remaining information contains social security numbers. Accordingly, section 552.147 does not apply.

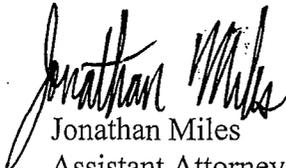
Finally, we note the remaining information contains documents protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of materials that are subject to copyright protection unless an exception applies to the information. *Id.* 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. *See* Open Records Decision No. 550 (1990).

In summary, DART must withhold the information we marked under section 552.110(a) of the Government Code. To the extent the individual whose information we have marked is a licensed peace officer and elects to restrict access to her information in accordance with section 552.1175(b), DART must withhold the marked information under section 552.1175. DART must withhold the account numbers we marked under section 552.136 of the Government Code. The remaining information must be released, but any copyrighted information must be released 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.oag.state.tx.us/open/index\\_orl.php](http://www.oag.state.tx.us/open/index_orl.php), 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 must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



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Assistant Attorney General  
Open Records Division

JM/jb

Ref: ID# 381557

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