



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

December 15, 2010

Mr. Hyattye O. Simmons  
General Counsel  
Dallas Area Rapid Transit  
P.O. Box 660163  
Dallas, Texas 75266-0163

OR2010-18799

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# 402953 (DART ORR#s 7736, 7731, and 7766).

Dallas Area Rapid Transit ("DART") received three requests, two from the same requestor, for information pertaining to the RFP and the RFQ for two specified light rail projects.<sup>1</sup> You state DART has released some of the requested information, including the requested RFPs and RFQs. You claim the remaining information is excepted from disclosure under section 552.101 of the Government Code. You also state the request may implicate the proprietary interests of third parties. Accordingly, pursuant to section 552.305 of the Government Code, you state you have notified Transit Solutions Team ("TST"), Kiewit, Stacy and Whitbeck, Reyes and Parsons ("KSWRP"), and Austin Bridge & Road ("Austin"), of the request and of each company's right to submit arguments to this office as to why its information should not be released. *See* Gov't Code § 552.305(d); *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 to disclosure under Act in certain circumstances). We have received comments

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<sup>1</sup>You state DART received clarification from the first requestor regarding his second request. *See* Gov't Code § 552.222(b) (stating if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used).

from all of the third parties. We have considered the submitted arguments and reviewed the submitted 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. You raise section 552.101 in conjunction with section 418.181 of the Government Code, a provision of the Texas Homeland Security Act. Section 418.181 provides “[t]hose documents or portions of documents in the possession of a governmental entity are confidential if they identify the technical details of particular vulnerabilities of critical infrastructure to an act of terrorism.” *Id.* § 418.181; *see also id.* § 421.001 (defining critical infrastructure to include “all public or private assets, systems, and functions vital to the security, governance, public health and safety, and functions vital to the state or the nation”). The fact that information may relate to a governmental body’s security concerns or emergency management activities does not make the information *per se* confidential under the Texas Homeland Security Act. *See* Open Records Decision No. 649 at 3 (1996) (language of confidentiality provision controls scope of its protection). Furthermore, the mere recitation by a governmental body of a statute’s key terms is not sufficient to demonstrate the applicability of a claimed provision. As with any exception to disclosure, a governmental body asserting one of the confidentiality provisions of the Texas Homeland Security Act must adequately explain how the responsive records fall within the scope of the claimed provision. *See* Gov’t Code § 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies).

You inform us that DART operates a light rail transit system, which is a critical transportation infrastructure that transports thousands of riders daily. You state that a disturbance or sabotage of this infrastructure could lead to derailment, which could result in hundreds of injuries or deaths. You further state the submitted information consists of “geotechnical reports, analysis of the structural soundness and designs of the DART Light Rail bridge structure[s],” as well as design documents that identify the layout and dimensions of the infrastructure that supports the light rail system. You contend that this information identifies technical details of the vulnerabilities of DART’s Orange and Blue Light Rail lines. Upon review, we find that, to the extent the submitted information identifies the technical details of particular vulnerabilities of critical infrastructure to an act of terrorism, DART must withhold such information, including the submitted drawings and plans, under section 552.101 of the Government Code in conjunction with section 418.181 of the Government Code.<sup>2</sup> To the extent the submitted information does not identify the technical details of particular vulnerabilities of critical infrastructure to an act of terrorism, we will address the arguments raised by the third parties against the disclosure of their information.

We note TST seeks to withhold information DART has not submitted to this office for our review. This ruling does not address that information and is limited to the information

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<sup>2</sup>As our ruling is dispositive, we need not address the remaining arguments against the disclosure of this information.

submitted as responsive by DART. *See id.* § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested).

We understand KSWRP to assert its information is confidential because it was submitted to DART with the understanding that the information would remain confidential. We note that information is not confidential under the Act simply because the party that submits the information anticipates or requests that it be kept confidential. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot overrule or repeal provisions of the Act through an agreement or contract. *See* Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) (“[T]he obligations of a governmental body under [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, unless the information at issue falls within an exception to disclosure, it must be released, notwithstanding any expectation or agreement to the contrary.

TST, KSWRP, and Austin, assert some or all of their information is confidential under section 552.110 of the Government Code. Section 552.110 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. *Id.* § 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.<sup>3</sup> RESTATEMENT OF TORTS § 757 cmt. b (1939). This 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 that section 552.110(a) is applicable unless it has been shown that 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* Open Records Decision No. 661 at 5 (1999).

Upon review, we find TST, KSWRP, and Austin have failed demonstrate that any of the information these parties seek to withhold meets the definition of trade secret, nor have any of these companies established a trade secret claim for this information. *See* Open Records Decision Nos. 319 at 3 (1982) (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), 402. We note that information, including pricing information, pertaining to a particular proposal or contract is generally not a trade secret because it is "simply information as to single or ephemeral events in the conduct of the business," rather than "a process for continuous use in the operation of the business." *See* RESTATEMENT OF TORTS § 757 cmt. b (1939); *Huffines*, 314 S.W.2d at 776; 306 at 3 (1982). Therefore, none of the remaining information may be withheld under section 552.110(a).

Upon review, we find TST, KSWRP, and Austin have all established that release of portions of their proposals would cause the companies substantial competitive injury. Therefore,

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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 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 (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

DART must withhold the following information under section 552.110(b) of the Government Code: section 8 in volume 1 of TST's Blue Line proposal; the pricing information, including the percentage of margin proposed for work and the general and administrative rate, from KSWRP's Blue Line proposal and section 8 from its Orange Line proposal; and the risk management approach from section 4.4, sections 5.1.4 through 5.1.7, section 5.2 and the associated Exhibit B, the utility matrix, section 7.1, section 7.4, and section 8 from Austin's proposal. However, we find that the companies have made only conclusory allegations that the release of any of their remaining information would result in substantial damage to any of their competitive positions. *See* ORD 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 give competitor unfair advantage on future contracts is too speculative). Furthermore, DART informed us that the contract for the Orange Line was awarded to KSWRP and the contract for the Blue Line was awarded to Austin. This office considers the prices charged in government contract awards to be a matter of strong public interest; thus, the pricing information of a winning bidder is generally not excepted under section 552.110(b). *See* Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors); *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). Accordingly, none of the remaining information may be withheld under section 552.110(b).

Section 552.136 of the Government Code states "[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> Gov't Code § 552.136(b); *see also id.* § 552.136(a) (defining "access device"). To the extent the remaining information contains access device numbers, DART must withhold such information under section 552.136 of the Government Code.<sup>5</sup>

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

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

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

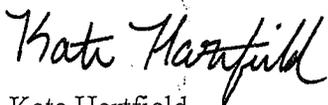
the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

In summary, to the extent the requested information identifies the technical details of particular vulnerabilities of critical infrastructure to an act of terrorism, DART must withhold such information, including the submitted drawings and plans, under section 552.101 of the Government Code in conjunction with section 418.181 of the Government Code. DART must withhold the information we have indicated under section 552.110(b) of the Government Code. To the extent the remaining information contains access device numbers, DART must withhold such information under section 552.136 of the Government Code. The remaining information must be released, but any information protected by copyright 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

KH/em

Ref: ID# 402953

Enc. Submitted documents

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