



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 8, 2011

Ms. Shirley Thomas
Acting General Counsel
Dallas Area Rapid Transit
P.O. Box 660163
Dallas, Texas 75266-0163

OR2011-16412

Dear Ms. Thomas:

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# 435597.

Dallas Area Rapid Transit ("DART") received a request for the following: 1) "all BPOs and service agreements on the security cameras at all DART stations" serviced by Wai Wize; 2) any contractual agreements with Connex Transit Services, Inc. ("Connex")/Veolia Transportation; 3) a copy of contract number C-1007571-01; and 4) "any Wai Wize deliverables or work product in association with that contract with the Archer Western Brunson Carcon construction venture." Although you take no position on whether the requested information is excepted from disclosure, you state release of this information may implicate the proprietary interests of Archer Western Contractors ("Archer Western") and Connex. Accordingly, you have notified both Archer Western and Connex of the request and of their right to submit arguments to this office as to why their information should not be released. *See* Gov't Code § 552.305(d) (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 certain circumstances). We have received comments from Archer Western. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note you have only submitted information pertaining to category four of the request. To the extent information responsive to the remainder of the request existed on the date DART received the request, we assume you have released it. If you have not released

any such information, you must do so at this time. *See* Gov't Code §§ 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible).

Next, we note that 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 decision, we have not received correspondence from Connex. Thus, Connex has not demonstrated that it has a protected proprietary interest in any of 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 the submitted information on the basis of any proprietary interests Connex may have in the information.

We understand Archer Western to assert that its submitted information is excepted under section 552.101 of the Government Code, which excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses information that is considered to be confidential under other constitutional, statutory, or decisional law. *See* Open Records Decision Nos. 611 at 1 (1992) (common-law privacy), 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality). Archer Western claims a portion of its submitted application is confidential under the federal Freedom of Information Act ("FOIA"), section 552 of title 5 of the United States Code. FOIA applies to an "agency," which is defined as "any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency[.]" *See* 5 U.S.C. § 552a(a)(1) (referring to 5 U.S.C. § 552(e) for definition of "agency"). In this instance, the submitted information is maintained by DART, which is not a federal agency. This office and the courts have stated FOIA applies only to federal agencies and not to state or local agencies. *See Davidson v. Georgia*, 622 F.2d 895, 897 (5th Cir. 1980) (state governments not subject to FOIA); Attorney General Opinion MW-95 (1979) (neither FOIA nor federal Privacy Act applies to records held by state or local governmental bodies in Texas). Therefore, DART may not withhold any of Archer Western's submitted information under section 552.101 of the Government Code on the basis of FOIA.

Next, Archer Western claims its submitted information is excepted under section 552.104 of the Government Code, which excepts from required public disclosure "information which, if released, would give advantage to competitors or bidders." Gov't Code § 552.104(a). However, this section only protects the interests of a governmental body. *See* Open Records Decision No. 592 at 8 (1991) (purpose of section 552.104 is to protect governmental body's

interest in competitive bidding situation). Because section 552.104 does not protect the interests of third parties, and DART does not claim this section applies to the submitted information, DART may not withhold any portion of the submitted information under section 552.104 of the Government Code.

Section 552.110(b) of the Government Code 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 requires a specific factual or evidentiary showing, not conclusory or generalized allegations, substantial competitive injury would likely result from release of the information at issue. *Id.*; *see also* ORD 661 at 5-6 (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

Archer Western claims some of its submitted information, including its pricing information, is excepted from disclosure under section 552.110(b) of the Government Code. However, we note the pricing information of an entity contracting with a governmental body 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* Dep’t of Justice Guide to the Freedom of Information Act 344-345 (2009) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). Further, we find Archer Western has made only conclusory allegations that the release of any of its remaining information would result in substantial damage to the company’s competitive position. Thus, Archer Western has not demonstrated that substantial competitive injury would result from the release of any of its submitted information. *See* Open Records Decision 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), 319 at 3 (statutory predecessor to section 552.110 generally not applicable to information relating to organization and personnel, market studies, professional references, and qualifications and experience), 175 at 4 (1977) (resumes cannot be said to fall within any exception to the Act). Accordingly, DART may not withhold any of Archer Western’s information under section 552.110(b) of the Government Code. As no further exceptions are raised, the submitted 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.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,



Vanessa Burgess
Assistant Attorney General
Open Records Division

VB/dls

Ref: ID# 435597

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Mr. Kevin J. Kelly
Corporate Counsel
Archer Western Contractors
929 West Adams Street
Chicago, Illinois 60607
(Third party w/o enclosures)

Mr. Ronald Hartman
Senior Vice President
Connex Transit Services, Inc.
8757 Georgia Avenue, Suite 1300
Silver Spring, Maryland 20910
(Third party w/o enclosures)