ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

February 28, 2012

Mr. Hyattye O. Simmons
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OR2012-03032

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# 446767 (DART ORR 8679).

Dallas Area Rapid Transit ("DART") received a request for all correspondence sent to and from DART pertaining to two named entities and DART's current contract for the provision of paratransit services. You claim the submitted information is excepted from disclosure under sections 552.104 and 552.107 of the Government Code. You also state the request may implicate the proprietary interests of Veolia Transportation, Inc. ("Veolia") and Pursuit of Excellence HR, Inc. ("POE"). Accordingly, you state, and provide documentation showing, you notified Veolia and POE of DART's receipt of the request for information and of their right to submit arguments to this office as to why the requested information should not be released to the requestor. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 at 3 (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 Veolia and an attorney for POE. We have considered the submitted arguments and reviewed the submitted information, a portion of which is a representative sample.[1]

Initially, we address POE's argument that its information should not be disclosed because of a confidentiality agreement. Information is not confidential under the Act simply because the party that submits the information anticipates or requests that it be kept confidential. *See*

[1]We assume the "representative sample" of information submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than those submitted to this office.

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.

DART and POE both argue the submitted information is excepted from disclosure under section 552.104 of the Government Code. We note, however, that section 552.104 only protects the interests of a governmental body and does not protect the interests of a third party; therefore, we will not consider POE's claim under section 552.104. *See* Open Records Decision No. 592 at 9 (1991). However, we will address DART's claim under section 552.104 for the submitted information. Section 552.104 excepts from required public disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). The purpose of section 552.104 is to protect the purchasing interests of a governmental body in competitive bidding situations where the governmental body wishes to withhold information in order to obtain more favorable offers. *See* ORD 592. Section 552.104 requires a showing of some actual or specific harm in a particular competitive situation; a general allegation that a bidder will gain an unfair advantage will not suffice. ORD 541 at 4. Generally, section 552.104 does not except bids from disclosure after bidding is completed and the contract has been executed. *See id.*

You state the submitted information consists of information pertaining to a dispute between Veolia and POE. You state DART recently released a solicitation for mobility management services and assert release of the submitted information at this time would disadvantage DART's position in its procurement process regarding this solicitation. Upon review, however, we find you have failed to demonstrate how release of the submitted information, which pertains to a mobility management service contract DART has already awarded, would harm DART's interests in a competitive situation. Accordingly, DART may not withhold the submitted information under section 552.104 of the Government Code.

Section 552.107(1) of the Government Code protects information that comes within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. *See* Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. *See* TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *See In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding)

(attorney-client privilege does not apply if attorney acting in capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. *See* TEX. R. EVID. 503(b)(1). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a confidential communication, *id.*, meaning it was "not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." *Id.* 503(a)(5). Whether a communication meets this definition depends on the intent of the parties involved at the time the information was communicated. *See Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, orig. proceeding). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You claim the submitted information in Exhibit B-1 is protected by section 552.107(1) of the Government Code. You state the e-mails consist of attorney-client communications that were made between DART employees and attorneys for the purpose of rendering professional legal services to DART. You state these communications were intended to be and remain confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue. Accordingly, DART may generally withhold the information at issue under section 552.107(1) of the Government Code. We note, however, these privileged e-mail strings include e-mails from non-privileged parties that are separately responsive to the instant request. Consequently, if these e-mails, which we have marked, exist separate and apart from the privileged e-mail strings in which they were included, DART may not withhold them under section 552.107(1) of the Government Code. If these e-mails do not exist separate and apart from the privileged e-mail strings in which they were included, DART may withhold them as privileged attorney-client communications under section 552.107(1) of the Government Code.

In the event the non-privileged e-mails we have marked in Exhibit B-1 exist separate and apart from the privileged e-mail strings in which they were included, we note some of this information is subject to section 552.101 of the Government Code.[2] Section 552.101 excepts

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[2]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).

from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses the doctrine of common-law privacy, which protects information if (1) the information contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Indus. Found.*, 540 S.W.2d at 685. To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *Id.* at 681-82. A compilation of an individual's criminal history is highly embarrassing information, the publication of which would be highly objectionable to a reasonable person. *Cf. U. S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 764 (1989) (when considering prong regarding individual's privacy interest, court recognized distinction between public records found in courthouse files and local police stations and compiled summary of information and noted that individual has significant privacy interest in compilation of one's criminal history). Furthermore, we find that a compilation of a private citizen's criminal history is generally not of legitimate concern to the public. Therefore, if the non-privileged e-mails in Exhibit B-1 exist separate and apart from the privileged e-mail strings in which they were included, DART must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy.

Veolia and POE claim some of their remaining information is excepted from disclosure under section 552.110 of the Government Code. This section 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." 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.[3] 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 5-6 (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

Upon review, we find Veolia and POE have not demonstrated how any of their remaining information meets the definition of a trade secret. *See*RESTATEMENT OF TORTS § 757 cmt. b (1939) (trade secret "is not simply information as to single or ephemeral events in the conduct of the business"); ORDs 402 (section 552.110(a) does not apply unless information meets definition of trade secret and necessary factors have been demonstrated to establish trade secret claim), 319 at 3 (information relating to organization and personnel, professional references, market studies, qualifications, and pricing not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Consequently, DART may not withhold any of Veolia's or POE's remaining information under section 552.110(a) of the Government Code.

Veolia and POE also claim their remaining information constitutes commercial information that, if released, would cause the companies substantial competitive harm. Upon review,

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[3]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 (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

however, we find Veolia and POE have failed to demonstrate that release of any of their remaining information would cause them substantial competitive injury, and have provided no specific factual or evidentiary showing to support such assertions. *See* Open Records Decision Nos. 661, 509 at 5 (1988) (because 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, we note Veolia was the winning bidder in this instance and the pricing information of a winning bidder is generally not excepted under section 552.110(b). This office considers the prices charged in government contract awards to be a matter of strong public interest. *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 344-45 (2009) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). Therefore, DART may not withhold any of Veolia's or POE's remaining information under section 552.110(b) of the Government Code.

Section 552.136 of the Government Code provides "[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." Gov't Code § 552.136(b). An access device number is one that may be used to (1) obtain money, goods, services, or another thing of value, or (2) initiate a transfer of funds other than a transfer originated solely by paper instrument, and includes an account number. *See id.* § 552.136(a) (defining "access device"). This office has concluded insurance policy numbers constitute access device numbers for purposes of section 552.136. Accordingly, DART must withhold the insurance policy, bank account, and routing numbers we have marked in the remaining information under section 552.136.

Section 552.137 of the Government Code provides that "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act]," unless the owner of the e-mail address has affirmatively consented to its release or the e-mail address is specifically excluded by subsection (c). *Id.* § 552.137(a)-(c). Upon review, we find the e-mail addresses we have marked in the remaining information are not of the type specifically excluded by section 552.137(c) of the Government Code. Accordingly, DART must withhold the e-mail addresses we have marked in the remaining information under section 552.137 of the Government Code, unless the owners consent to disclosure.[4]

In summary, DART may generally withhold the information in Exhibit B-1 under section 552.107(1) of the Government Code; however, if the non-privileged e-mails we have marked exist separate and apart from the privileged e-mail strings in which they were

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[4]We note Open Records Decision No. 684 (2009) is a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including e-mail addresses of members of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

included, DART may not withhold them under section 552.107(1) of the Government Code. In this instance, DART must withhold the information we have marked in the non-privileged e-mails under section 552.101 of the Government Code in conjunction with common-law privacy. DART must withhold the insurance policy, bank account, and routing numbers we have marked in the remaining information under section 552.136 of the Government Code. DART must withhold the e-mail addresses we have marked in the remaining information under section 552.137 of the Government Code, unless the owners consent to disclosure. DART 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.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,

Sean Nottingham
Assistant Attorney General
Open Records Division

SN/agn

Ref: ID# 446767

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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