



October 8, 2001

Ms. Elaine Snow
Assistant General Counsel
Texas Department of Health
1100 West 49th Street
Austin, Texas 78756-3199

OR2001-4528

Dear Ms. Snow:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 152903.

The Texas Department of Health (the "department") received eleven requests for copies of a specified winning bid proposal, one request for the scoring tabulations and/or summaries of bid prices generated for two specified regions, and one request for the scoring instruments and rankings used to evaluate all bids submitted for eight specified regions. We note that you did not submit any information to us pertaining to the requested scoring tabulations, pricing summaries, scoring instruments, and rankings for the specified regions. Therefore, we assume that you have provided the requestors with this information to the extent that it exists. If not, you must do so at this time. *See* Gov't Code §§ 552.006, .301, .302; *see also* Open Records Decision No. 664 (2000) (noting that if governmental body concludes that no exceptions apply to requested information it must release information as soon as possible under the circumstances to the extent that it exists). You claim that the submitted information is excepted from disclosure pursuant to section 552.110 of the Government Code. You state, however, that you take no position with regard to the release of the submitted information. We have considered the exception you claim and have reviewed the submitted information.

Pursuant to section 552.305 of the Government Code, you notified the third party who may have a proprietary interest in the requested proposal, Le Fleur Transportation ("Le Fleur"). *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 Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Public Information Act in certain circumstances). Le Fleur argues that portions

of its proposal are excepted from disclosure pursuant to sections 552.101 and 552.110 of the Government Code.¹ Le Fleur states that it has provided the requestors with all other portions of its proposal that do not implicate its proprietary interests.

Le Fleur argues that the pricing and routing; client; operational standards and directives; and vehicle sourcing, supply, and subcontract information contained within the submitted proposal and the distinctive format and copy of the proposal itself is excepted from disclosure under section 552.110(a) of the Government Code as trade secret information. Section 552.110(a) protects trade secrets of private parties. The Texas Supreme Court has adopted the definition of "trade secret" from the Restatement of Torts, section 757, 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 Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958). If a governmental body takes no position with regard to the application of the "trade secrets" branch of section 552.110 to requested information, we accept a private person's claim for exception as valid under that branch if that person establishes a prima facie case for exception and no one submits an argument that rebuts the claim as a matter of law.² *See* Open Records Decision No. 552 at 5 (1990).

¹ Although Le Fleur argues that portions of its proposal are excepted from disclosure pursuant to section 552.101 of the Government Code, it offers no independent bases as to why portions are protected under this exception to disclosure. Accordingly, we do not address Le Fleur's section 552.101 claim with respect to the submitted bid proposal.

² The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are: "(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

Le Fleur also argues that the pricing and routing; client; operational standards and directives; and vehicle sourcing, supply, and subcontract information contained within the submitted proposal is excepted from disclosure pursuant to section 552.110(b) of the Government Code. Section 552.110(b) excepts from disclosure “[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.” An entity will not meet its burden under section 552.110(b) by a mere conclusory assertion of a possibility of commercial harm. *Cf. National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). The governmental body or interested third party raising section 552.110(b) must provide a specific factual or evidentiary showing that substantial competitive injury would likely result from disclosure of the requested information. *See Open Records Decision Nos. 639 at 4 (1996)* (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure).

We first address Le Fleur’s trade secret claims. Le Fleur argues that release of the highlighted client contact portions of its proposal would provide competitors with an unfair means of identifying major potential clients with a need for particularized services and all contact information necessary to solicit business and submit future bids. Le Fleur also argues that operational and field staff have access to this client information only to the extent that each Le Fleur employee is enabled to effectively communicate with clients during the course of his or her employment and that each employee is bound by confidentiality agreements regarding such information. Finally, Le Fleur argues that this client contact information is never published or disclosed to third parties, except through the bid submission process. Based on Le Fleur’s arguments and our review of the relevant information, we conclude that the department must withhold from disclosure the highlighted portions of pages 16 and 17 of the Le Fleur proposal in Exhibit A under section 552.110(a) as trade secret information.

Le Fleur also argues that release of the highlighted operational standards and directives portions of its proposal would enable competitors to “free-ride on Le Fleur’s operational research and experience for purposes of establishing, implementing and marketing a proven system for providing transportation services.” Le Fleur also argues that it has spent more than five million dollars over a period of ten years developing and documenting its operational methods. Further, Le Fleur argues that this operational standards and directives information is never disclosed to third parties and is only provided to Le Fleur field staff on a need-to-know basis. Based on Le Fleur’s arguments and our review of the relevant information, we conclude that the department must withhold from disclosure the highlighted portions of pages 18 through 25 and pages 27 through 39 of the Le Fleur proposal in Exhibit A under section 552.110(a) as trade secret information. However, we conclude that the

(1982), 255 at 2 (1980).

highlighted information on page 26 of Le Fleur's proposal does not constitute Le Fleur's trade secret information. Accordingly, you may not withhold the highlighted information on page 26 of Le Fleur's proposal pursuant to section 552.110(a) of the Government Code.

Le Fleur also argues with regard to the highlighted vehicle sourcing, supply, and subcontract portions of its proposal that it has invested years of market research in identifying, creating, and developing relationships with reliable suppliers who can meet Le Fleur's needs and the specific needs of Le Fleur's clients. Le Fleur also argues that this information is not readily accessible through private investigation, is not disclosed to third parties, and is accessed only by senior and operational management personnel who are bound by confidentiality agreements. Based on Le Fleur's arguments and our review of the relevant information, we conclude that the department must withhold from disclosure the highlighted portions of pages 47 through 67 of the Le Fleur proposal in Exhibit A under section 552.110(a) as trade secret information. However, we conclude that the highlighted information on pages 44 and 46 of Le Fleur's proposal does not constitute Le Fleur's trade secret information. Accordingly, you may not withhold the highlighted information on pages 44 and 46 of Le Fleur's proposal pursuant to section 552.110(a) of the Government Code.

Le Fleur also argues that the distinctive format and copy of its proposal constitutes trade secret information that must be withheld from disclosure under section 552.110(a). However, we find that Le Fleur has not sufficiently demonstrated that the release of information relating to the proposal's distinctive format and copy would constitute a release of trade secret information. Accordingly, the department may not withhold from disclosure any information relating to the proposal's format and copy pursuant to section 552.110(a). *SEE* RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958).

Le Fleur also in part argues that a competitor's knowledge of its pricing and routing information would enable competitors to implement similar routing methods and, thus, unfairly achieve the same efficiencies that Le Fleur has accomplished only as a result of ten years of operational research, trial, and error. Le Fleur also argues that such knowledge would provide competitors with enormous advantages, including the ability to use Le Fleur's pricing and routing information to Le Fleur's economic disadvantage in future bidding processes. Based on our review of Le Fleur's arguments and the submitted proposal, we conclude that Le Fleur has not sufficiently demonstrated that the release of pricing and routing information contained within Le Fleur's proposal would constitute a release of trade secret information. Accordingly, the department may not withhold from disclosure any pricing and routing information contained in Le Fleur's proposal pursuant to section 552.110(a). *See* Open Records Decision Nos. 306 (1982) (finding that pricing proposals may only be withheld during bid submission process), 184 (1978), 175 (1977).

We also conclude that Le Fleur has not presented specific factual evidence to show that the release of its pricing and routing information and the highlighted information on pages 26,

44, and 46 would cause it substantial competitive harm under section 552.110(b). Consequently, the department may not withhold from disclosure the highlighted pricing and routing information contained within Le Fleur's proposal nor the highlighted information on pages 26, 44, and 46 pursuant to section 552.110(b) of the Government Code.

In summary, you must release all highlighted pricing and routing information contained throughout Le Fleur's proposal. You must release the highlighted information on pages 26, 44, and 46 to the requestor. You must withhold from disclosure all other highlighted portions of Le Fleur's proposal pursuant to section 552.110(a) of the Government Code as trade secret information.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

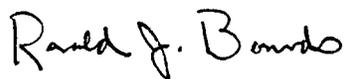
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Ronald J. Bounds
Assistant Attorney General
Open Records Division

RJB/seg

Ref: ID# 152903

Enc. Submitted documents

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