



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

This ruling has been modified by court action
The ruling and judgment can be viewed in PDF
format below.



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 5, 2011

Ms. Kerri L. Butcher
Interim Chief Counsel
Capital Metropolitan Transportation Authority
2910 East Fifth Street
Austin, Texas 78702

The ruling you have requested has been amended as a result of litigation and has been attached to this document.

OR2011-11296

Dear Ms. Butcher:

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# 426130.

The Capital Metropolitan Transportation Authority (the "authority") received a request for two specified contracts. Although you state the authority takes no position with respect to the public availability of the submitted contracts, you state that the proprietary interests of LeFleur Transportation of Texas, Inc. ("LeFleur") and Greater Austin Transportation Company ("GATC") might be implicated. Accordingly, you provided notice to LeFleur and GATC of the request and each company's right to submit arguments to this office explaining why its information should not be released. *See Gov't Code* § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released). We have received comments from LeFleur and GATC. We have considered the submitted arguments and reviewed the submitted information. We have also received and considered comments submitted by the requestor. *See id.* § 552.304 (providing that interested party may submit written comments regarding why information should or should not be released).

LeFleur and GATC both claim portions of their information are excepted 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: trade secrets and commercial or financial information, the release of which would cause a third party substantial competitive harm. Section 552.110(a) of the Government Code excepts from disclosure "[a] trade secret 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. *Hyde Corp. v. Huffines*, 314

S.W.2d 763 (Tex. 1958); *see also* Open Records Decision No. 552 at 2 (1990). Section 757 provides a trade secret is

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 Huffines*, 314 S.W.2d at 776. 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.¹ RESTATEMENT OF TORTS § 757 cmt. b (1939). This office must accept a private person's claim for exception as valid under section 552.110 if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. ORD 552 at 5-6. However, we cannot conclude section 552.110(a) applies 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. *See* Open Records Decision No. 402 (1983).

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." Gov't Code

¹The following are the six factors that the Restatement gives 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).

§ 552.110(b). 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 requested information. *See* 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 LeFleur and GATC have failed to establish a *prima facie* case that any of their information is a trade secret protected by section 552.110(a). *See* ORD 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). We further note 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 or device for continuous use in the operation of the business.” *See* RESTATEMENT OF TORTS § 757 cmt. b (1939); *Huffines*, 314 S.W.2d at 776; ORDs 319 at 3, 306 at 3. Thus, the authority may not withhold any of the information at issue under section 552.110(a) of the Government Code.

LeFleur and GATC also contend portions of their information are excepted from disclosure under section 552.110(b) of the Government Code. Upon review, we find that LeFleur has established that a portion of its information, which we have marked, constitutes commercial or financial information, the release of which would cause the company substantial competitive injury. Therefore, the authority must withhold the information we have marked under section 552.110(b) of the Government Code. However, we find LeFleur and GATC have failed to make the specific factual or evidentiary showing required by section 552.110(b) that release of any of their remaining information would cause either company substantial competitive harm. Additionally, 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* 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). Therefore, the authority may not withhold any of the remaining information at issue under section 552.110(b) of the Government Code.

We note that some of the remaining information is confidential under section 552.130 of the Government Code.² Section 552.130 excepts from disclosure motor vehicle record information issued by this state, another state, or country. *See* Act of May 24, 2011, 82nd Leg., R.S., S.B. 1638, § 4 (to be codified as an amendment to Gov’t Code § 552.130).

²The 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).

Therefore, you must withhold the Texas license plate numbers we have marked under section 552.130 of the Government Code.³

Finally, we note that portions of the remaining information are 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. 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 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, the authority must withhold the information we have marked under section 552.110(b) of the Government Code. The authority must withhold the Texas license plate number we have marked under section 552.130 of the Government Code. The remaining information must be released, but any information that is protected by copyright may only 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, 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,



Tamara Wilcox
Assistant Attorney General
Open Records Division

TW/dls

³Open Records Decision No. 684 (2009) is a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including Texas-issued license plate numbers under section 552.130 of the Government Code, without the necessity of requesting an attorney general decision.

Ref: ID# 426130

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Mr. Brian O'Toole
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Ms. Monica D. Cunningham
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JUN 18 2014

Cause No. D-1-GN-11-002497

At S. B. 3904 M.
Amalia Rodriguez-Mendoza, Clerk

LEFLEUR TRANSPORTATION OF TEXAS, INC., <i>Plaintiff,</i>	§	IN THE DISTRICT COURT
	§	
	§	
v.	§	261st JUDICIAL DISTRICT
	§	
GREG ABBOTT, ATTORNEY GENERAL OF TEXAS, <i>Defendant.</i>	§	
	§	
	§	TRAVIS COUNTY, TEXAS

AGREED FINAL JUDGMENT

This cause is an action under the Public Information Act (PIA), Tex. Gov't Code ch. 552, in which Plaintiff Lefleur Transportation of Texas (Lefleur), sought to withhold certain information in the possession of Capital Metropolitan Transportation Authority (Capital Metro) from public disclosure. All matters in controversy between Lefleur and Defendant Greg Abbott, Attorney General of Texas (Attorney General), arising out of this lawsuit have been resolved, and the parties agree to the entry and filing of this Agreed Final Judgment.

PIA section 552.325(d) requires the Court to allow a requestor a reasonable period of time to intervene after notice is attempted by the Attorney General. See Tex. Gov't Code § 552.325. The Attorney General represents to the Court that in compliance with PIA section 552.325(c), the Attorney General sent a letter by certified mail and electronic mail to the requestor, Mr. Pat Bartel, on May 23, 2014, providing reasonable notice of this setting (see attached notice). The requestor was informed of the parties' agreement that Capital Metro must withhold the information at issue. The requestor was also informed of his right to intervene in the suit to contest this Agreed Final Judgment. The requestor has not filed a motion to intervene.

After considering the agreement of the parties and the law, the Court is of the opinion that entry of an agreed final judgment is appropriate, disposing of all claims between these parties.

IT IS THEREFORE ADJUDGED, ORDERED AND DECLARED THAT:

1. Lefleur and the Attorney General have agreed that in accordance with the PIA and under the facts presented, the information at issue, certain trade secret information in the contract Capital Metro awarded to Lefleur, is excepted from disclosure under Tex. Gov't Code § 552.110(a).

2. The Attorney General will instruct Capital Metro to withhold from the requestor the information described in Paragraph 1 of this Agreed Final Judgment. The Attorney General will provide a redacted copy of the information at issue to Capital Metro for the purpose of releasing the information to the requestor. Upon receipt of this Agreed Final Judgment and the information at issue, Capital Metro will provide the same redacted copy of the information at issue to the requestor.

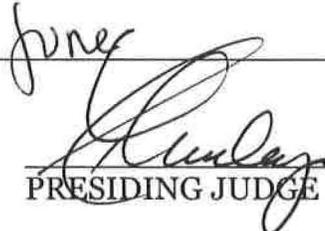
3. The Attorney General will inform Capital Metro that all other requested information must be released or withheld in compliance with Letter Ruling OR2011-11295. Further, the Attorney General will inform Capital Metro that for future requests Letter Ruling OR2011-11295, will not be considered a previous determination by the Office of the Attorney General under Tex. Gov't Code § 552.301(a), (f), and should not be relied upon by Capital Metro to withhold requested information without asking for a decision from the Attorney General. In addition to requesting a decision from the Attorney General in compliance with Tex. Gov't Code § 552.301, Capital Metro may refer to the Settlement Agreement and this Agreed Final Judgment in its letter requesting a decision (see attached Settlement Agreement).

4. All court cost and attorney fees are taxed against the parties incurring the same;

5. All relief not expressly granted is denied; and

6. This Agreed Final Judgment finally disposes of all claims between Lefleur and the Attorney General and is a final judgment.

SIGNED the 18 day of June, 2014.



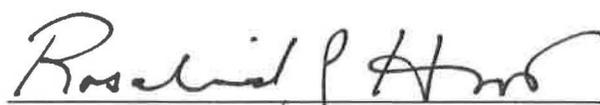
PRESIDING JUDGE

AGREED:



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ATTORNEY FOR DEFENDANT
ATTORNEY GENERAL OF TEXAS

LEFLEUR TRANSPORTATION OF TEXAS, INC., <i>Plaintiff,</i>	§	IN THE DISTRICT COURT
	§	
	§	
v.	§	261st JUDICIAL DISTRICT
	§	
GREG ABBOTT, ATTORNEY GENERAL OF TEXAS, <i>Defendant.</i>	§	
	§	
	§	TRAVIS COUNTY, TEXAS

SETTLEMENT AGREEMENT

This Settlement Agreement (Agreement) is made by and between Plaintiff Lefleur Transportation of Texas, Inc. (Lefleur) and Defendant Greg Abbott, Attorney General of Texas (Attorney General), on the terms set forth below.

Background

On May 18, 2011, the Capital Metropolitan Transportation Authority (Capital Metro) received a written request for information from Mr. Pat Bartel. The request was for two specific contracts, including a contract awarded to Lefleur that is at issue in this case. Capital Metro asked for an open records ruling from the Attorney General pursuant to the Public Information Act (PIA), Texas Government Code ch. 552, and took no position with respect to the availability of the information. *See* Tex. Gov't Code § 552.301. Capital Metro also notified Lefleur that its proprietary interest may be implicated by release of the information. *See* Tex. Gov't Code § 552.325.

Lefleur submitted a letter to the Attorney General and contended the requested information was excepted from disclosure as a trade secret under PIA section 552.110(a) and contended disclosure of the information would cause substantial competitive harm under PIA section 552.110(b). *See* Tex. Gov't Code § 552.110(a), (b). The Attorney General issued Letter Ruling OR2011-11295, and ruled some of the information was

confidential under PIA sections 552.110(b) and 552.130, but the remaining information must be disclosed to the requestor.

Lefleur disputed the ruling and filed a lawsuit, styled Cause No. D-1-GN-11-002497, *Lefleur Transportation of Texas, Inc. v. Greg Abbott, Attorney General of Texas*, In the 261st Judicial District Court of Travis County, Texas (this lawsuit), to preserve its rights under the PIA. After the lawsuit was filed, Lefleur submitted additional information to the Attorney General establishing that portions of the requested information were excepted from disclosure under PIA section 552.110(a).

Pursuant to PIA section 552.325(c), the Attorney General may enter into a settlement that allows all or part of the information at issue in this lawsuit to be withheld. Tex. Gov't Code § 552.325(c). Therefore, the parties wish to resolve this matter without further litigation and agree to the following terms.

Terms

For good and sufficient consideration, the receipt of which is acknowledged, the parties agree and stipulate that:

1. The information at issue, specifically, certain trade secret information in the contract Capital Metro awarded to Lefleur, is excepted from disclosure under Tex. Gov't Code § 552.110(a).

2. The Attorney General will instruct Capital Metro to withhold from the requestor the information described in Paragraph 1 of this Agreement. The Attorney General will provide a redacted copy of the information at issue to Capital Metro for the purpose of releasing the information to the requestor. Upon receipt of the Agreed Final Judgment and the information at issue, Capital Metro will provide the same redacted copy of the information at issue to the requestor.

3. The Attorney General will inform Capital Metro that all other requested information must be released or withheld in compliance with Letter Ruling OR2011-11295. Further, the Attorney General will inform Capital Metro that for future requests Letter Ruling OR2011-11295 will not be considered a previous determination by the Office of the Attorney General under Tex. Gov't Code § 552.301(a), (f), and should not be relied upon by Capital Metro to withhold requested information without asking for a decision from the Attorney General. In addition to requesting a decision from the Attorney General in compliance with Tex. Gov't Code § 552.301, Capital Metro may refer to this Settlement Agreement and the Agreed Final Judgment in its letter requesting a decision.

4. The Attorney General agrees to notify the requestor, as required by PIA section 552.325(c), of the proposed settlement and of his right to intervene to contest Lefleur's right to protect the requested information from public disclosure. The terms of a final judgment entered in this lawsuit after a requestor intervenes shall prevail over the terms of this Agreement.

5. Lefleur and the Attorney General agree to the entry of an agreed final judgment, the form of which has been approved by each party's attorney.

6. Each party to this Agreement will bear their own costs, including attorney fees relating to this litigation.

7. The terms of this Agreement are contractual and not mere recitals, and the agreements contained herein and the mutual consideration transferred is to compromise disputed claims fully, and nothing in this Agreement shall be construed as an admission of fault or liability, all fault and liability being expressly denied by all parties to this Agreement.

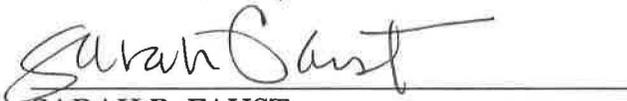
8. Lefleur warrants that its undersigned representative is duly authorized to execute this Agreement on its behalf and that its representative has read this Agreement and fully understands it to be a compromise and settlement and release of all claims that Lefleur has against the Attorney General arising out of the matters described in this Agreement.

9. The Attorney General warrants that his undersigned representative is duly authorized to execute this Agreement on behalf of the Attorney General and his representative has read this Agreement and fully understands it to be a compromise and settlement and release of all claims that the Attorney General has against Lefleur arising out of the matters described in this Agreement.

10. This Agreement shall become effective, and be deemed to have been executed, on the date on which the last of the undersigned parties sign this Agreement.

AGREED:

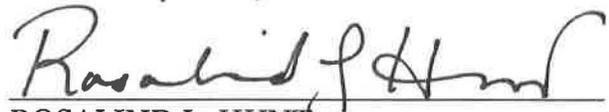
Date: 05/23/14



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