



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 16, 2012

Mr. Christopher Sterner
Assistant General Counsel
Office of the Governor
P.O. Box 12428
Austin, Texas 78711

OR2012-12924

Dear Mr. Sterner:

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# 463412 (OOG ID# 154-12).

The Office of the Governor (the "governor's office") received a request for correspondence to and from specified individuals and entities regarding FlexSteel Pipeline Technologies, Inc. ("FlexSteel") and any documents regarding incentives or grants to FlexSteel from the governor's office. You state some information has been released. You state the governor's office has redacted information as permitted by section 552.136(c) of the Government Code.¹ You further state release of the requested information may implicate the proprietary interests of FlexSteel. Accordingly, you inform us you have notified FlexSteel of the request and its right to submit arguments to this office. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (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 FlexSteel. You also claim some of the submitted information is excepted from disclosure under

¹Section 552.136 authorizes a governmental body to redact, without the necessity of requesting a decision from this office, access device numbers subject to section 552.136(b). *See* Gov't Code § 552.136(c); *see also id.* § 552.136(d)-(e) (requestor may appeal governmental body's decision to withhold information under section 552.136(c) to attorney general and governmental body withholding information pursuant to section 552.136(c) must provide certain notice to requestor).

section 552.107 of the Government Code. We have considered the submitted arguments and reviewed the submitted information.

Section 552.107(1) of the Government Code protects information coming 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. 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. 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. *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 a capacity other than that of attorney). Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. 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. *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 state the information you have marked consists of communications between individuals you have identified as attorneys for and employees of the governor’s office. You state the communications were made for the purpose of facilitating the rendition of legal services, and were intended to be, and have remained, confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information you have marked. Accordingly, the governor’s office may withhold the marked information under section 552.107 of the Government Code.

FlexSteel raises section 552.110 of the Government Code for portions of the remaining information. Section 552.110 protects the proprietary interests of private parties by

excepting from disclosure (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 a "trade secret" from section 757 of the Restatement of Torts. *See Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1957); *see also* Open Records Decision No. 552 (1990). Section 757 defines 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) (citation omitted); *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.² This office will accept a claim that information subject to the Act is excepted as a trade secret under section 552.110(a) if a *prima facie* case for the exception is made, and no one submits an argument that rebuts the claim as a matter of law. *See* ORD 552 at 5. 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. Open Records Decision No. 402 (1983).

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

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. *See* Open Records Decision No. 661 at 5-6 (1999) (business must show by specific factual evidence that release of particular information at issue would cause substantial competitive injury).

Upon review, we find FlexSteel has established that release of its customer information would cause the company substantial competitive injury. Therefore, the governor’s office must withhold the information we have marked in FlexSteel’s proposal under section 552.110(b). However, we find FlexSteel has not established by a factual or evidentiary showing that release of the remaining information it seeks to withhold would cause the company substantial competitive injury for purposes of section 552.110(b). *See* Open Records Decision Nos. 661 (for information to be withheld under commercial or financial information prong of section 552.110, business must show 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 (information relating to organization and personnel, professional references, market studies, and qualifications are not ordinarily excepted from disclosure under statutory predecessor to section 552.110). In addition, we find FlexSteel has failed to establish any of the remaining information at issue meets the definition of a trade secret, nor has FlexSteel demonstrated the necessary factors to establish a trade secret claim for the remaining information. *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). Therefore, the governor’s office may not withhold any of FlexSteel’s remaining information under subsection 552.110(a) or (b).

In summary, the governor’s office may withhold the information you have marked under section 552.107 of the Government Code and must withhold the information we have marked under section 552.110(b) of the Government Code. The remaining information must be released to the requestor.

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,



Misty Haberer Barham
Assistant Attorney General
Open Records Division

MHB/som

Ref: ID# 463412

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Ms. Meghan Paulk-Ingle
Counsel for FlexSteel Pipeline Technologies, Inc.
DLA Piper, L.L.P.
401 Congress Avenue, Suite 2500
Austin, Texas 78701-3799
(w/o enclosures)

LM JUL 09 2013

At 8:34A M.
Amalia Rodriguez-Mendoza, Clerk

CAUSE NO. D-1-GN-12-002592

FLEXSTEEL PIPELINE	§	IN THE DISTRICT COURT OF
TECHNOLOGIES, INC.,	§	
<i>Plaintiff,</i>	§	
	§	
v.	§	126TH JUDICIAL DISTRICT
	§	
THE HONORABLE GREG ABBOTT, IN	§	
HIS CAPACITY AS TEXAS ATTORNEY	§	
GENERAL & THE HONORABLE RICK	§	
PERRY, IN HIS CAPACITY AS	§	
GOVERNOR OF TEXAS,	§	
<i>Defendants.</i>	§	TRAVIS COUNTY, TEXAS

AGREED FINAL JUDGMENT

This is an open records lawsuit brought under the Public Information Act (PIA), Tex. Gov't Code ch. 552, in which FlexSteel Pipeline Technologies, Inc. sought the withholding of certain information held by Rick Perry, Governor of Texas. All matters in controversy between Plaintiff, FlexSteel Pipeline Technologies, Inc. (FlexSteel) and Defendants, Greg Abbott, Attorney General of Texas (the Attorney General), and Rick Perry, Governor of Texas (the Governor), arising out of this lawsuit have been resolved, and the parties agree to the entry and filing of an agreed final judgment.

Texas Government Code section 552.325(d) requires the Court to allow the requestor of information a reasonable period of time to intervene after notice of the intent to enter into settlement is attempted by the Attorney General. The Attorney General represents to the Court that, in compliance with Tex. Gov't Code § 552.325(c), the Attorney General sent notice by certified letter to the requestor, Mr. R. Keith Cochran, on 6/17/13, providing reasonable notice of this setting (see attached certified mail receipt). The requestor was informed of the parties' agreement that the Governor must withhold portions of the information at issue in this suit, as agreed upon between the parties. The requestor

was also informed of his right to intervene in the suit to contest the withholding of the information. The requestor has neither informed the parties of his intention to intervene, nor has a motion to intervene been filed.

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 in this suit.

IT IS THEREFORE ADJUDGED, ORDERED AND DECLARED THAT:

1. FlexSteel, the Attorney General, and the Governor have agreed that, in accordance with the PLA and under the facts presented, portions of the information at issue, as indicated by a redacted copy of the information at issue provided to the parties by the Attorney General, are excepted from disclosure pursuant to Tex. Gov't Code § 552.110(b) (hereinafter, the Excepted Information);

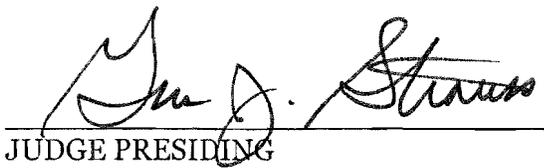
2. The Governor must withhold the Excepted Information described in Paragraph 1 of this order;

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

4. All relief not expressly granted is denied; and

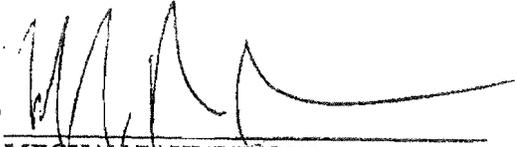
5. This Agreed Final Judgment finally disposes of all claims between FlexSteel, the Attorney General, and the Governor in this cause and is a final judgment.

SIGNED this 9th day of July, 2013.



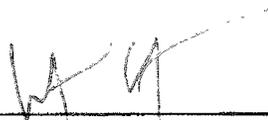
JUDGE PRESIDING

AGREED:



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Facsimile: (512) 457-7001
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Assistant Attorney General
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Administrative Law Division
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ATTORNEY FOR DEFENDANT GREG ABBOTT,
ATTORNEY GENERAL OF TEXAS



JOSHUA GODBEY
State Bar No. 24049996
Assistant Attorney General
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Austin, Texas 78711-2548
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Facsimile: (512) 477-2348
joshua.godbey@texasattorneygeneral.gov

ATTORNEY FOR DEFENDANT RICK PERRY,
GOVERNOR OF TEXAS

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1. Article Addressed to:

R. KEITH COCHRAN
 MAXIMUSalliance
 3131 McKinney Avenue, Suite 500
 Dallas, Texas 75204-2441
 [FlexSteel]: [Req Ltr 1-Settlement]

COMPLETE THIS SECTION ON DELIVERY

A. Signature

X

-
- Agent
-
-
- Addressee

B. Received by (Printed Name)

C. Date of Delivery

R. Keith Cochran

6/17/13

 D. Is delivery address different from item 1? Yes
 If YES, enter delivery address below: No

3. Service Type

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- Certified Mail
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- Express Mail
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- Registered
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-
- Insured Mail
-
- C.O.D.

4. Restricted Delivery? (Extra Fee)

 Yes

2. Article Number

(Transfer from service label)

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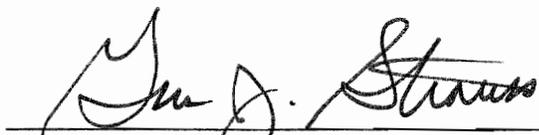
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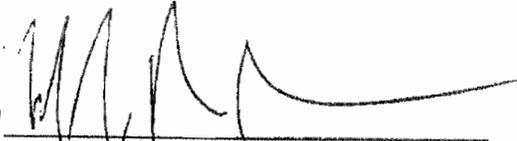
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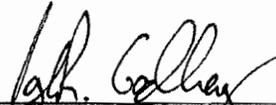
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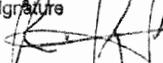
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A. Signature  Agent
 Addressee

B. Received by (Printed Name) C. Date of Delivery
 R. Keith Cochran 6/17/13

D. Is delivery address different from item 1? Yes
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3. Service Type
 Certified Mail Express Mail
 Registered Return Receipt for Merchandise
 Insured Mail C.O.D.

4. Restricted Delivery? (Extra Fee) Yes

2. Article Number
 (Transfer from service label)

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