



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

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

June 5, 2013

Ms. Linda Turner Spears
President
Board of Commissioners
Port of Port Arthur Navigation District of Jefferson County
P.O. Box 1428
Port Arthur, Texas 77641

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

OR2013-09333

Dear Ms. Spears:

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# 489359.

The Port of Port Arthur Navigation District of Jefferson County, Texas (the "port") received a request for documents related to a lease agreement between the port and Texas Pellets, Inc. ("Texas Pellets"). You do not take a position as to whether the submitted information is excepted from disclosure under the Act. However, you state, and provide documentation showing, you notified Texas Pellets of the port's receipt of the request for information and of its right to submit arguments to this office as to why the requested information should not be released. *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 correspondence from Texas Pellets objecting to the release of the requested information under sections 552.101 and 552.110 of the Government Code. We have reviewed the submitted arguments and information.

Initially, Texas Pellets asserts some of the submitted information is not responsive to the request for information. A governmental body must make a good-faith effort to relate a request to information that is within its possession or control. *See* Open Records Decision No. 561 at 8-9 (1990). The port has reviewed its records and determined the documents it has submitted are responsive to the request. Thus, we find the port has made a good-faith

effort to relate the request to information within its possession or control. Accordingly, we will determine whether the port must release the submitted information under the Act.

We must next address the port's procedural obligations under section 552.301 of the Government Code, which prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Pursuant to section 552.301(b), a governmental body must ask for a decision from this office within ten business days of receiving the written request. Gov't Code § 552.301(b). You inform us the port received the request for information on February 22, 2013. Thus, the port's ten-business-day deadline to request a ruling was March 8, 2013. However, the port did not request a decision from this office until April 2, 2013.¹ *See id.* Therefore, the port failed to comply with the procedural requirements mandated by section 552.301.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ); *see also* Open Records Decision No. 630 (1994). A compelling reason exists when third-party interests are at stake or when information is confidential under other law. Open Records Decision No. 150 (1977). The interests of Texas Pellets are at stake. Therefore, we will consider whether the submitted information must be withheld to protect its interests.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses the doctrine of common-law privacy, which protects information that (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). However, the doctrine of common-law privacy protects the privacy interests of individuals, not of corporations or other types of business organizations. *See* Open Records Decision Nos. 620 (1993) (corporation has no right to privacy), 192 (1978) (right to privacy is designed primarily to protect human feelings and sensibilities, rather than property, business, or other pecuniary interests); *see also Rosen v. Matthews Constr. Co.*, 777 S.W.2d 434 (Tex. App.—Houston [14th Dist.] 1989) (corporation has no right to privacy (citing *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950))), *rev'd on other grounds*, 796 S.W.2d 692 (Tex. 1990). Upon review, we find none of the submitted

¹We note an attorney representing the port submitted correspondence to this office postmarked February 26, 2013 that contained a copy of the requested information and the request for information, but the port did not request a ruling from this office in that correspondence. *See* Gov't Code § 552.301(e).

information is highly intimate or embarrassing. Therefore, the submitted information is not confidential under common-law privacy and the port may not withhold it from release under section 552.101 on that ground.

Section 552.101 of the Government Code also encompasses the constitutional right to privacy, which protects two kinds of interests. See *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977); see also Open Records Decision Nos. 600 at 3-5 (1992), 478 at 4 (1987), 455 at 3-7 (1987). The first is the interest in independence in making certain important decisions related to the “zones of privacy,” which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. See *Fadjo v. Coon*, 633 F.2d 1172 (5th Cir. 1981); see also ORD 455 at 3-7. The second constitutionally protected privacy interest is in freedom from public disclosure of certain personal matters. See *Ramie v. City of Hedwig Village, Tex.*, 765 F.2d 490 (5th Cir. 1985); see also ORD 455 at 6-7. This aspect of constitutional privacy balances the individual’s privacy interest against the public’s interest in the information. See ORD 455 at 7. Constitutional privacy under section 552.101 is reserved for “the most intimate aspects of human affairs.” *Id.* at 8 (quoting *Ramie*, 765 F.2d at 492). Upon review, we find you have failed to demonstrate how any portion of the submitted information falls within the zones of privacy or implicates an individual’s privacy interests for purposes of constitutional privacy. Consequently, the port may not withhold any of the submitted information under section 552.101 in conjunction with constitutional privacy.

Texas Pellets asserts the information at issue is excepted from disclosure under section 552.110 of the Government Code. Section 552.110(a) of the Government Code exempts from disclosure “[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision.” 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.² RESTATEMENT OF TORTS § 757 cmt. b. This office must 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 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). We also note pricing information pertaining to a particular 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." RESTATEMENT OF TORTS § 757 cmt. b; *see Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); ORDs 319 at 3, 306 at 3.

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." 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). However, the pricing information of a winning bidder is generally not excepted under section 552.110(b). *See* Open Records Decision Nos. 514 (1988) (public has interest in knowing prices charged by government contractors), 319 at 3 (information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing is not ordinarily excepted from disclosure under statutory predecessor to section 552.110). *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). Moreover, we believe the public has a strong interest in the release of prices in government contract awards. *See* ORD 514.

Having considered Texas Pellets's arguments and reviewed the information at issue, we find Texas Pellets has not shown any of the submitted information meets the definition of a trade

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

secret or demonstrated the necessary factors to establish a trade secret claim. *See* Gov't Code § 552.110(a). We also find Texas Pellets has made only conclusory allegations that release of the information at issue would cause it substantial competitive injury and has provided no specific factual or evidentiary showing to support such allegations. *See id.* § 552.110(b). Therefore, the port may not withhold any of the information pursuant to section 552.110.

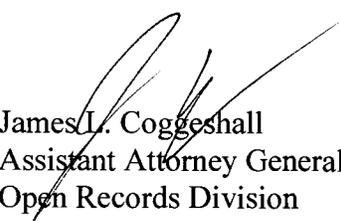
The submitted information contains an insurance policy number. Section 552.136(b) of the Government Code provides that “[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.”³ *Id.* § 552.136. This office has determined an insurance policy number is an access device number for purposes of section 552.136. Thus, the port must withhold the insurance policy number we have marked under section 552.136.

To conclude, the port must withhold the information we have marked under section 552.136 of the Government Code. The port must release the remaining information 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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/tch

³The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body. *See* Open Records Decision Nos. 481 at 2 (1987), 480 at 5 (1987); *see, e.g.*, Open Records Decision No. 470 at 2 (1987) (because release of confidential information could impair rights of third parties and because improper release constitutes a misdemeanor, attorney general will raise predecessor statute of section 552.101 on behalf of governmental bodies).

Ref: ID# 489359

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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JUN 08 2016 ml

At 1:20 P.M.
Velva L. Price, District Clerk

No. D-1-GN-13-002000

TEXAS PELLETS, INC.
Plaintiff,

v.

GREG ABBOTT, ATTORNEY
GENERAL OF TEXAS,
Defendant.

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IN THE DISTRICT COURT

261st JUDICIAL DISTRICT

TRAVIS COUNTY, TEXAS

AGREED FINAL JUDGMENT

The parties, Plaintiff Texas Pellets, Inc. ("TPI") and Defendant Ken Paxton,¹ Attorney General of Texas, agree that all matters in controversy between them have been fully and finally resolved.

This is an action brought by Plaintiff TPI to challenge Letter Ruling OR2013-09333 (the "Ruling"). The Port of Port Arthur Navigational District of Jefferson County, Texas (the "Port") received a request from Liz Paris on behalf of multiFUELS, L.P. (the "Requestor") pursuant to the Public Information Act (the "PIA"), Tex. Gov't Code ch. 552, for a copy of documents related to a lease agreement between the Port and TPI. These documents contain information TPI claims is confidential, proprietary, trade secret, and commercial and financial information exempt from disclosure under the PIA ("TPI Information"). The Port requested a ruling from the Open Records Division of the Office of the Attorney General ("ORD"). ORD subsequently issued the Ruling, ordering the release of the TPI Information. The Port holds the information that has been ordered to be disclosed.

¹ Greg Abbott was sued in his official capacity as the Attorney General of Texas. Ken Paxton is the successor in office to Greg Abbott as the Attorney General of Texas and is the proper defendant in this lawsuit.



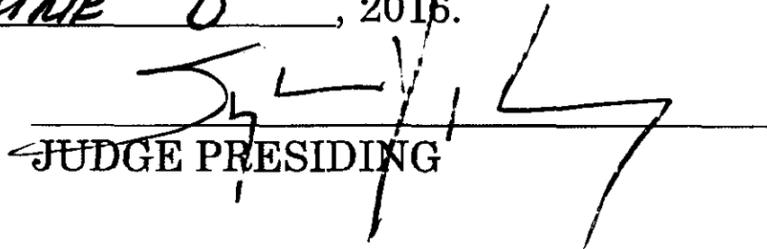
The parties represented to the Court that: (1) pursuant to Tex. Gov't Code § 552.327(2) the Attorney General has determined and represents to the Court that the Requestor has in writing voluntarily withdrawn its request, (2) in light of this withdrawal the lawsuit is now moot, and (3) pursuant to Tex. Gov't Code § 552.327(1) the parties agree to the dismissal of this cause.

IT IS THEREFORE ORDERED that:

1. Because the request has been withdrawn, no TPI Information should be released in reliance on Letter Ruling OR2013-09333. The Ruling should not be cited for any purpose related to the TPI Information as a previous determination by the Office of the Attorney General under Tex. Gov't Code § 552.301(f).
2. Within 30 days of the Court signing this Agreed Final Judgment, the Office of the Attorney General shall notify the Port in writing of this Agreed Final Judgment and shall attach a copy of this Judgment to the written notice. In the notice, the Office of the Attorney General shall expressly instruct the Port that pursuant to Tex. Gov't Code § 552.301(g) it shall not rely upon Letter Ruling OR2013-09333 as a previous determination under Tex. Gov't Code § 552.301(f) nor shall it release any TPI Information in reliance on said Ruling, and if the Port receives any future requests for the same or similar TPI Information it must request a decision from the Office of the Attorney General, which shall review the request without reference to Letter Ruling OR2013-09333.
3. All costs of court and attorney fees are taxed against the parties incurring same.

4. All other requested relief not expressly granted herein is denied.
5. This cause is hereby DISMISSED without prejudice.
6. This order disposes of all the parties and all the claims and is final.

SIGNED on JUNE 8, 2016.

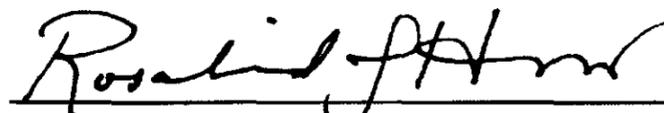

JUDGE PRESIDING

AGREED:



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