



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

February 7, 2006

Ms. Bonnie Prosser Elder  
Chief Counsel  
VIA Metropolitan Transit  
P.O. Box 12489  
San Antonio, Texas 78212

OR2006-01261

Dear Ms. Elder:

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# 241812.

The VIA Metropolitan Transit ("VIA") received a request for the following information related to Project No. 05-151: (1) "[c]opies of all proposals, exhibits and attachments[;]" (2) "[a]ll documents, notes, correspondence, and records regarding the award of [the] contract(s)[;]" and (3) "[a]ll documents, notes, correspondence and records regarding the evaluation of, responsiveness of, scoring of and/or fitness of all bidders or offerors." You state, and provide documentation showing, that the requestor subsequently amended his request to limit the scope of item 1 and to entirely exclude item 2 of the request. You claim that some of the submitted information is excepted from disclosure under section 552.111 of the Government Code. While you make no arguments on behalf of VIA regarding the remaining submitted information, you contend that it may contain proprietary information subject to exception under the Act. Accordingly, you state, and provide documentation showing, that you notified the following interested third parties of VIA's receipt of the request for information and of each company's right to submit arguments to this office as to why the information at issue should not be released to the requestor: First Transit, Inc. ("First Transit"); LeFleur Transportation of Natchez, Inc. ("LeFleur"); and Noah's Express Tours ("Noah's"). *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 correspondence from an attorney for LeFleur. We have considered the submitted arguments and reviewed the submitted information.

Initially, we must address VIA's procedural obligations under the Act. Pursuant to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply not later than the tenth business day after the date of receiving the written request. Additionally, pursuant to section 552.301(e), a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. In this instance, VIA received the request for information on October 31, 2005. You did not, however, request a decision from this office until December 1, 2005. Furthermore, you did not submit the information required by section 552.301(e) until December 2, 2005. Consequently, we find that VIA has failed to comply with the procedural requirements of 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 information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 319 (1982). Section 552.111 of the Government Code is a discretionary exception to disclosure and may be waived. *See Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 470 at 7 (1987) (statutory predecessor to section 552.111 subject to waiver).* Therefore, VIA may not withhold any of the submitted information pursuant to section 552.111. However, because the proprietary interests of third parties can provide compelling reasons to overcome the presumption of openness, we will consider whether the submitted information must be withheld to protect third party interests.

Next, we note that an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why requested information relating to that party should be withheld from disclosure. *See Gov't Code § 552.305(d)(2)(B).* As of the date of this letter, neither First Transit nor Noah's has submitted any comments to this office explaining how release of the information at issue would affect its proprietary interests. Therefore, First Transit and Noah's have provided us with no basis to conclude that either company has a protected proprietary interest in any of the submitted information. *See Gov't Code § 552.110(b)* (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); Open Records Decision Nos. 639 at 4 (1996), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). Accordingly, we conclude that VIA may not withhold any portion of the submitted information on the basis of any proprietary interest that First Transit and Noah's may have in the information.

LeFleur contends that some of its proposal 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: (a) trade secrets obtained from a person and privileged or confidential by statute or judicial decision; and (b) 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).

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.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 at 2 (1990). Section 757 provides that 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). There are six factors to be assessed in determining whether information qualifies as a trade secret:

- (1) the extent to which the information is known outside of [the company's] business;
- (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 to [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing this information; and
- (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 No. 232 (1979). This office must accept a claim that information subject to the Act is exempted as a trade secret if a *prima facie* case for exemption is made and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990). However, we cannot conclude that section 552.110(a) is applicable unless it has been shown that 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).

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. Gov’t Code § 552.110(b); *see also National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974); Open Records Decision No. 661 (1999).

Upon review of the submitted information and arguments submitted by LeFleur, we find that LeFleur has made a *prima facie* case that portions of its information are protected as trade secrets. Moreover, we have received no arguments that would rebut these claims as a matter of law. Thus, we have marked the portions of LeFleur’s information that VIA must withhold pursuant to section 552.110(a).<sup>1</sup> We find, however, that LeFleur has not presented a *prima facie* claim that any of its remaining information qualifies as a trade secret under section 552.110(a). We likewise find that LeFleur has not sufficiently shown that the release of any of its remaining information would be likely to cause it substantial competitive harm for purposes of section 552.110(b). *See* Open Records Decision Nos. 661 (1999) (for information to be withheld under commercial or financial information prong of section 552.110, business must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue); 509 at 5 (1988) (because costs,

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<sup>1</sup>As we are able to make this determination, we need not address LeFleur’s remaining argument against disclosure of this information.

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). We therefore conclude that none of the remaining information at issue is excepted from disclosure under section 552.110.

We note that some of the remaining information is excepted from disclosure under section 552.101 of the Government Code in conjunction with common law privacy.<sup>2</sup> Section 552.101 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 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. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The common law right to privacy encompasses personal financial information not relating to a financial transaction between an individual and a governmental body. *See* Open Records Decision Nos. 600 (1992), 545 (1990). We note, however, that common law privacy protects the interests of individuals, not those 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 U. S. v. Morton Salt Co.*, 338 U.S. 632, 652 (1950); *Rosen v. Matthews Constr. Co.*, 777 S.W.2d 434 (Tex. App.—Houston [14th Dist.] 1989), *rev’d on other grounds*, 796 S.W.2d 692 (Tex. 1990) (corporation has no right to privacy). We have marked the personal financial information that VIA must withhold pursuant to section 552.101 in conjunction with common law privacy.

In summary, we conclude that VIA must withhold the information we have marked under section 552.110(a) of the Government Code and section 552.101 of the Government Code in conjunction with common law privacy. The remaining submitted information must be released to the requestor.

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

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<sup>2</sup> This office will raise a mandatory exception like section 552.101 on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 Dep't of Pub. 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 Office of the Attorney General 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,



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Open Records Division

CEC/sdk

Ref: ID# 241812

Enc. Submitted documents

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