



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.



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

April 16, 2015

Ms. Kerri L. Butcher
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.

OR2015-07385

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# 560435.

The Capital Metropolitan Transportation Authority (the "authority") received a request for each final proposal revisions submitted for RFP-128735 and the related scoring evaluations. The authority states it will release some of the requested information. The authority does not take a position as to whether the submitted information is excepted from disclosure under the Act. However, the authority states, and provides documentation showing, it notified New Flyer of America, Inc. ("New Flyer") of the authority's receipt of the request for information and of New Flyer's 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 comments from New Flyer objecting to the release of some of the submitted information under sections 552.101, 552.104, and 552.110 of the Government Code.¹ We have reviewed the submitted arguments and information.

Section 552.110 of the Government Code 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." Gov't Code § 552.110(a). The Texas Supreme Court has adopted the definition of trade secret

¹Although New Flyer also raises section 552.031 of the Government Code, we note there is no such section in the Act.

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).

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 § 552.110(b). Section 552.110(b) requires a specific factual or evidentiary showing, not conclusory or generalized allegations, 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 release of information would cause it substantial competitive harm).

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).

Upon review, we find New Flyer has established the release of some of the information at issue would cause it substantial competitive injury. Therefore, the authority must withhold this information, which we have marked, under section 552.110(b).³ However, we also find New Flyer has failed to establish release of any of the remaining information would cause it substantial competitive injury. *See id.* § 552.110(b). In addition, we conclude New Flyer has failed to establish a *prima facie* case that any of the remaining information is a trade secret. *See id.* § 552.110(a); ORD 402. Therefore, the authority may not withhold any of the remaining information under section 552.110.

We understand New Flyer to assert some of the remaining information is confidential under common-law privacy. 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. Section 552.101 encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. 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 remaining information satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the remaining information is not confidential under common-law privacy, and the authority may not withhold it under section 552.101 on that ground.

New Flyer also argues some of the remaining information is excepted from disclosure under section 552.104 of the Government Code. Section 552.104 excepts from disclosure information that, if released, would give an advantage to a competitor or bidder. Gov’t Code § 552.104. However, section 552.104 is a discretionary exception that protects only the interests of a governmental body, as distinguished from exceptions that are intended to protect the interests of third parties. *See* Open Records Decision Nos. 592 (1991) (statutory predecessor to section 552.104 designed to protect interests of a governmental body in a competitive situation, and not interests of private parties submitting information to the government), 522 (1989) (discretionary exceptions in general). The authority did not assert section 552.104. Therefore, the authority may not withhold any of the information at issue

³As our ruling is dispositive, we do not address the authority’s other arguments to withhold this information.

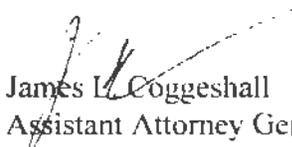
pursuant to that section. *See* ORD 592 (governmental body may waive statutory predecessor to section 552.104).

To conclude, the authority must withhold the information we have marked under section 552.110(b) of the Government Code. The authority must release the remaining information.

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/cbz

Ref: ID# 560435

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Mr. Andrew P. Vickers
Counsel for New Flyer of America, Inc.
Hohmann, Taube & Summers, L.L.P.
100 Congress Avenue, 18th Floor
Austin, Texas 78701
(w/o enclosures)

FEB 13 2017

At 1:39 P.M.
Velva L. Price, District Clerk

Cause No. D-1-GN-15-001642

NEW FLYER OF AMERICA INC.,
Plaintiff,

v.

HON. KEN PAXTON, ATTORNEY
GENERAL OF TEXAS, and CAPITAL
METROPOLITAN TRANSPORTATION
AUTHORITY,
Defendants.

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IN THE DISTRICT COURT OF

126th JUDICIAL DISTRICT

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 New Flyer of America Inc. ("New Flyer"), sought to withhold certain information which is in the possession of the Capital Metropolitan Transportation Authority (Capital Metro) from public disclosure. All matters in controversy between Plaintiff, New Flyer, and Defendants, Ken Paxton, Attorney General of Texas (Attorney General), and Capital Metro arising out of this lawsuit have been resolved by a Settlement Agreement, a copy of which is attached hereto as Exhibit "A", and the parties agree to the entry and filing of this Agreed Final Judgment.

The Attorney General represents to the Court that, in compliance with Tex. Gov't Code § 552.325(c), the Attorney General sent certified letters to the requestors, Mr. Steve Kratzer and Mr. Ben Grunat, on January 24, 2017, informing them of the setting of this matter on the uncontested docket on this date. The requestors were informed of the parties' agreement that Capital Metro will withhold the designated portions of the information at issue. The requestors were also informed of their right to intervene in the suit to contest the withholding of this information.



Verification of the certified mailing of the letter is attached to this judgment as Exhibit "B."

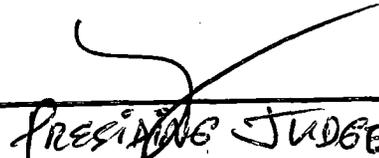
Neither requestor has filed a plea in intervention. Texas Government Code section 552.325(d) requires the Court to allow a requestor a reasonable period to intervene after notice is attempted by the Attorney General.

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:

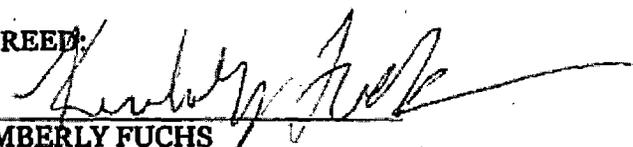
1. New Flyer, the Attorney General, and Capital Metro have agreed that in accordance with the PIA and under the facts presented, designated portions of the information at issue, which is contained in a bid from New Flyer to Capital Metro, is excepted from disclosure pursuant to Texas Government Code section 552.104. Pursuant to Texas Government Code section 552.104, Capital Metro will redact the bid in conformity with the redactions proposed by New Flyer on June 20, 2016.
2. Attorney General Letter Rulings OR2015-07307 and OR2015-07385 shall not be relied on as a previous determinations.
3. All court costs 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 that are the subject of this lawsuit between New Flyer, the Attorney General, and Capital Metro and is a final judgment.

SIGNED the 13TH day of FEBRUARY, 2017.


PRESIDING JUDGE
KARIN CRUMP

~~_____
PRESIDING JUDGE~~

AGREED:



KIMBERLY FUCHS

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Assistant Attorney General
Administrative Law Division
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NEW FLYER OF AMERICA INC.,
Plaintiff,

v.

HON. KEN PAXTON, ATTORNEY
GENERAL OF TEXAS, and CAPITAL
METROPOLITAN TRANSPORTATION
AUTHORITY,
Defendants.

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IN THE DISTRICT COURT OF

TRAVIS COUNTY, TEXAS

126th JUDICIAL DISTRICT

SETTLEMENT AGREEMENT

This Settlement Agreement (Agreement) is made by and between New Flyer of America Inc. ("New Flyer"), Ken Paxton, Attorney General of Texas (the Attorney General), and Capital Metropolitan Transportation Authority (Capital Metro) collectively "parties". This Agreement is made on the terms set forth below.

Background

This case is a challenge to Open Records Letter rulings OR2015-07307 and OR2015-07385. New Flyer disputed the rulings as they apply to New Flyer's information, and filed the above-styled lawsuit to preserve its rights under the PIA.

New Flyer submitted information and briefing to the Attorney General establishing that some of its information is excepted from disclosure under Texas Government Code section 552.104. Capital Metro and the Attorney General agree to the settlement.

Texas Government Code section 552.325(c) allows the Attorney General to enter into a settlement pursuant to which the information at issue in this lawsuit may be withheld. The parties wish to resolve this matter without further litigation.

Terms

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

1. New Flyer, the Attorney General, and Capital Metro have agreed that in accordance with the PIA and under the facts presented, portions of the information at issue, which is contained in a bid from New Flyer to Capital Metro, and which has been designated by New Flyer in writing to the parties is excepted from disclosure pursuant to Texas Government Code section 552.104. Pursuant to Texas Government Code section 552.104, Capital Metro will redact the bid in conformity with the redactions proposed by New Flyer on June 20, 2016, prior to producing it to any third-party PIA requestors.
2. New Flyer, Capital Metro, 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. The agreed final judgment will be presented to the court for approval, on the uncontested docket, with at least 15 days prior notice to the requestors.
3. The Attorney General agrees that he will also notify the requestors, as required by Tex. Gov't Code § 552.325(c), of the proposed settlement and of their rights to intervene to contest New Flyer's right to have Capital Metro withhold the information.
4. A final judgment entered in this lawsuit after a requestor timely intervenes will prevail over this Agreement to the extent of any conflict.
5. Each party to this Agreement will bear their own costs, including attorney fees relating to this litigation.

6. 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.

7. New Flyer 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 New Flyer has against the Attorney General and/or Capital Metro arising out of the matters described in this Agreement.

8. 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 New Flyer and/or Capital Metro arising out of the matters described in this Agreement.

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

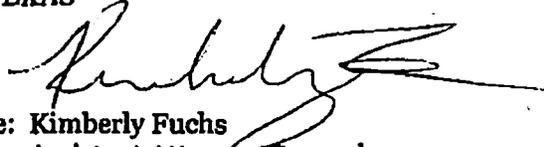
10. This Agreement shall become effective, and be deemed to have been executed, on the date on which the last of the undersigned parties sign this Agreement.

NEW FLYER OF AMERICA INC.

By: 
name: Paul Matula
Andrew Vickers
firm: Waller Lansden Dortch & Davis,
LLP

Date: 1/24/17

**KEN PAXTON, ATTORNEY GENERAL
OF TEXAS**

By: 
name: Kimberly Fuchs
title: Assistant Attorney General,
Administrative Law Division

Date: 1/24/17

**CAPITAL METROPOLITAN TRANSPORTATION
AUTHORITY**

By: 
name: C. Robert Heath
title: Bickerstaff Heath Delgado
Acosta, LLP

Date: 1-24-17

Facsimile: (512) 320-5638
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**ATTORNEY FOR DEFENDANT CAPITAL METROPOLITAN
TRANSPORTATION AUTHORITY**