

No. 11-11-00112-CV

\* \* \*

IN THE COURT OF APPEALS  
FOR THE ELEVENTH JUDICIAL DISTRICT  
AT EASTLAND, TEXAS

\* \* \*

WASTE MANAGEMENT OF TEXAS, INC.  
Appellant

V.

GREG ABBOTT, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF  
TEXAS, COUNTY OF WILLIAMSON, and KURT E. JOHNSON  
Appellees

\* \* \*

ON APPEAL FROM THE 261<sup>ST</sup> JUDICIAL DISTRICT COURT  
OF TRAVIS COUNTY, TEXAS  
TRIAL COURT CSE NUMBER D-1-GN-09-004107

\* \* \*

APPELLEE's BRIEF

\* \* \*

KURT E JOHNSON  
Appellee and Intervenor

Appearing *Pro Se*

\* \* \*

This Appellee requests ORAL ARGUMENT  
and does not object to nor oppose Appellant's request for ORAL ARGUMENT

## IDENTITY OF PARTIES AND COUNSEL

The following is a full list of all parties, as well as the names and addresses of all counsel:

### **PARTIES**

### **COUNSEL**

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## DESIGNATION OF PARTIES

Unless otherwise described or identified, the parties are designated as follows:

“Appellant,” “Plaintiff,” or “Waste Management” shall refer to Waste Management of Texas, Inc.

“Appellees” or “Defendants” shall refer collectively to all other parties in the case, and shall refer

individually to those parties as follows: “Attorney General” shall refer individually to Attorney

General Greg Abbott, “County” shall refer individually to the County of Williamson, and

“Intervenor,” “Requestor,” or “Johnson” shall refer individually to Kurt Johnson.

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APPELLEE'S BRIEF

TO THE HONORABLE COURT OF APPEALS:

NOW COMES Kurt Johnson, Intervenor, and would respectfully show the following:

On August 11, 2009, Intervenor filed an Open Records Request pursuant to the Texas Public Information Act with Williamson County requesting all of the sequentially-numbered gatehouse tickets for individual loads of solid waste deposited by customers at the Williamson County Landfill on one day of business, namely July 14, 2009. Williamson County owns the landfill, owns the land on which the landfill is located, is the sole holder of Permit 1405 (b) authorizing operation of the landfill as issued by the Texas Commission on Environmental Quality (TECQ) , and is the *Site Operator* in control of the landfill. Appellant is only the landfill contractor, subject to a Landfill Operating Agreement executed in March of 2009.

## ISSUES PRESENTED

Appellant avers that pricing and volume information on Waste Management's waste tickets constitute a "trade secret" of Waste Management within the meaning of section of 552.110(a) of the Texas Government Code. Johnson shows that such is not the case.

Appellant avers that the county's disclosure of the pricing and volume information on Waste Management's (solid) waste (gatehouse) tickets would cause substantial competitive harm to Waste Management within the meaning of section 552.110(b) of the Texas Government Code. Johnson shows that such is not the case.

Johnson also shows that even though Appellant procures the information found on the gatehouse tickets which Appellant generates, the information and the tickets belong to and are controlled by Williamson County, a subdivision of Texas government, as per the landfill contract (hereinafter, the 2009 Landfill Operating Agreement, or "LOA"), which also owns the landfill, the land on which the landfill is located, and is the *Site Operator* on Permit 1405(b) as issued by the Texas Commission on Environmental Quality.

In Johnson's proactive argument for the Appellant's obligation to see to the release of the gatehouse tickets through the county, argued is the real reason why the gatehouse tickets have a compelling value for the public interest and why they should be released, and this reason has nothing to do with (and is not cited by the Appellant for) the true importance of the information being made public. Johnson argues convincingly the veracity of this reason.

### **Negating Appellant's First Argument**

Appellant argues that the information sought by Johnson constitutes a "trade secret" based on *Hyde Corp v. Huffines*, 314 S.W.2d 7653 (Tex. 1958). The characterization is that a "trade secret" applies when such information gives someone "an opportunity to to obtain an advantage who do not

know or use it .... [It may] relate to the sale of goods or other operations of the business.”

As argued by Appellant, the “Restatement of Torts” lists six criteria associated with the *Huffines* case which must be met (either wholly or partially) to establish that information is indeed a “trade secret”. Johnson avers that none of those criteria has been met. Before proceeding to show how none of those six criteria has been met, an economic and financial detail must be explained.

Over time, Johnson has submitted numerous Open Record Requests to Williamson County regarding operation of the county's landfill. This information is contained in monthly, quarterly and annual reports filed by the Appellant which categorize and aggregate revenues and tonnage pertaining to the landfill. Using those reports as acquired through Open Records Requests, Johnson has published analyses of landfill financials on the website: [www.gismedia.com/agreement](http://www.gismedia.com/agreement), in citizens' newsletters and in other venues available to the public. Here is an example of one of those analyses:

*For the period of March 1, 2009 through through June 30, 2009, total tonnage reported was 112,666 tons, and revenues for that tonnage from tipping fees was \$2,502,623. Doing the math, the per-ton tipping fee is \$22.21 per ton. The posted gate rate is \$31.50 per ton, so the explanation for the differential obviously in found in the discounted rates for commercial haulers. It is appropriate to conclude that the discounted rates to commercial haulers averages less than some \$22 per ton, but a more precise number is not available inasmuch as we don't know what proportion of the tonnage is due to discounted haulers as compared to non-discounted haulers. If the proportion of the tonnage due to discounted haulers is substantially higher than the tonnage provided by non-discounted haulers (private citizens), then the tipping fee for discounted haulers would be significantly less than \$22 per ton. The tickets sought by Johnson's request would provide a more specific figure, but in substance, the discount information obviously is known outside of Waste Management.*

*Additional information consistent with the above conclusion is that for the four-month period, there were collected tipping fees of \$2,502,623, resulting in royalty payments to the county of \$313,055. Inasmuch as the Agreement calls for a royalty schedule of 10 percent (for the first year), a royalty total of \$313,055 would reflect tipping fee collections of \$3,130,550.*

*This difference of some \$600,000 for four months (or some \$150,000 per month) is best explained by the fact that discounts to commercial haulers are grossed up for the purpose of royalty payments to the county, but the result is that these haulers receive in the aggregate some \$150,000 per month in discounts (a discount of some 30.5 percent) below the gate rate available to the public (\$31.50 per ton discounted to \$22.21 per ton). It is reasonable to say that the discount provided to commercial haulers actually is much greater than that in light of the fact that the \$22.21 per ton for all waste includes revenues from the general public, which pays the posted gate rate of \$31.50.*

*And so, the obvious fact that substantial discounts are made available by WMI to commercial haulers (including its own hauling company, which is the key element in the selfdealing component) is already well-known, despite WMI's efforts, as described by Muelker,<sup>1</sup> to secret the information. The secreting away of the information is even more significant in light of the appearance that WMI is doing so (secreting) as part of WMI's possible and apparent abuse of its position in being the contractor for the operation of a publicly-owned asset.”<sup>2</sup>*

Therefore, it already is known to the public as provided through Johnson's published analyses that the Appellant gives commercial haulers (including its own hauling company) a discount of approximately 30 percent off of the retail gate, resulting in a tipping fee (at most) of \$22 per ton, on average, a significant discount off of the posted gate rate of \$31.50 per ton.<sup>3</sup>

Given this information, the response to the Appellant's citation of the six factors in the Restatement of Torts is as follows:

**Regarding point one**, “the extent to which the information is known outside of the [company's] business,” it is abundantly clear that the information is known outside of the company's business, as shown by Johnson's analyses. The public can know full well what the discounts are and how substantial they are.

**Regarding point two**, “the extent to which it is known by employees and others involved in the [company's] business,” it is clear that Appellants' employees who need to know what the prices and discounts are know what they are, and those with no need to know simply do not have the information. When Mike Thompson, Appellant's Senior Manager for Third Party Landfill Revenue testified at trial regarding this information, he did not testify that the discount and pricing information was withheld from employees who had reason to know what it is, but in that same regard, there would be no reason for it to be given to employees who had no use for it in their respective positions in the company. Simply not advancing the information to all or even a smaller number of employees whose positions

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1 Ruth Muelker is Appellant's in-house counsel who handled the case before Bickerstaff Heath *et al* was retained.

2 Accessible at <http://www.gismedia.com/agreement>, published by Kurt Johnson.

3 When this analysis was performed, the posted gate rate was \$31.50 per ton. It now has dropped to \$30.50 per ton.

are irrelevant to the issue is not an argument that a trade secret is being protected. There could be many other reasons for not circulating that information within the company, including embarrassment over the size of the discounts given to commercial haulers and to the Appellant's own hauling company, which could constitute self-dealing while taking advantage of a public asset owned by Williamson County.

**Regarding point three**, “the extent of measures taken by [the company] to guard the secrecy of the information,” the Appellant's claim that these discounted rates are not distributed generally throughout the company as opposed to those who need the information because of the positions they hold is irrelevant, especially in light of the fact that the scope of the discounts already is known and published through Johnson's analyses. There could be many reasons for the Appellant limiting the information only to those who need it to do their work, a primary reason of which would be work efficiency and not burdening other employees with information which they do not need.

In its Brief to the Appeals court, Appellant argues that a provision in the landfill contract between Appellant and Williamson County (the LOA) allows the Appellant to designate these gatehouse records as confidential. That language, as cited by Appellant, reads, “Contractor [Waste Management] may designate documents as Confidential Business Records. Documents reasonably so designated shall remain the exclusive property of Contractor.”<sup>4</sup>

There is another incontrovertible fact negating the applicability of that argument:

Appellant cannot and has not demonstrated that it ever designated the information as “confidential business records” prior to the county's statutory requirement (10 business days) to respond to Johnson's initial Open Records Request for the gatehouse tickets, thus the gatehouse tickets should have been released to Johnson within that time frame because the required declaration of “Confidential Business Records” had not been made by Appellant.

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4 From Page 12 of 21 in the Appellant's *Brief*.

**Regarding point four**, “the value of the information to [the company] and to its competitors,” it is abundantly clear that, in light of the information in Johnson's analyses, it already is known that the tipping fee discounts given to Appellant's customers is in the range of 30 percent, so nothing on those gatehouse tickets would add to any substantive market-competition information already in the possession of the public and any of the Appellant's competitors who want to use the information. And the value of the information to the Appellant is self-evident. The Appellant's employees in the gatehouse need to know how much to charge for tipping fees in order to do business, but that is simply a necessary operating detail that has nothing to do with being a “trade secret”.

**Regarding point five**, “the amount of effort or money expended by [the company] in developing the information”, no information provided by the Appellant in briefs, filings, arguments, or by any of its witnesses sought to estimate or quantify the “effort” or “money” expended by the company in developing the information. Certainly, the effort and expense needed to figure out how much to discount commercial hauling rates is operationally important and needs to be done, but that is an entirely different matter from hiring guards for filing cabinets or going to other extreme measures to protect, as opposed to develop, the information. Protecting the information is not the same as developing it.

**Regarding point six**, “the ease or difficulty with which the information could be properly acquired or duplicated by others,” it is abundantly clear that Johnson, a single individual, on his own time and at his own expense “properly” acquired the information through Open Records Requests, and then performed some relatively simple algebraic calculations to determine the size of the discounts to commercial haulers—something a high school student with a basic competency in algebra could accomplish. For Johnson, it was relatively easy, and many other members of the public could have done the same thing.

## Negating Appellant's Second Argument

Appellant characterizes its Second Argument thus: “Release of the pricing and volume information at issue in this case would cause substantial competitive harm to Waste Management within the meaning of section 552.110(b) of the Texas Government Code.”

Throughout its narrative for this argument, including the statement by Appellant's witness, Mike Thompson, that the information is the “life blood' of Waste Management's business at the Williamson County Landfill,”<sup>5</sup> the Appellant does not acknowledge and offers no rebuttal to the fact that Johnson, in his published analyses, already has made the pricing and volume and information public. It already is known what the waste disposal volumes are as well as the level of discounted pricing.<sup>6</sup>

Anyone wanting to compete with the Appellant in running a landfill already knows the discounted rate based on the Johnson analysis. The information on the tickets is hardly a “life blood” trade secret. It already has been figured out. The so-called “competitive disadvantage” is a myth.

## Johnson's Proactive Arguments

As previously stated, the county owns the landfill, the property, the operating permit, and is named as the *Site Operator* on the state permit. The landfill is a public asset and is owned by the taxpayers of the county. As more than just a general principle, the public has a right to know who is being charged what rates for use of a public landfill. It is the county's landfill to use and manage as the legal *Site Operator*, and it owns all the records. The gatehouse tickets are included in this section of the LOA which states that the records “shall remain the exclusive property of the county.”<sup>7</sup>

The Appellant's mismanaged use of *Huffines* in making the “trade secrets” argument, and Johnson's neutralization of the tangentially-related, six points in the *Restatement of Torts* is amplified by two precedent cases which are clearly on point and more applicable than *Huffines*:

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<sup>5</sup> From Page 17 of 21 in Appellant's *Brief*.

<sup>6</sup> An approximately 30 percent discount off of the posted gate rate of \$31.50 per ton, or about \$20 to \$22 per ton.

<sup>7</sup> LOA, Page 19 in 2.11 (b) (2).

In a Greg Abbott Opinion (OR200-08593) issued on June 23, 2009 involving Houston Community College, the Opinion stated: “We note that pricing information pertaining to a particular contract is not a trade secret because it is “simply information as to single or ephemeral events in the conduct of business.””

In a John Cornyn Opinion (OR-2002-2648) issued on May 17, 2002 involving the West Orange Grove Independent School District, the Opinion stated: “We note that pricing information is not a trade secret because it relates exclusively to a particular circumstance rather than “a process or device for continuing use in the operation of a business.””

Johnson cited these precedent cases in his *Petition to Intervene* in the District Court trial phase of this case, and the Appellant neither neutralized nor argued against these precedents during that trial nor in its Appellant's *Brief* to the Court of Appeals for the Eleventh Judicial District. It was and is obvious that nothing that Appellant could say about these precedents would be of any help to its case. And, in this specific case, Attorney General Greg Abbott sided with the Appellees and, in fact, is one.

As previously stated, there is a prominent reason or motive for the attempt by the Appellant as well as the county to withhold the gatehouse tickets from public scrutiny.

The county's periodic audits of the Appellant's financial records regarding the management of the landfill have long been known to be brief and superficial, and it has been more than clear that the audits have not included examination of the sequentially-numbered gatehouse tickets as a means of ratifying or “proving up” the truth of accuracy in the monthly, quarterly and annual reports filed by the Appellant with the county. Over time, citizens who have observed the landfill activity and compared notes have suspected that more solid waste is being deposited in the landfill than is being reported. For example, even though the Appellant, in managing the landfill, has issued press releases and made optimistic announcements regarding its aggressive recycling of shingles and construction-and-demolition materials (including the use of a boiler-stack-conveyor structure for processing shingles),

for the entire year of 2011, the Appellant paid the county only \$2,134.13 in royalties.<sup>8</sup>

These questions, suspicions and discrepancies could be illuminated if there were a serious audit of the gatehouse tickets, which contain the raw, source information for the landfill's volumes and financials. In Appellant's *Brief* to the 11<sup>th</sup> Appeals Court dated July 11, 2011, it is confirmed that the county has not been diligent in auditing the gatehouse tickets. The *Brief* states: "On the date that this case went to trial, the only time that the county had ever requested the tickets was in response to the public information request that forms the basis of this lawsuit."<sup>9</sup>

This case revolves around a somewhat unique and even erratic arrangement in which the public interest has gone unprotected. Even though the landfill is a publicly-owned asset (owned by county government which owns the land, holds the permit, and is the *Site Operator*), the Appellant, per the LOA, can set the prices charged for using the facility, so long as those prices are below \$40 per ton. The Appellant is not required to notify the county outright regarding the discounted rates charged to commercial customers, nor is the Appellant required to notify the county when those rates change. The single and best way for the county to know these rates as charged at its own landfill would be to glean the information from the gatehouse tickets, which it has refused to inspect as part of the auditing process. Clearly, the public interest has been left unprotected by this arrangement, a problem that would instantly be cured if the public had access to the gatehouse tickets. It is unreasonable to conclude that the public should not have access to the rates charged at a county-owned, public landfill, especially rates for commercial haulers which constitute the bulk of the landfill customers in both volume and revenue categories.

The county's failure to perform proper auditing of the landfill by closely examining the gatehouse tickets and reconciling the information found therein with the monthly, quarterly and annual

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<sup>8</sup> As revealed in a letter dated January 21, 2011 from Appellant's senior financial analyst, Steven Johnson, to County Judge Dan Gattis and procured through an Open Records Request.

<sup>9</sup> Pages 3 of 21 and 4 of 21.

reports filed with the county by the Appellant is consistent with the county's failure to perform in this case as a defendant and as an Appellee with the other Appellees. County has not filed a single brief, offered a single witness, or made a single argument in support of the public's right to have access to these gatehouse tickets, a pernicious failure in light of the added failure to audit the gatehouse tickets. Even though the county has not been diligent in protecting the integrity of this public asset, the county-owned landfill, it does not mean that proper scrutiny should not be undertaken. If the public is willing to undertake that scrutiny, then the public should be permitted to do so, and in fact the public is legally entitled to do so based on the provisions of the LOA and precedent Attorney General opinions and court cases, especially in light of the way the Appellant has maligned *Huffines*.

### **CONCLUSION**

This case is not about “trade secrets” or any competitive disadvantage Appellant claims it would suffer should the tickets be released. This *Brief* has shown that those arguments on the part of Appellee have no merit anyway. This case actually is about proper oversight of a public asset which processes at least \$6 million annually or an amount which might be substantially higher than that, the truth of which will not be known unless and until the public is allowed to exercise its legal right to examine the gatehouse tickets for this very public landfill. The conclusions by both the Attorney General and the trial court in supporting the position of the Appellees should be sustained.

### **PRAYER**

For these reasons, Kurt Johnson, intervenor, prays that this court uphold the judgment of the trial court in the interest of justice, in comporting with law, and in supporting transparency in government, especially as involving a valuable public asset.

## CERTIFICATE OF SERVICE

I hereby certify, by my signature below, that a true and correct copy of this Appellee's *Brief* was forwarded by United States Postal Service First Class Mail and by electronic FACSIMILIE transmission on August 10, 2011 to the following parties of record:

### **PARTIES**

#### **APPELLANT:**

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### **COUNSEL**

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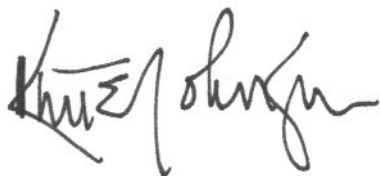
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