ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 12, 2009

Ms. Dolores Alvarado Hibbs
General Counsel
Texas Department of Agriculture
P.O. Box 12847
Austin, Texas 78711

OR2009-11237

Dear Ms. Hibbs:

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# 352004 (TDA-PIR-09-409).

The Texas Department of Agriculture (the "department") received a request for copies of responses to RFIs submitted by eighteen companies for a proposed broadband mapping project. You state the department has released some of the requested information.[1] Although you take no position regarding the public availability of the submitted information, you state the release of this information may implicate the rights of some of the third parties whose information has been requested. You state, and provide documentation showing, that you have notified AMA TechTel ("AMA") and Michael Baker Jr. Inc. ("Michael Baker Jr.") of their right to submit arguments to this office as to why their submitted information should not be released. *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 Michael Baker, Jr. and TSTCI Foundation, Inc. ("TSTCI"). We have considered the submitted comments and reviewed the submitted information.

[1]You state that the department has provided responders an opportunity to authorize the department to release their information and that the department has received authorization from all but two of the eighteen companies for release of their information.

Initially, 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 it should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have not received correspondence from AMA explaining why their information should not be released. Thus, we have no basis for concluding that any portion of the submitted information pertaining to AMA constitutes proprietary information, and the department may not withhold any portion of AMA's information on that basis. *See* Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990).

Next, TSTCI asserts that its information is excepted from public disclosure under sections 552.101, 552.104, and 552.110 of the Government Code. We note, however, that the department did not submit TSTCI's information for our review and instead informs us it has released the RFI responses of all the responding entities except AMA and Michael Baker Jr. This ruling does not address information beyond what the department has submitted for our review. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from attorney general must submit copy of specific information requested). Therefore, we do not address TSTCI's arguments for this information.

Michael Baker, Jr. asserts that portions of its RFI response are confidential under section 552.110 of the Government Code. Section 552.110 of the Government Code protects: (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 the property interests of private parties by excepting from disclosure trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *See id.* § 552.110(a). A "trade secret"

> may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives [one] 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, as for example the amount or other terms of a secret bid for a contract or the salary of certain employees . . . . A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as for example, a machine or formula for the production of an article. It may, however, 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 Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

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;
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> (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* ORD 232. This office must accept a claim that information subject to the Act is excepted 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. *See* ORD 552. 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. *See* Open Records Decision No. 402 (1983). We note that 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 (1939); *see Huffines*, 314 S.W.2d at 776; Open Records Decision Nos. 319 at 3 (1982), 306 at 3 (1982).

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 id.* § 552.110(b); *see also* ORD 661 at 5-6.

Upon review, we find that Michael Baker, Jr. has not demonstrated that any of its information constitutes a trade secret or demonstrated the necessary factors to establish a trade secret claim. *See* ORD 552 at 5-6. Thus, the department may not withhold any of the information at issue under section 552.110(a) of the Government Code. However, we determine Michael Baker, Jr. has established that the release of certain pricing information would cause the company substantial competitive harm. Therefore, the department must withhold the information we have marked under section 552.110(b) of the Government Code. However, Michael Baker, Jr. has made only conclusory allegations that release of the remaining information it seeks to withhold would cause it substantial competitive harm. *See* Gov't Code § 552.110; ORD Nos. 661 at 5-6 (business entity must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue). Thus, we conclude that none of the remaining information may be withheld under section 552.110(b) of the Government Code.

To summarize, the department must withhold the information we have marked under section 552.110(b) of the Government Code. The remaining information must be released.

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 at (512) 475-2497.

Sincerely,

Pam Wissemann

Pamela Wissemann
Assistant Attorney General
Open Records Division

PFW/dls

Ref: ID# 352004

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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