



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

October 7, 2009

Ms. Katherine R. Fite  
Assistant General Counsel  
Office of the Governor  
P.O. Box 12428  
Austin, Texas 78711

OR2009-14147

Dear Ms. Fite:

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# 358646.

The Office of the Governor (the "governor") received two requests for information related to request for proposals number 300-9-0751. You state that some responsive information is being released to the requestors. You claim that the submitted information is excepted from disclosure under section 552.110 of the Government Code.<sup>1</sup> You also indicate that the release of the submitted information may implicate the proprietary interests of two interested third parties, BGB and Mangum Hills Balfour GmbH ("Mangum"). Accordingly, you state you have notified BGB and Mangum of the governor's receipt of the request for information and of their right to submit arguments to this office as to why the information should not be released to the requestor. *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 both BGB and Mangum. We have considered the submitted claims and reviewed the submitted information. We have also considered comments submitted by one of the requestors. *See* Gov't Code § 552.304

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<sup>1</sup>We note that section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act. *See* Gov't Code § 552.147(b). Although the governor raises other exceptions to disclosure, you have provided no arguments explaining how these exceptions are applicable to the submitted information. Therefore, we do not address these exceptions. Gov't Code § 552.301(e)(1)(A).

(providing that interested party may submit comments stating why information should or should not be released).

Mangum contends that its proposal is a "tangible item" and therefore not "information" for the purpose of the Act. This office has determined that the Act applies to "tangible items such as documents and other 'developed materials.'" Attorney General Opinion JM-640 at 2 (1987). On the other hand, information that has no significance than its use as a tool for the maintenance, manipulation, or protection of public property is not subject to the Act. See Open Records Decision No. 581 at 5-6 (1990). Here, the requested item consists of a written document. Therefore, we believe it is "information" for the purpose of the Act. See Attorney General Opinion JM-640 at 2 (1987).

Mangum also asserts that the requests for information are "not appropriate" because the requestors are not citizens or entities of the United States. However, the Act contains no requirement that a requestor be a citizen of the United States. Section 552.001 of the Government Code provides that it is the policy of this state that each person is entitled, unless otherwise expressly provided by law, at all times to complete information about the affairs of government and the official acts of public officials and employees. See Gov't Code § 552.001(a). Further, the Act provides that it "shall be liberally construed in favor of granting a request for information." *Id.* § 552.001(b).

Although the governor argues that the submitted information is excepted under section 552.110 of the Government Code, that exception is designed to protect the interests of third parties, not the interests of a governmental body. Thus, we do not address the governor's arguments under section 552.110. BGB and Mangum each raise section 552.110 of the Government Code as an exception to disclosure. Section 552.110 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 *Id.* § 552.110(a), (b).

The Texas Supreme Court has adopted the definition of a trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1958), *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). 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.<sup>2</sup> *Id.* This office will 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. ORD 552 at 2. However, we cannot conclude that section 552.110(a) applies 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 also 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; *see Huffines*, 314 S.W.2d at 776; ORD 319 at 3, 306 at 3.

Section 552.110(b) of the Government Code 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). 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.*; *see also* 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* Freedom of Information Act Guide & Privacy Act Overview, 219 (2000) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with

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<sup>2</sup>The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are: (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 (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

government). Moreover, we believe the public has a strong interest in the release of prices in government contract awards. *See* ORD 514.

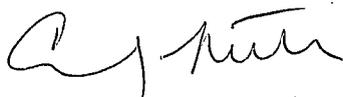
Mangum claims that its proposal comprises a trade secret that is protected under section 552.110(a). Upon review, we find that Mangum has failed to make a *prima facie* case that any of the submitted information belonging to this company constitutes a trade secret. Thus, no portion of the information pertaining to Mangum may be withheld under section 552.110(a) of the Government Code.

Both BGB and Mangum assert section 552.110(b) as an exception to disclosure. Upon review of the submitted arguments and information at issue, we find that BGB has established that the release of its pricing information would cause it substantial competitive injury. We further determine that BGB and Mangum have made only conclusory allegations that release of the remaining information would cause either company substantial competitive injury and have provided no specific factual or evidentiary showing to support such allegations. *See* Gov't Code § 552.110; ORD 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. Therefore, the governor must withhold only the information we have marked under section 552.110(b) of the Government Code. The remaining submitted 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](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, toll free, at (888) 672-6787.

Sincerely,



Cindy Nettles  
Assistant Attorney General  
Open Records Division

CN/dls

Ref: ID# 358646

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

Mr. T. Keith Mangum  
Mangum Hills Balfour GmbH  
c/o Ms. Katherine R. Fite  
Assistant General Counsel  
Office of the Governor  
P.O. Box 12428  
Austin, Texas 78711  
(w/o enclosures)

Mr. Robin Mack  
Sales & Marketing Director  
BGB  
91 Waterloo Road  
London SE 1 8RT  
United Kingdom  
(w/o enclosures)