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October 21, 2015

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OR2015-22080

Dear Mr. Garcia:

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# 584000.

The Region 17 Education Service Center (the "center"), which you represent, received a request for the recaps of submissions for a specified bid. Although the center takes no position as to whether the submitted information is excepted under the Act, it states release of the submitted information may implicate the proprietary interests of third parties.¹ Accordingly, the center states, and provides documentation showing, it notified the third parties of the request for information and of their right to submit arguments to this office as to why the 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

¹The center notified the following third parties: Advances Pierre Foods; Alpha Foods Company; American Foods Group; Basic American Foods; Best Express Foods; Bongard Creameries; Bosco's Pizza Co.; Brookwood Farms Inc.; Cargill Kitchen Solutions; Cargill Meat Solutions; Cavendish Farms, Inc.; Con Agra Foods Gilardi; Dave's Baking; ES Foods; Foster Poultry Farms; Fresh Innovations of CA; Giorgio Foods, Inc.; Goodman Foods Products d/b/a Don Lee Farms; High Liner Foods (USA), Inc.; Horizon Snack Foods; Idahoan Foods, LLC; Integrated Food Service; J & J Snack Foods Corp.; J.R. Simplot; Jennie-O Turkey Store; JM Smucker Company; JSB Industries Inc.; JTM Food Group; Lamb Weston; Land O'Lakes, Inc.; M.C.I. Foods, Inc./Los Cabos Mexican Foods; Maid-Rite Specialty Foods, LLC; McCain Foods USA; Michael Foods, Inc.; Mrs. Clark's Foods; Nardone Brothers Pizza; National Food Group; Pilgrim's Pride Corp.; Red Gold, LLC; Rich Chicks; Rich Production Corp.; Rodriguez Foods LTD; S.A. Piazza; Schwan's Food Service; Tabatchnick Fine Foods, Inc.; Tasty Brands; Trident Seafoods; Tyson Foods, Inc.; Uno Foods, Inc.; Wawona Frozen Foods; Out of the Shell, LLC d/b/a Ling's; and Asian Food Solutions.

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 Best Express Foods (“Best Express”); Giorgio Foods, Inc. (“Giorgio”); Michael Foods, Inc. (“Michael”); National Food Group (“National”); Pilgrim’s Pride Corporation (“Pilgrim’s”); and Tyson Foods, Inc. (“Tyson”). We have considered the submitted arguments and reviewed the submitted information.

Initially, we note Giorgio objects to the disclosure of information the center has not submitted to this office for review. This ruling does not address information that was not submitted by the center and is limited to the information submitted as responsive by the center. *See* Gov’t Code § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested).

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 information relating to that party should be withheld from public disclosure. *See id.* § 552.305(d)(2)(B). As of the date of this letter, we have only received comments from Best Express, Giorgio, Michael, National, Pilgrim’s, and Tyson explaining why the submitted information should not be released. Therefore, we have no basis to conclude any of the remaining third parties has a protected proprietary interest in the submitted information. *See id.* § 552.110; 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, release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case information is trade secret), 542 at 3. Accordingly, the center may not withhold the submitted information on the basis of any proprietary interest the remaining third parties may have in the information.

Section 552.104(a) of the Government Code exempts from disclosure “information that, if released, would give advantage to a competitor or bidder.” Gov’t Code § 552.104(a). A private third party may invoke this exception. *Boeing Co. v. Paxton*, 466 S.W.3d 831 (Tex. 2015). The “test under section 552.104 is whether knowing another bidder’s [or competitor’s information] would be an advantage, not whether it would be a decisive advantage.” *Id.* at 841. Michael and Pilgrim’s state they have competitors. In addition, Michael and Pilgrim’s state the release of their information at issue would give competitors an advantage. After review of the information at issue and consideration of the arguments, we find Michael and Pilgrim’s have established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude the center may withhold the pricing information Michael’s has indicated and Pilgrim’s information under section 552.104(a).²

²As our ruling is dispositive, we need not address Michael and Pilgrim’s remaining arguments against disclosure of this information.

Best Express, Giorgio, National, and Tyson state their information is excepted from disclosure under section 552.110 of the Government Code. 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* Gov't Code § 552.110(a)-(b). Section 552.110(a) protects trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *Id.* § 552.110(a). The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts, which holds a trade secret to be:

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 Hyde Corp. v. Huffines*, 314 S.W.2d 776 (Tex. 1958). 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.³ RESTATEMENT OF TORTS § 757 cmt. b. This office must accept a claim information subject to the Act is excepted as a trade secret if a *prima facie* case for the exception is made and no argument is submitted that rebuts the claim as a matter of law. *See* ORD 552 at 5. However, we cannot conclude section 552.110(a) is applicable 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. Open Records

³The Restatement of Torts lists the following six factors 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 other 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).

Decision No. 402 (1983). We note 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 also Huffines*, 314 S.W.2d at 776; Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

Section 552.110(b) protects “[c]ommercial or financial information for which it is demonstrated based on specific factual evidence 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, substantial competitive injury would likely result from release of the information at issue. *Id.*; *see also* ORD 661 at 5.

Best Express, Giorgio, National, and Tyson argue their information consists of commercial information, the release of which would cause the companies substantial competitive harm under section 552.110(b) of the Government Code. We note this office considers the prices charged in government contract awards to be a matter of strong public interest; thus, the pricing information of a winning bidder is generally not excepted under section 552.110(b). *See* Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors). *See generally* Dep’t of Justice Guide to the Freedom of Information Act 344-345 (2009) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). Upon review, we find, with the exception of their winning bids, Giorgio, National, and Tyson have demonstrated their pricing information constitutes commercial or financial information, the release of which would cause substantial competitive injury. Accordingly, with the exception of their winning bids, the center must withhold the pricing information of Giorgio, National, and Tyson under section 552.110(b) of the Government Code. However, we find Best Express, Giorgio, National, and Tyson have not made the specific factual or evidentiary showing required by section 552.110(b) that release of any of the remaining information would cause their companies substantial competitive harm. *See* ORD 661. Therefore, the center may not withhold any of the remaining information under section 552.110(b).

Best Express, Giorgio, National, and Tyson argue their remaining information constitutes trade secrets. Upon review, we find Best Express, Giorgio, National, and Tyson have failed to establish a *prima facie* case any of their remaining information meets the definition of a trade secret, nor have they demonstrated the necessary factors to establish a trade secret claim for the information at issue. *See* ORD 402. Therefore, the center may not withhold any of the remaining information under section 552.110(a).

In summary, the center may withhold the pricing information Michael’s has indicated and Pilgrim’s information under section 552.104(a) of the Government Code. With the exception of their winning bids, the center must withhold the pricing information of Giorgio,

National, and Tyson under section 552.110(b) of the Government Code. The center 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,



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Ref: ID# 584000

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