



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

June 28, 2016

Ms. Jessica Vu  
Assistant General Counsel  
Office of Governor Greg Abbott  
P.O. Box 12428  
Austin, Texas 78711

OR2016-14633

Dear Ms. Vu:

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# 616365 (OOG ID# 16-106).

The Office of the Governor (the "governor's office") received a request for applications and contracts relating to the Texas Enterprise Fund during a specified time period. You state the governor's office will withhold certain information under section 552.136 of the Government Code.<sup>1</sup> Although the governor's office takes no position as to whether the submitted information is excepted under the Act, you state release of this information may implicate the proprietary interests of BASF Corporation ("BASF"); Corrigan OSB, L.L.C. ("Corrigan"); Galderma Laboratories, L.P. ("Galderma"); GRI Renewable Industries ("GRI"); Kubota Tractor Corporation ("Kubota"); LiveOps, Inc. ("LiveOps"); Roy O. Martin Lumber Management, L.L.C. ("RoyOMartin"); and Siro Group USA, L.L.C. ("Siro"). Accordingly, you state, and provide documentation showing, you notified these third parties of the request for information and of their rights to submit arguments to this office as to why

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<sup>1</sup>Section 552.136 of the Government Code permits a governmental body to withhold the information described in section 552.136(b) without the necessity of seeking a decision from this office. *See id.* § 552.136(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.136(e). *See id.* § 552.136(d), (e).

the information at issue 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 BASF, RoyOMartin, and Kubota. We have considered the submitted arguments and reviewed the submitted information.

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* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from Corrigan, Galderma, GRI, LiveOps, or Siro explaining why the submitted information should not be released. Therefore, we have no basis to conclude any of these third parties has protected proprietary interests 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, 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. Further, RoyOMartin informs this office it has no objection to the release of its information. Accordingly, the governor's office may not withhold the submitted information on the basis of any proprietary interest Corrigan, Galderma, GRI, LiveOps, RoyOMartin, or Siro may have in the information.

BASF argues its information is not responsive to the instant request. A governmental body must make a good faith effort to relate a request to information held by the governmental body. *See* Open Records Decision No. 561 at 8 (1990). In this instance, the governor's office has reviewed its records and determined the submitted information is responsive to the request. Accordingly, we conclude the governor's office has made a good faith effort to relate the request to information the governor's office holds and we will determine whether the governor's office must release the information at issue under the Act.

BASF and Kubota claim portions of their information are 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. 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. *See Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1957); *see also* Open Records Decision No. 552 (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); *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.<sup>2</sup> RESTATEMENT OF TORTS § 757 cmt. b. This office must accept a claim that 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. *See* Open Records 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 Record 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 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,

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<sup>2</sup>The 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).

not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. *Id.*; *see also* Open Records Decision 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).

BASF asserts its information at issue constitutes trade secrets under section 552.110(a) of the Government Code. Upon review, we conclude BASF has failed to establish a *prima facie* case that any portion of its information at issue meets the definition of a trade secret. We further find BASF has not demonstrated the necessary factors to establish a trade secret claim for its information. *See* ORDs 402, 319 at 2 (information relating to organization, personnel, market studies, professional references, qualifications, experience, and pricing not excepted under section 552.110). Therefore, none of the submitted information may be withheld under section 552.110(a).

BASF and Kubota contend portions of their information are commercial or financial information, the release of which would cause substantial competitive harm to the companies. However, upon review, we find BASF has not established any of its remaining information constitutes commercial or financial information the disclosure of which would cause the company substantial competitive harm. *See* Gov't Code § 552.110(b). Therefore, the governor's office may not withhold any of BASF's information on this basis. Kubota contends some of its information, consisting of the amount of its working capital entered on page 7 of its application, is commercial or financial information the release of which would cause the company substantial competitive harm. Upon review, we find that Kubota has established that its information at issue constitutes commercial or financial information the release of which would cause Kubota substantial competitive harm. Thus, the governor's office must withhold the information at issue, which we marked, under section 552.110(b) of the Government Code.

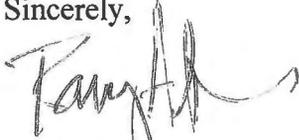
In summary, the governor's office must withhold the information we marked under section 552.110(b) of the Government Code. The remaining submitted information must be released.

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.texasattorneygeneral.gov/open/orl\\_ruling\\_info.shtml](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,

A handwritten signature in black ink, appearing to read "Ramsey A. Abarca". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Ramsey A. Abarca  
Assistant Attorney General  
Open Records Division

RAA/dls

Ref: ID# 616365

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

8 Third Parties  
(w/o enclosures)