



OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

April 22, 2003

Ms. Leigh Sebastian
Associate General Counsel
Lower Colorado River Authority
P.O. Box 220
Austin, Texas 78767-0220

OR2003-2660

Dear Ms. Sebastian:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 179760.

The Lower Colorado River Authority (the "LCRA") received a request for the top five proposals submitted in response to RFP# 3822, concerning the Technology Services Division Strategic Plan. While you indicate that the requested information may be excepted from disclosure under sections 552.101, 552.110, 552.113, and 552.131 of the Government Code, the LCRA takes no position as to whether the requested information is so excepted. Rather, you state, and provide documentation showing, that you notified third party bidders Pacific Technologies, Inc. ("PTI"), MGT of America ("MGT"), IBM Global Services ("IBM"), and KEMA Consulting ("KEMA") of the request and of their right to submit arguments to this office as to why the information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under Act in certain circumstances). We have reviewed the submitted information.

With respect to the proposals of PTI, MGT, and IBM, 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 that party should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, PTI, MGT, and IBM have not submitted any comments to this office explaining why their respective proposals should not be released to

the requestor. Therefore, PTI, MGT, and IBM have provided us with no basis to conclude that they have a protected proprietary interest in any of the submitted information. *See* Gov't Code § 551.110(b) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure); Open Records Decision Nos. 639 at 4 (1996), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990).

KEMA has submitted comments to this office contending that certain information in KEMA's proposal is excepted from disclosure pursuant to section 552.110 of the Government Code. Section 552.110 protects the property interests of private persons by excepting from disclosure two types of information: (1) trade secrets obtained from a person and privileged or confidential by statute or judicial decision and (2) commercial 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. A governmental body or interested third party seeking to withhold information pursuant to the commercial and financial information prong of section 552.110 must provide a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from disclosure. Gov't Code § 552.110(b); *see* Open Records Decision No. 661 (1999).

KEMA contends that its proposal is excepted under section 552.110(b). KEMA argues that release of its project experience, pricing information, and the identities and capabilities of its consultants would allow a competitor to use this information to obtain a competitive advantage. Upon review, we find that KEMA has demonstrated that the release of its client list would result in substantial competitive injury. We therefore determine that the LCRA must withhold KEMA's client list, located at page 12 and Appendix B of KEMA's proposal, under section 552.110(b) of the Government Code. With respect to the remainder of the proposal, however, we find that while KEMA has generally alleged that release of this information would cause it substantial competitive harm, it has not made a specific factual or evidentiary showing that such harm would result from the release of its information. Therefore, we find that KEMA has not adequately demonstrated that the remainder of the information in its proposal is excepted from disclosure under section 552.110(b). *See* Open Records Decision No. 319 at 3 (1982) (information relating to organization and personnel, market studies, qualifications, and pricing are not ordinarily excepted from disclosure under statutory predecessor); *see also* Open Records Decision Nos. 661 (1999), 541 at 8 (1990) (general terms of contract with governmental body are usually not excepted from disclosure), 509 at 5 (1988) (stating that because costs, bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts was entirely too speculative), 319(1982); *see generally* Freedom of Information Act Guide & Privacy Act Overview (1995) 136-138, 140-141, 151-152 (disclosure of prices is cost of doing business with government). *Cf.* Open Records Decision Nos. 514 (1988) (public has an interest in knowing prices charged

by government contractors), 184 (1978). Consequently, the LCRA may not withhold the remainder of the proposal submitted by KEMA under section 552.110 of the Government Code.

Next, the proposals of MGT and PTI contain information that is excepted from disclosure under section 552.101 of the Government Code. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. Prior decisions of this office have held that section 6103(a) of title 26 of the United States Code renders tax return information confidential. Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision Nos. 600 (1992) (W-4 forms), 226 (1979) (W-2 forms). Section 6103(b) defines the term "return information" to include "a taxpayer's identity." *See* 26 U.S.C. 6103(b)(2)(A). The term "taxpayer identity" "means the name of a person with respect to whom a return is filed, his mailing address, his taxpayer identifying number (as described in section 6109), or a combination thereof." *See* 26 U.S.C. 6103(b)(6). On this basis, we determine that the W-9 forms contained in the proposals of MGT and PTI are confidential pursuant to federal law in their entirety, and are therefore excepted from disclosure under section 552.101.

The proposals of MGT and PTI contain bank account information that is excepted from disclosure under section 552.136 of the Government Code. Section 552.136 provides in relevant part:

(a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

(1) obtain money, goods, services, or another thing of value; or

(2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.

We have marked the account information in the proposals of MGT and PTI that the LCRA must withhold pursuant to section 552.136 of the Government Code.

We note that the submitted information pertaining to PTI, MGT, and IBM contains e-mail addresses. Section 552.137 of the Government Code provides:

(a) An e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.

(b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

Unless the relevant individuals have affirmatively consented to the release of their e-mail addresses, the LCRA must withhold the e-mail addresses that we have marked under section 552.137 of the Government Code.

Finally, we note that some of the submitted information is protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are protected by copyright. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

In summary, the marked client list information in the proposals submitted by KEMA must be withheld pursuant to section 552.110(b) of the Government Code. The LCRA must withhold the marked W-9 forms in proposals of MGT and PTI in their entirety under section 552.101 of the Government Code in conjunction with federal law. The marked account information in the proposals of MGT and PTI must be withheld under section 552.136 of the Government Code. The LCRA must withhold the marked e-mail addresses pursuant to section 552.137 of the Government Code. The remainder of the submitted information must be released in compliance with copyright law.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney

general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



David R. Saldivar
Assistant Attorney General
Open Records Division

DRS/seg

Ref: ID# 179760

Enc: Submitted documents

c: Mr. Tod E. Pendergrass
213 Congress Avenue, Suite 200
Austin, Texas 78701
(w/o enclosures)

Mr. Douglas K. Mansfield
Casner & Edwards, L.L.P.
303 Congress Street
Boston, Massachusetts 02210
(w/o enclosures)

Mr. Mike Silverman
Pacific Technologies, Inc.
14711 Northeast 29th Place, Suite 216
Bellevue, Washington 98007
(w/o enclosures)

Dr. Jeffrey Ling
MGT of America
502 East 11th Street, Suite 300
Austin, Texas 78701
(w/o enclosures)

Mr. Michael D. Mainard
IBM Global Services
15301 Dallas Parkway, Suite 300
Addison, Texas 75001
(w/o enclosures)