



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

June 28, 2011

Mr. Vic Ramirez  
Associate General Counsel  
Lower Colorado River Authority  
P.O. Box 220  
Austin, Texas 78767-0220

OR2011-09190

Dear Mr. Ramirez:

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# 421955.

The Lower Colorado River Authority (the "LCRA") received three requests for all bid documents for the proposed divestiture of the LCRA's water and wastewater systems, including but not limited to the bid package and any documents developed by staff or the LCRA's consultant, BMO Capital Markets ("BMO"), that will be or have been mailed to the interested bidders. You claim Exhibits D, E, and F are excepted from disclosure under sections 552.104, 552.105, and 552.111 of the Government Code.<sup>1</sup> We have considered the exceptions you claim and reviewed the submitted sample of records.<sup>2</sup> We have also considered comments submitted by the requestors and their legal representative. *See Gov't Code § 552.304* (providing that interested person may submit comments explaining why requested information should or should not be released).

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<sup>1</sup>Although you initially sought to withhold Exhibit C, Confidential Information Memorandum, from disclosure, you represent to this office that you released this document to the requestors.

<sup>2</sup>We assume the sample records submitted to this office are truly representative of the requested records as a whole. *See Open Records Decision Nos. 499 (1988), 497 (1988)*. This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

The requestor contends the LCRA did not comply with section 552.301 in requesting a decision from this office. Pursuant to section 552.301(b) of the Government Code, a governmental body must ask for the attorney general's decision and state the exceptions that apply within ten business days of receiving the request. *See id.* § 552.301(b). The LCRA received the first request for this information on February 16, 2011. The LCRA responded to this request by referring the requestor to BMO, which in turn, informed the requestor that it would only release the requested information if the requestor signed a confidentiality agreement.<sup>3</sup> On March 21, 2011, the requestor once again requested these records. The LCRA responded by stating the records would only be released if the requestor signed a confidentiality agreement. On April 7, 2011, the LCRA received the third request for these records. On April 21, 2011, in response to this third request, the LCRA requested a ruling from this office. However, we find that in not seeking a ruling in response to the February 16 request or March 21 request, the LCRA failed to comply with the requirements mandated by section 552.301.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the requirements of section 552.301 results in the legal presumption the requested information is public and must be released unless a compelling reason exists to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); *see also* Open Records Decision No. 630 at 3 (1994) Generally, a compelling reason to withhold information is a demonstration that the information is confidential by law or that third-party interests are at stake. Although you seek to withhold the submitted information under sections 552.104, 552.105, and 552.111 of the Government Code, these exceptions to disclosure are discretionary in nature and are, therefore, waived by a governmental body's failure to comply with section 552.301. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions in general), 663 at 5 (1999) (untimely request for decision resulted in waiver of discretionary exceptions), 592 (1991) (stating that governmental body may waive Gov't Code § 552.104), 522 (1989), 473 (1987) (governmental body may waive statutory predecessor to Gov't Code § 552.111). Thus, we find, that in failing to comply with section 552.301, the LCRA waived its claimed exceptions for all responsive documents created prior to March 21, 2011.

The report submitted in Exhibit D and most of the draft documents submitted in Exhibit E were created prior to March 21, 2011. You state the report in Exhibit D 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 copyrighted. Open Records Decision No. 180

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<sup>3</sup>We note governmental bodies may not enter into agreements to keep information confidential except where specifically authorized to do so by statute. Open Records Decision Nos. 514 (1988), 484 (1987), 437 (1986), 425 (1984), 414 (1983), 283 (1981), 207 (1978), 133 (1976).

at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; see Open Records Decision No. 109 (1975). 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. Accordingly, Exhibit D must be released in accordance with copyright law. Most of the draft documents submitted in Exhibit E must also be released. Finally, any confidentiality agreement that was signed prior to March 21, 2011 must be released. You have submitted one draft agreement and one executed agreement that appear to have been created after March 21, 2011. Accordingly, we will address your claimed exceptions to disclosure for these records.

Section 552.104 of the Government Code provides that information is excepted from required public disclosure if release of the information would give advantage to a competitor or bidder. Gov't Code § 552.104. The purpose of this exception is to protect the interests of a governmental body in competitive bidding situations. See Open Records Decision No. 592 (1991). This exception protects information from public disclosure if the governmental body demonstrates potential harm to its interests in a particular competitive situation. See Open Records Decision No. 463 (1987). Generally, section 552.104 does not except bids from public disclosure after bidding is completed and the contract has been executed. See Open Records Decision No. 541 (1990).

You explain the LCRA is in the process of negotiating and selling certain water and wastewater system assets. You state the draft confidentiality agreements and the executed confidentiality agreement contain the identities of persons or entities who are interested in purchasing these assets. You state the release of the potential bidders' identities would harm the LCRA's negotiating position with respect to the sale. In Attorney General Opinion No. MW-591 (1982), this office concluded the identities of probable bidders may be withheld under the statutory predecessor to section 552.104 because disclosure could interfere with the governmental body's ability to obtain the most favorable bid. Attorney General Opinion MW-591 (1982). The requestor asserts, however, that none of the information may be withheld under section 552.104 because it has been selectively disclosed to the public. Generally, if a governmental body voluntarily discloses non-confidential information to a member of the public, the governmental body may not withhold that information from another member of the public under one of the Act's discretionary exceptions. See Gov't Code § 552.007 (prohibiting selective disclosure). In this instance, we have no basis to conclude that the identities of the probable bidders have been released to any member of the public. Thus, based on your representations and our review, we agree the LCRA may withhold under section 552.104 the identities of the potential bidders contained in the draft and executed agreements that were created after March 21, 2011. You do not, however, submit any arguments explaining how the release of the contractual language of the confidentiality agreement will harm the LCRA's negotiating position with regard to the sale. Accordingly, the remaining portions of the agreements may not be withheld under section 552.104.

Section 552.105 of the Government Code excepts from disclosure information relating to:

- (1) the location of real or personal property for a public purpose prior to the public announcement of the project; or
- (2) appraisals or purchase price of real or personal property for a public purpose prior to the formal award of contract for the property.

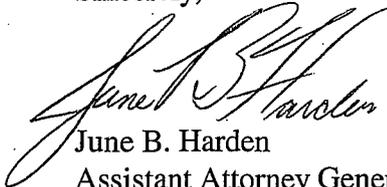
*Id.* § 552.105. This exception is designed to protect a governmental body's planning and negotiating position in transactions involving the purchase of real or personal property for a public purpose until the transaction has been completed. Open Records Decision Nos. 564 (1990), 357 (1982), 310 (1982). Although you generally assert section 552.105 for Exhibit E, you do not explain how the release of the draft contractual language would harm the LCRA's negotiating position with respect to the sell of these assets. Therefore, the remaining information in Exhibit E may not be withheld under section 552.105 of the Government Code.

In summary, the LCRA may withhold the identities of probable bidders contained in the draft and executed confidentiality agreements that were created after March 21, 2011. The remaining information must be released in accordance with copyright law.

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,



June B. Harden  
Assistant Attorney General  
Open Records Division

JBH/sdk

Ref: ID# 421955

Enc. Submitted documents

c: 2 Requestors  
(w/o enclosures)