



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 29, 2007

Mr. Vic Ramirez
Associate General Counsel
Lower Colorado River Authority
P.O. Box 220
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OR2007-11245

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# 288542.

The Lower Colorado River Authority (the "LCRA") received a request for the responses to a request for proposals, information relating to the LCRA's evaluation of the responses, and any final contract and cost for the services.¹ You take no position with respect to the public availability of the requested information. You believe, however, that some of the information may implicate the proprietary interests of ION Consulting ("ION"); KEMA, Inc.; and Phase Two Associates ("Phase Two"). You notified ION, KEMA, and Phase Two of this request for information and of their right to submit arguments to this office as to why their information should not be released.² We received correspondence from KEMA. We have considered KEMA's arguments and have reviewed the information you submitted.³ We assume that the LCRA has released any other information that is responsive to this request,

¹You inform us that the requestor subsequently notified the LCRA that he no longer seeks access to Navigant Consulting's response. Accordingly, that information is not responsive to the request, and this decision does not address its public availability.

²See Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to Gov't Code § 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances).

³We note that KEMA has submitted the information that it seeks to have withheld from disclosure. This decision addresses only the information that the LCRA submitted to this office in requesting this decision. See Gov't Code § 552.301(e)(1)(D).

to the extent that such information existed when the LCRA received the request.⁴ If not, then any such information must be released immediately. *See* Gov't Code §§ 552.221, .301, .302; Open Records Decision No. 664 (2000).

We note that an interested third party is allowed ten business days from the date of its receipt of the governmental body's notice under section 552.305 of the Government Code to submit its reasons, if any, as to why information relating to that party should not be released. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this decision, this office has received no correspondence from either ION or Phase Two. Thus, because neither ION nor Phase Two has demonstrated that any of the submitted information is proprietary for the purposes of the Act, the LCRA may not withhold any of their information on that basis. *See* Gov't Code § 552.110(a)-(b); Open Records Decision Nos. 552 at 5 (1990), 661 at 5-6 (1999).

KEMA contends, among other things, that its proposal is encompassed by a confidentiality agreement with the LCRA. We note that information is not confidential under the Act simply because the party that submits the information anticipates or requests that it be kept confidential. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot overrule or repeal provisions of the Act through an agreement or contract. *See* Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) (“[T]he obligations of a governmental body under [the predecessor to the Act] cannot be compromised simply by its decision to enter into a contract.”), 203 at 1 (1978) (mere expectation of confidentiality by person supplying information does not satisfy requirements of statutory predecessor to Gov't Code § 552.110). Consequently, unless KEMA's information comes within an exception to disclosure, it must be released, notwithstanding any expectation or agreement to the contrary.

KEMA also argues that section 552.110 of the Government Code is applicable to parts of its proposal. Section 552.110 protects the proprietary interests of private parties with respect to two types of information: (1) “[a] trade secret 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.” Gov't Code § 552.110(a)-(b).

The Texas Supreme Court has adopted the definition of a “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

⁴We note that the Act does not require a governmental body to release information that did not exist when it received a request or create responsive information. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

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 a single or ephemeral event 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 763, 776 (Tex. 1958). If a governmental body takes no position on the application of the “trade secrets” aspect of section 552.110 to the information at issue, this office will accept a private person’s claim for exception as valid under section 552.110(a) if the person establishes a *prima facie* case for the exception and no one submits an argument that rebuts the claim as a matter of law.⁵ *See* ORD 552 at 5. However, we cannot conclude that section 552.110(a) is applicable 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).

Section 552.110(b) 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* ORD 661 at 5-6 (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

KEMA argues that portions of its proposal constitute trade secrets for purposes of section 552.110(a). KEMA also contends that portions of the proposal are protected by section 552.110(b). Having considered KEMA’s arguments and reviewed the information at issue, we conclude that the LCRA must withhold the names of some of KEMA’s clients

⁵The 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 (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

under section 552.110(a). We have marked that information. We note that the rest of the client information at issue is published on KEMA's internet website. Given the fact that KEMA itself makes that information available to the public, we are not persuaded either that the remaining client information is a trade secret or that its release under the Act would cause KEMA any competitive harm. We therefore conclude that the LCRA may not withhold any of the remaining client information in KEMA's proposal under section 552.110.

We further conclude that KEMA has not demonstrated that any other information in its proposal qualifies as a trade secret under section 552.110(a). Likewise, we conclude that KEMA has not made the specific factual or evidentiary showing required by section 552.110(b) that release of any other information in the proposal would cause KEMA substantial competitive harm. We therefore conclude that the LCRA may not withhold any other information in KEMA's proposal under section 552.110. *See* Open Records Decision Nos. 509 at 5 (1988) (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 at 3 (1982) (statutory predecessor to Gov't Code § 552.110 generally not applicable to information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing).

With respect to the public availability of KEMA's pricing information, we are informed that KEMA was awarded the related contract with the LCRA. 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." *See* RESTATEMENT OF TORTS § 757 cmt. b (1939); *Hyde Corp. v. Huffines*, 314 S.W.2d at 776; Open Records Decision Nos. 319 at 3 (1982), 306 at 3 (1982). Likewise, the pricing information of a winning bidder such as KEMA is generally not excepted from disclosure under section 552.110(b). *See* Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors); *see generally* Freedom of Information Act Guide & Privacy Act Overview at 219 (2000) (federal cases applying analogous Freedom of Information Act exemption reason that disclosure of prices charged government is a cost of doing business with government). Moreover, the terms of a contract with a governmental body are generally not excepted from public disclosure. *See* Gov't Code § 552.022(a)(3) (contract involving receipt or expenditure of public funds expressly made public); Open Records Decision No. 541 at 8 (1990) (public has interest in knowing terms of contract with state agency).

We note that section 552.136 of the Government Code is applicable to some of the remaining information.⁶ Section 552.136(b) states that "[n]otwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected,

⁶Unlike other exceptions to disclosure, this office will raise section 552.136 on behalf of a governmental body, as this exception is mandatory and may not be waived. *See* Govt. Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions).

assembled, or maintained by or for a governmental body is confidential.” Gov’t Code § 552.136(b); *see id.* § 552.136(a) (defining “access device”). We have marked banking information relating to KEMA and Phase Two that the LCRA must withhold under section 552.136.

In summary, the LCRA must withhold the information that we have marked under sections 552.110 and 552.136 of the Government Code ⁷ The rest of the submitted information must be released.

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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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).

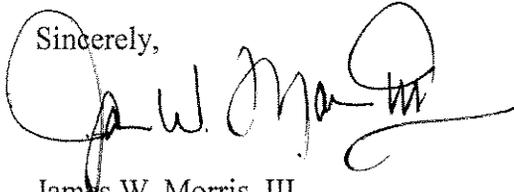
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep’t of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

⁷We note that Phase Two’s proposal also contains a social security number. 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.

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 Office of the Attorney General 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. 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,



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JWM/ma

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