



THE ATTORNEY GENERAL
OF TEXAS

JIM MATTOX
ATTORNEY GENERAL

December 28, 1990

Mr. Bruce Hineman
Executive Secretary
Teacher Retirement System of Texas
1000 Red River
Austin, Texas 78701-2698

OR90-593

Dear Mr. Hineman:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S. Your request was assigned RQ-2064.

The Teacher Retirement System of Texas has made a participating first mortgage loan to the developer of an office building in Little Rock, Arkansas bearing the name TCBY Tower. The Teacher Retirement System has received a request for the following nine items of information regarding that investment:

1. Monthly occupancy reports giving the percentage the building was leased for each month since it was opened.
2. Current rent rolls for the building, listing the tenants, spaces occupied, rent charged, dates the leases took effect, and dates the leases expire.
3. All profit and loss statements from the building's opening quarter to the present.
4. Rent summaries for all current tenants and a rent summary for a specific tenant.
5. Documentation of any and all appraisals done on the building.
6. All documentation concerning the cost of the project and the financing of it.
7. Any and all correspondence and documents within the last year concerning the project.

8. All correspondence concerning lawsuits and legal action on the project or principals involved in it.

9. Information on the financial performance of all projects currently funded by the Teacher Retirement System.

You ask whether the information requested in items 2, 3, 4, 5, and 7 [hereinafter, the "requested information"], is subject to required public disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S. You advise, with respect to the information requested in items 1 and 9, that you have supplied the requested information to the requestor. You advise, with respect to the information requested in item 6, that you have either supplied the requested information to the requestor or have determined that the information may be withheld pursuant to previous decisions of this office. Accordingly, you do not request a decision from this office with respect to items 1, 6, and 9. You advise that the Teacher Retirement System has no records such as those described in item 8. Consequently, you cannot provide the information requested in item 8.

As responsive to the requests in items 2, 3, 4, 5, and 7, you have submitted exhibits for our review pursuant to section 7 of the Open Records Act. Items 2, 3, 4, and 5 correspond to your exhibits A, B, C, and D, respectively. Item 7 corresponds to your exhibits E and F.

You describe the Teacher Retirement System's investment as follows:

TCBY Tower is a 40-story office building located in downtown Little Rock and constructed in the mid-1980's. Capitol Avenue Development Company, an Arkansas limited partnership, was formed in 1984 to construct, own, operate, and lease TCBY Tower. It is the borrowing entity for the property. Flake & Company is the managing partner for the property.

TRS [the Teacher Retirement System] extended a \$65 million loan to Capitol Avenue Development Company for a term of 15 years for development of the property. The loan closing was December 23, 1986. TRS's loan is a participating first mortgage loan. Thus, not only does TRS receive payment of principal and interest on the loan, but it also has a contingent interest in the cash flow and any increase in value of the property. . . . Additionally, the collateral for the loan is

the property itself. Because it is a participating loan, the success of the project is critical to the success of TRS's investment.

You assert that all or part of the requested information is excepted from required public disclosure by sections 3(a)(1), 3(a)(4), 3(a)(5), 3(a)(10), and 3(a)(11) of the Open Records Act. With respect to section 3(a)(1) which excepts information deemed confidential by law, you assert the requested information is confidential under the fiduciary duty of the Teacher Retirement System to protect assets held in trust for the system's beneficiaries.

Section 3(a)(10) excepts from required public disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision." It is upon the exception for the latter category, commercial, or financial information, that you rely.

Section 3(a)(10) is patterned after section 552(b)(4) of the federal Freedom of Information Act, 5 U.S.C. § 552 et seq. This office has taken guidance from federal authorities in interpreting section 3(a)(10). Open Records Decision Nos. 550 (1990); 309 (1982). The test for the applicability of section 552(b)(4) with respect to information that is not a trade secret requires the information to be (1) commercial or financial, (2) obtained from a person, and (3) privileged or confidential. National Parks & Conservation Ass'n v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974). The information in your exhibits A, B, C and parts 1, 2, and 3 of exhibit E¹ is commercial or financial information obtained from Capitol Avenue Development Company [hereinafter, the "borrower"] pursuant to the terms of the loan. The test for determining whether commercial or financial information is confidential within the meaning of section 552(b)(4), which has been adopted by this office for purposes of construing the corresponding language in section 3(a)(10) of the Open Records Act, is as follows:

a commercial or financial matter is 'confidential' for purposes of the exemption if disclosure of the information is likely to have either of the following effects: 1) to impair the Government's ability to obtain

1. Parts 1, 2, and 3 of exhibit E consist, respectfully, of (1) a lease agreement and lease summary, with a transmittal letter, (2) an operating budget of the borrower, and (3) a financial statement of the borrower.

necessary information in the future; or 2) to cause substantial harm to the competitive position of the person from whom the information was obtained. (Emphasis added.)

National Parks & Conservation Ass'n v. Morton, supra, at 770.

The courts have held under section 552(b)(4) that

in order to show the likelihood of substantial competitive harm, it is not necessary to show actual competitive harm. Actual competition and the likelihood of substantial competitive injury is [sic] all that need be shown. (Emphasis added.)

Gulf & Western Industries v. United States, 615 F.2d 527, 530 D.C. Cir. 1979); see also National Parks & Conservation Ass'n v. Kleppe, 547 F.2d 673, 679 (D.C. Cir. 1976).

"Conclusory and generalized allegations" of competitive harm have been held insufficient to satisfy the requirements for non-disclosure. See National Park v. Kleppe, supra, at 680. However, the allegations of the borrower in this instance are specific. In an affidavit in support of a brief submitted by the borrower pursuant to section 7(c) of the Open Records Act, a general partner of the borrower states, in part:

I am particularly familiar with the current market for commercial office space in the downtown Little Rock area. The market is very competitive and many office buildings, including the TCBY Tower, have significant vacancies. To release to the press the TCBY Tower's current rent rolls, quarterly profit and loss statements, lease summaries, current appraisals and certain recent correspondence and documents concerning these matters would result in substantial negative competitive consequences to CADC [the borrower]. Such disclosure would allow competing rental property interests as well as current and potential tenants to gain a negotiating edge over our efforts to obtain and maintain an adequate level of occupancy at sufficient rental rates to support our obligation to TRS.

The affidavit goes on to describe competitive disadvantages to the borrower resulting from the disclosure of the requested information.

Moreover, in the context of our duty to render decisions under the Open Records Act, we do not have the resources or powers of a court for purposes of finding fact, and must rely on the facts alleged to us. Open Records Decision No. 552 (1990). As the borrower has alleged actual competition and the likelihood of substantial competitive harm, we find that the information in your exhibits A, B, and C, and parts 1, 2, and 3 of your exhibit E is excepted from required public disclosure by section 3(a)(10).

The information in your exhibit D consists of two appraisals done of the TCBY Tower project. These appraisals were prepared by the Teacher Retirement System's real estate advisor. The appraisals contain, as supporting data, some information obtained from the borrower (e.g., rent rolls) which is duplicative of information which we have already determined to be excepted by section 3(a)(10). This supporting information may be withheld. The appraisals in exhibit D are prepared by your agents, and not "obtained from a person" to whom the information relates. Accordingly, section 3(a)(10) does not apply to the appraisals themselves. Open Records Decision No. 550 (1990).

The appraisals in exhibit D consist of descriptions of the property and its surroundings, the opinions of the appraisers of current property values, and economic projections, including projections of future property values and future cash flows.

Section 3(a)(11) of the Open Records Act excepts from required public disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party in litigation with the agency." It is well established that the purpose of section 3(a)(11) is to protect from public disclosure advice, opinion, and recommendation used in the decisional process within an agency or between agencies. This protection is intended to encourage open and frank discussion in the deliberative process. See, e.g., Austin v. City of San Antonio, 630 S.W.2d 391, 394 (Tex. App. - San Antonio 1982, writ ref'd n.r.e.); Attorney General Opinion H-436 (1974); Open Records Decision No. 538 (1990). Factual information, where severable, is not excepted from public disclosure by section 3(a)(11). Open Records Decision No. 559 (1990). Section 3(a)(11) may apply to memoranda from a consultant outside the agency if the consultant has some duty to advise the agency or act on its behalf in an official capacity. Open Records Decision No. 429 (1985).

As the Teacher Retirement System's real estate advisor has been retained specifically for the purpose of rendering its advice, opinion, and recommendations on these matters, it certainly may be regarded as a consultant with a duty to advise the agency for purposes of section 3(a)(11). The

appraisals largely consist of the opinions of your advisor regarding current and future economic conditions. These portions of the appraisals may be withheld. The portions of the appraisals consisting of purely factual descriptions of your investment in the TCBY Tower and economic conditions in Little Rock must be released. (You advise some of this material has already been released.)

Part 4 of your exhibit E consists of a report from your financial advisor which consists of both factual information and advice. The portion excepted by section 3(a)(11) has been marked.

Part 5 of your exhibit E consists of two letters from your advisor which consist of both factual information and advice. The portion excepted by section 3(a)(11) has been marked.

Part 6 of your exhibit E consists of an exchange of letters between the Teacher Retirement System and your advisor. These letters do not appear to consist of advice, opinion, or recommendation, and are therefore not excepted from public disclosure by section 3(a)(11). Part 7 of your exhibit E consists of information regarding certain financing modifications and appears purely factual. Your exhibit F consists of miscellaneous correspondence which neither you nor the borrower has established is within an exception to required public disclosure under the Open Records Act.

We note that you assert that the requested information is excepted from required public disclosure by section 3(a)(4) which excepts information "which, if released, would give advantage to competitors or bidders." The application of this exception has hitherto been restricted to protecting the interests of governmental bodies in competitive bidding situations. See, e.g., Open Records Decision No. 568 (1990). You assert:

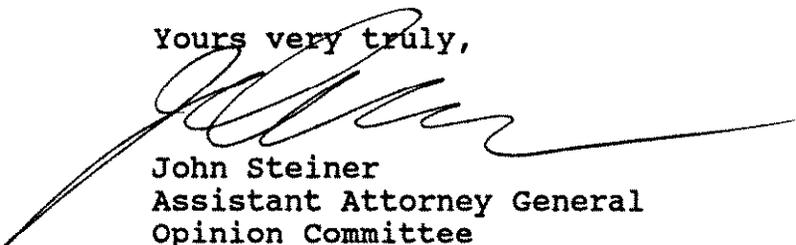
It is apparent that any previous Open Records decisions which hold that an entity acting in a governmental capacity may not be properly deemed to compete with private enterprise are inapplicable, since it is TCBY Tower that is in actual competition with other properties, not TRS itself.

It appears, without so deciding, that the relationship of the Teacher Retirement System to private enterprise may present a situation in which a governmental entity has interests in the marketplace which have not been hitherto considered in open records decisions. Similarly, your assertion of a fiduciary duty as a basis for exception under section 3(a)(1) presents a case of first impression.

Under the Open Records Act, all information held by governmental bodies is open unless it falls within one of the act's specific exceptions to disclosure. The act places on the custodian of records the burden of proving that records are excepted from public disclosure. Attorney General Opinion H-436 (1974). You have clearly established that some of the information submitted for review is excepted from public disclosure by sections 3(a)(10) and 3(a)(11). However, as the issues you raise under sections 3(a)(1) and 3(a)(4) are questions of first impression, we would consider further briefing on these issues if you wish to submit additional arguments. Please resubmit the documents with markings to correlate with the specific exceptions you claim, or otherwise explain how the exceptions you claim apply to specific documents or portions thereof. You have 10 days from receipt of this letter in which to resubmit the documents at issue. Otherwise, except as provided herein, the information must be released.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please refer to OR90-593.

Yours very truly,



John Steiner
Assistant Attorney General
Opinion Committee

JS/le

Ref.: RQ-2064, 8984, 9036, 9845, 10163

Enclosures: Documents Submitted