



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

February 3, 1994

Mr. Wayne Blevins
Teacher Retirement System of Texas
1000 Red River Street
Austin, Texas 78701-2698

OR94-059

Dear Mr. Blevins:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code (former article 6252-17a, V.T.C.S.).¹ Your request was assigned ID# 23344.

The Teacher Retirement System ("TRS") of Texas received an open records request for the following:

- (1) One report which was the subject of a prior open records request. That request was answered by Open Records Letter No. 93-709.
- (2) Financial disclosure statements filed by the system's "key executives" for the last three years.
- (3) Information concerning specific real estate investments.

Since the request for the report has already been answered by Open Records Letter No. 93-709 (1993), we will address the request for financial disclosure statements and real estate investment information. *See* Gov't Code § 552.301; Open Records Decision No. 435 (1986) at 2 (previous determination).

¹We note that the Seventy-third Legislature repealed V.T.C.S. article 6252-17a. Acts 1993, 73d Leg., ch. 268, § 46. The Open Records Act is now codified in the Government Code at chapter 552. *Id.* § 1. The codification of the Open Records Act in the Government Code is a nonsubstantive revision. *Id.* § 47.

FINANCIAL DISCLOSURE STATEMENTS

The requestor asks for the last three years of financial disclosure statements filed by employees TRS indicates are "key executives." As of September 1, 1993, every employee "who exercises significant decisionmaking or fiduciary authority, as determined by the board" must file a financial statement within 30 days after accepting employment and also by April 30 of each year. These statements are open to the public. Gov't Code § 825.212 (amended by Acts 1993, 73d Leg., ch. 812, § 20). The executive director of TRS and members of the board of trustees also file annual financial statements which are public information. Id. §§ 572.021; 572.032. However, TRS has on file financial statements filed by "key executives," which were not required by statute but by TRS policy. You state that TRS has had a policy of having its "key executives" fill out financial statements which were kept by the agency but not made public. You contend that these previously filed statements are protected by common-law privacy under section 552.101 or are protected personnel file information under section 552.102. We conclude that the financial statement forms which have been previously filed with TRS must be released, for the reasons given below.

Section 552.102 would apply only if disclosure of the financial statements "would constitute a clearly unwarranted invasion of personal privacy." Section 552.101 would apply if the documents were protected by common-law privacy. The test as to confidentiality under either section 552.101 or section 552.102 is the common-law privacy test set out in *Industrial Foundation of the South v. Texas Industrial Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). *Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546, 550 (Tex. App.--Austin 1983, writ ref'd n.r.e); Open Records Decision No. 423 (1984) at 2. In the *Industrial Foundation of the South* decision, the Texas Supreme Court recognized a common-law right-of-privacy in information which is highly intimate or embarrassing to a reasonable person and of no legitimate concern to the public. In Open Records Decision No. 373 (1983) at 3, we stated:

In our opinion, all financial information relating to an individual -- including sources of income, salary, mortgage payments, assets, medical and utility bills, social security and veterans benefits, retirement and state assistance benefits, and credit history -- ordinarily satisfies the first requirement of common-law privacy, in that it constitutes highly intimate or embarrassing facts about the individual, such that its public disclosure would be highly objectionable to a person of ordinary sensibilities.

You have submitted a copy of the financial statement form which employees had filled out prior to the section 825.212 provisions. The form includes questions about debts, income sources, and assets. It also contains questions about financial interests with

lobbyists and outside board or executive positions.² This information is disclosable because even though it is intimate, it is of legitimate public concern. These statements were filed by "key executives" at TRS, who make significant financial decisions.³ The statements in question could provide information about potential conflicts of interest between these decision-makers' personal financial investments and the interests of TRS. The forms would also disclose financial relationships with lobbyists and lobbying entities. This type of financial information about public servants who make significant financial decisions is of valid public interest and concern. See Attorney General Opinion H-15 (1973) at 5-7.

Although the request was for financial statements filed for the past three years, you indicate you have collected the statements for only two years. You do not have to collect new information. You must provide the information that has been filed. *Economic Opportunities Dev. Corp. v. Bustamente*, 562 S.W.2d 266 (Tex. Civ. App.--San Antonio 1978, writ dismissed) (government does not have to prepare new information); Open Records Decision No. 572 (1990) at 1.

SPECIFIC REAL ESTATE INVESTMENTS

As to the third category of information requested, you indicate that you have already provided the requestor the names, locations, and descriptions of each property inquired about. You have also provided the amounts of the original investments, any additional loans, and the names of the original and current borrowers and/or owners of the properties in question. The requestor also asked for copies of loan compliance checklists or trend sheets, which you are not required to provide because you do not have such documents. *Id.* However, you contend that five categories of information may be withheld under section 552.104.⁴ You have provided exhibits with each category.⁵

² The form requires financial information concerning the preceding year. An employee who filled the form out in 1993 would be disclosing information about 1992 financial affairs.

³We do not address whether the "key executives" who filled out financial statements are the same employees as those the board determines must file because of their significant decisionmaking or fiduciary authority.

⁴ You have listed a number of other sections you believe to be applicable. However, you primarily discuss TRS' marketplace interests under section 552.104. You mention that some of the information relates to properties and loans where litigation is pending or reasonably anticipated and may be protected under section 552.103, but you have not specifically marked this information nor explained how it relates to pending or anticipated litigation related to a specific matter. See Open Records Decision No. 346 (1982); 289 (1981). You also contend that information should be confidential under section 552.101 but have not made a specific argument.

⁵ We assume that these are the only categories of information which have been withheld and that all other information has been released. See Open Records Decision No. 197 (1978) (failure to submit documents raises presumption the information is public).

Appraisals - Exhibit "C"

The requestor asked for "results of periodic appraisals." However, you state that you "interpret" this to be a request for the appraised value of the property and any write-downs occurring as a result of the appraisals, rather than a request for the complete appraisals. It is your responsibility to advise the requestor as to what information is available so that he may more clearly explain his request. Open Records Decision No. 563 (1990) at 7. In any event, you urge that both the appraisals and the "results" of the appraisals should be withheld in their entirety.

We conclude that TRS may withhold the appraised property value figures and information about the write-downs, based on its argument concerning the likelihood of harm to its legitimate marketplace interests. As to the "results," or write-downs and appraised values, you state:

Disclosure of writedowns or reductions in value which result from appraisals could seriously impair TRS' ability to sell the loan or property. The . . . annual Investment Report includes value reductions at the time real estate loan collateral is acquired. Providing to the public any further "writedowns" which result from periodic appraisals can only disadvantage TRS' ability to compete in the marketplace and ensure that a lesser price is received upon sale.

Section 552.104 states that information may be held from release "if it is information that, if released, would give advantage to a competitor or bidder." In Open Records Decision No. 593 (1991), we determined that TRS has marketplace interests which are subject to protection under section 552.104 (construing statutory predecessor to section 552.104). See Open Records Decision No. 604 (1992). To withhold information under section 552.104, TRS must show that the information at issue could and likely would cause specific harm to its legitimate marketplace interests. We accept TRS' argument as to the appraised value figures and write-downs, which you call the "results" of the appraisal records.

As to the appraisal records, you state that releasing the complete appraisals would also have the effect of disclosing confidential assessments and financial information to marketplace competitors. However, the sample appraisal you sent indicates that there is a certain amount of factual information which may be released without impairing TRS' marketplace interests.⁶ You may not withhold the following information that is

⁶ You refer to Open Records Letter No. 90-593 (1990), which held that the portions of an appraisal containing opinions and recommendations by a TRS real estate advisor could be withheld under section 552.111 (former section 3(a)(11), V.T.C.S. article 6252-17a), but that the factual information in the appraisal must be released. You ask that this office reconsider that letter to protect the factual information from release under section 552.111. In regard to the scope of section 552.111, please find enclosed Open Records Decision No. 615 (1993), reconsidering the section in light of *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ).

contained in the appraisals: maps that do not indicate the location of comparable sales or comparable rentals; photographs of the real estate that is the subject of the appraisal; *general economic information about a state, city or neighborhood*. The other sections of the appraisals may be withheld under section 552.104. We have marked the sample appraisal report you sent to indicate the type of information which must be disclosed.

Loan Performance Reports, Risk Ratings and Loan Loss Allowance Reports - Exhibit "D"

You state that TRS publishes an annual report, after the close of the fiscal year, which may meet the open records request for loan performance reports, risk ratings, and loan loss allowance reports. You state:

To the extent that Requestor is asking for anything in addition to monthly transaction amounts for individual loans or risk ratings on a total portfolio basis which are published in annual TRS financial reports, TRS submits that this information is confidential

It is your duty to advise the requestor as to what information is available so that the request can be narrowed. Open Records Decision No. 563 (1990) at 7. Under these circumstances, we can only consider the documents you sent as "Exhibit D." If the requestor seeks additional information you may then seek an opinion as to those specific records. The documents you marked as "Exhibit D" provide current, sensitive financial information about loans and properties. The release of this information could impact on TRS' ability to sell and effectively compete in the marketplace. These documents may be withheld under section 552.104.

Loan Portfolio Management Reports - Exhibit "E"

You contend that certain information in the loan portfolio management reports is exempt from disclosure as broken down in the following sections:^{7, 8}

(Footnote continued)

You also state that release of the factual information in the appraisals at issue will harm TRS' marketplace interests, as follows:

The factual descriptions of properties in appraisals are extremely detailed and could provide information, such as defects in code requirements or physical condition, to competing lenders who want to attract tenants away from the property securing TRS' loan or from the owned property.

We would note that section 552.104 protects only *legitimate* marketplace interests. Hiding building code violations and defects would not appear to be *legitimate* marketplace interests.

⁷Many of the arguments advanced for keeping the loan portfolio management reports confidential indicate that TRS is concerned that disclosure of certain information about loans and real estate may deter sales and rentals. We do not address questions concerning legal requirements for full disclosure in the context of certain financial transactions and in renting.

Part I - Executive Summary: Based on your argument that release of the information in this section will likely cause specific harm to TRS' legitimate marketplace interests, you may withhold information in Part I under section 552.104. You state:

Disclosure of detailed financial information for a particular loan or property, such as the information contained in Part I of the portfolio management reports, could significantly hinder TRS' ability to compete in the marketplace by causing tenants to leave, keeping potential tenants away, negatively impacting the ability of the owner . . . to negotiate or renegotiate favorable lease terms, or hindering TRS' ability to sell the note or reap the benefits of a sale of property held by its title-holding entity.

Part II - Investment Activity Summary: You state that disclosure of the report "would hinder TRS' ability to obtain the best price for its investments" by providing potential tenants, competing lenders and potential buyers inside information about the specific properties. Since the information contained in section II gives details about sales prospects, potential rental values and other financial information that would likely harm TRS' legitimate market interests, this information may be withheld under section 552.104.

Part III - Financial Statements: These statements include information about investments such as the amounts spent improving property and transaction costs. You state that disclosing this information "could severely damage TRS' ability to effect transactions in the marketplace in competition with other lenders." Based on this argument, you may withhold these statements under section 552.104.

Part IV - Investment Descriptions: The descriptions provide investment value or property value estimates. Based on your argument that disclosure of the valuation portions of these descriptions would have a harmful effect on TRS' ability to sell and obtain the highest selling price for these properties, the valuation portions of the investment descriptions may be withheld under section 552.104.

Amounts Invested Subsequent to Initial Investment - Exhibit "F"

(Footnote continued)

⁸You state that you provided the requestor with a list of information that included the names and locations of the properties; a short description of the properties; the initial investment amounts; subsequent loans; and names of the original borrowers or owners of the properties. You state that the requestor has also been given property location maps and the occupancy and leasing percentages for the properties. You indicate that this information is included in the appraisal reports. As this specific information has already been given to the requestor, you may not now withhold that same information from the appraisal reports. Open Records Decision No. 518 (1989) at 3.

You state that release of this information should be withheld under section 552.104 because disclosing the amounts invested when properties are being readied for sale would harm TRS' interests in the marketplace. Based on your argument that disclosure of the information at issue would cause specific harm to TRS' competitive interests in the marketplace, you may withhold these reports under section 552.104. You state:

TRS' title-holding entities hold real estate for sale subject to TRS disposition policies. If TRS contributions to capital to the title-holding corporations constitute public information, potential buyers in the marketplace would have access to information which would impair TRS' ability to reap the maximum amount from its additional investments in its corporations. . . . It would be counter to TRS' competitive interests in the marketplace for the public to be privy to which title-holding entities had operating expenses in excess of income.

Owned Real Estate Plans - Exhibit "G"

You state that the plans contain "sensitive analyses and plans regarding the sale of individual properties, which include minimum sales prices." Since release of this information would likely affect TRS' ability to obtain the highest sale price, you may withhold these plans under section 552.104.

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 contact our office.

Yours very truly,



Ruth H. Soucy
Assistant Attorney General
Open Government Section

RHS/rho

Ref.: ID#s 23344, related to OR93-709
ID# 23607
ID# 23760

Enclosures: Marked documents
Open Records Decision No. 615 (1993)

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