



July 21, 1999

Ms. Erin Mack  
General Counsel  
Houston Municipal Employees Pension System  
1111 Bagby, Suite 1450  
Houston, Texas 77002-2503

OR99-2057

Dear Ms. Mack:

You have asked whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 125850.

The Houston Municipal Employees' Pension System (the "system") received a request for information concerning the system's Japan equity holdings. You submitted to this office a representative sample of the records at issue.<sup>1</sup> You contend that the responsive records are exempted from disclosure under sections 552.104 and section 552.110 of the Government Code. We have addressed the records at issue and will consider your arguments against disclosure. We also reviewed the arguments submitted to this office by the system's investment managers.

Section 552.104 exempts "information that, if released, would give advantage to a competitor or bidder." The purpose of section 552.104 is to protect a governmental body's interests in a commercial context by keeping some competitors or bidders from gaining unfair advantage over other competitors or bidders. Open Records Decision No. 541 at 4 (1990). Section 552.104 is generally applicable to competitive bidding situations prior to the awarding of a contract. *Id.* at 5. Section 552.104 has also been applied in situations where a governmental body has shown that it is a competitor with marketplace interests that may be protected under

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<sup>1</sup>We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision No. 499 (1988), 497 (1988). Here, we do not address any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

section 552.104. Open Records Decision No. 593 (1991). In Open Records Decision No. 593 (1991) we agreed that the Teacher Retirement System had shown that release of particular information would harm its legitimate marketplace interests by showing specific harm in a particular competitive situation.

You state as follows:

The System is a significant investor in the marketplace and, through its investment manager, competes with other investors, including private pension funds, for the best rates, commission, and trading terms. Release of the information would likely cause specific harm to the System's legitimate marketplace interests and could significantly hinder the System's ability to compete in the marketplace by negatively impacting the ability of the investment manager to negotiate favorable trades and to get the best price for its investments. Because of the nature of such trades, the System has a continuing competitive interest in these markets and must operate within this competitive environment.

Under the reasoning set out in Open Records Decision No. 593 (1991), we agree that the system has shown the possibility of specific harm to its legitimate marketplace interests in this particular competitive situation. Thus, based on that decision, we agree that the market values and share information may be protected from disclosure under section 552.104.<sup>2</sup> However, because you have failed to show us that release of the company names would harm the system's legitimate market place interests, the list of companies in which shares are held is not protected from disclosure.

You also assert that the information at issue is commercial and financial information made confidential under section 552.110. Section 552.110 provides an exception for "[a] trade secret or commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision." Section 552.110 refers to two types of information: (1) trade secrets, and (2) commercial or financial information that is obtained from a person and made privileged or confidential by statute or judicial decision. Open Records Decision No. 592 at 2 (1991). We note that the information at issue is held by the fund managers on behalf of the system.

We also note that you rely on *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974) for your assertion that the information held by the system's own fund managers is protected from public disclosure. Although in Open Records Decision No. 639 (1996) this office relied on *National Parks & Conservation Association v. Morton*,

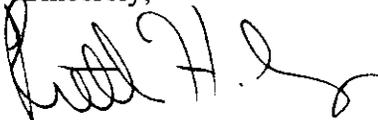
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<sup>2</sup>You note that the system has an agreement that information will be kept confidential. As you note, a confidentiality agreement does not keep information confidential under the Open Records Act.

498 F.2d 765 (D.C. Cir. 1974) as a judicial decision and applied the standard set out in *National Parks* to determine whether information is excepted from public disclosure under the commercial and financial prong of section 552.110, the Third Court of Appeals has recently held that *National Parks* is not a judicial decision within the meaning of section 552.110. *Birnbaum v. Alliance of Am. Insurers*, 1999 WL 314976 (Tex. App.–Austin May 20, 1999, no pet. h.). You may not withhold the requested information under the commercial or financial information prong of section 552.110.<sup>3</sup> Portions of the information may be withheld under section 552.104 as addressed above.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Sincerely,



Ruth H. Soucy  
Assistant Attorney General  
Open Records Division

RHS/ch

Ref: ID# 125850

Encl. Submitted documents

cc: Mr. John Taylor  
Investor Responsibility Research Center  
1350 Connecticut Avenue NW, Suite 700  
Washington, D.C. 20036-1701  
(w/o enclosures)

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<sup>3</sup>There is no protected common-law privacy interest in commercial or financial information about a business. Open Records Decision No. 192 at 4 (1978) (right of privacy protects feelings of human beings, not property, business, or other monetary interests).