



December 30, 1999

Ms. Belinda R. Perkins
Teacher Retirement System of Texas
1000 Red River Street
Austin, Texas 78701-2698

OR99-3810

Dear Ms. Perkins:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 130904.

The Teacher Retirement System of Texas (the "system") received a request for "all information relating to or concerning 'HBW Holdings, Inc. (Teacher Retirement System of Texas Alternative Assets, Texas Growth Fund - 1995 Trust).'" You claim that the requested information is excepted from disclosure under sections 552.104, 552.110, and 552.111 of the Government Code. You also claim confidentiality under section 552.101 of the Government Code in conjunction with provisions of the Texas Constitution. We have considered the exceptions you claim and reviewed the submitted information.

Pursuant to section 552.305 of the Government Code, you notified the Texas Growth Fund of the request and instructed its attorney to notify HBW Holdings, Inc., as you could not find an address for the corporation. Section 552.305 of the Government Code, as amended by Act of May 25, 1999, 76th Leg., R.S., ch. 1319, § 24, 1999 Tex. Sess. Law Serv. 4500, 4510 (Vernon) (codified as an amendment to Gov't Code § 552.305), took effect September 1, 1999. It requires a governmental body to make a good faith attempt to notify a person whose proprietary interests may be affected by a request for information. The notice must:

(1) be in writing and sent within a reasonable time not later than the 10th business day after the date the governmental body receives the request for the information; and

(2) include:

(A) a copy of the written request for the information, if any,

received by the governmental body; and

(B) a statement, in the form prescribed by the attorney general, that the person is entitled to submit in writing to the attorney general within a reasonable time not later than the 10th business day after the date the person receives the notice:

(i) each reason the person has as to why the information should be withheld; and

(ii) a letter, memorandum, or brief in support of that reason.

Your notification dated November 1, 1999, coincidentally corresponding to the 10th business day after the system received the request for information, is substantially in compliance with section 552.305, as amended. However, neither the Texas Growth Fund nor HBW Holdings, Inc. has submitted to this office any reason to withhold the requested information or any documentation in support of any such reason. As the system has authority to rely on the third parties involved to make their own arguments under section 552.110, and as the system did so rely and neither third party responded, the information is not excepted under section 552.110. The system also relies on the Texas Growth Fund to make arguments under section 552.111; because the fund made no such arguments, the information is not excepted under that section.

In addition to the items submitted to this office for review, you claim an exception for any “other materials relating to the Texas Growth Fund -- 1995 Trust and HBW Holdings, Inc. that are in the possession of the Texas Growth Fund to which TRS may have a right of access. TRS will rely on the Texas Growth Fund to make arguments regarding any responsive materials that are not in TRS’s possession.” While the requestor may make a similar request directly of the Texas Growth Fund, we note that the governmental body by or for which information is “collected, assembled, or maintained” pursuant to section 552.002(a) retains ultimate responsibility for disclosing or withholding information in response to a request under the Public Information Act, even though another governmental body has physical custody of it. Open Records Decision No. 576 (1990).

The primary argument you make is based on section 552.104 of the Government Code. Section 552.104 protects from required public disclosure “information that, if released, would give advantage to a competitor or bidder.” The purpose of section 552.104 is to protect the government’s interests when it is involved in certain commercial transactions. For example, section 552.104 is generally invoked to except information submitted to a governmental body as part of a bid or similar proposal. *See, e.g.*, Open Records Decision No. 463 (1987). In these situations, the exception protects the government’s interests in obtaining the most favorable proposal terms possible by denying access to proposals prior to the award of a contract. When a governmental body seeks protection as a competitor, however, we have stated that it must be afforded the right to claim the “competitive advantage” aspect of section 552.104 if it meets two

criteria. The governmental body must first demonstrate that it has specific marketplace interests. Open Records Decision No. 593 at 4 (1991). Second, a governmental body must demonstrate actual or potential harm to its interests in a particular competitive situation. A general allegation of a remote possibility of harm is not sufficient to invoke section 552.104. *Id.* at 2. Whether release of particular information would harm the legitimate marketplace interests of a governmental body requires a showing of the possibility of some specific harm in a particular competitive situation. *Id.* at 5, 10.

After reviewing your arguments, we also conclude that you have demonstrated that the system has specific marketplace interests. You state that the system is “constitutionally responsible for the administration of the system and investment of funds of the system, including [Texas] Growth Fund investments and other private marketplace investments,” citing the Texas Constitution, article XVI, §§ 67(a) (3) and (b)(1) and section 825.301(a) of the Government Code. A member of the system’s board of trustees serves on the fund’s board. Tex. Const. article XVI, § 70(c)(3). You inform us that the system is currently an active participant in the Texas Growth Fund’s trust, and that the system “has an on-going interest in the performance of the 1995 Trust.”

You assert that, if the requested information were disclosed, the Texas Growth Fund would not be able to attract as many favorable investments, because companies seeking investors would be unwilling to disclose confidential information to the fund. Without the benefit of forthright self-analysis from companies seeking investors, the fund would be unable to evaluate potential investments adequately. Additionally, disclosing the fund’s evaluations of potential investments could affect market perceptions of those investments, directly impairing the system’s market position.

We conclude that you have demonstrated actual or potential harm to the system’s interests in a particular competitive situation. You have shown that releasing the documents will bring about a specific harm. You may withhold the submitted information under section 552.104.¹ However, because you alert us that there may be other materials responsive to the request which are not in the possession of the system but to which the system has access, we emphasize that 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.

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

¹Because we are able to make a determination under section 552.104, we do not address the section 552.101 argument against disclosure.

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, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, 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 Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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,



Patricia Michels Anderson
Assistant Attorney General
Open Records Division

PMA/jc

Ref: ID# 130904

Encl. Submitted documents

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