



May 15, 2002

Ms. Christy Wallace
Interim Secretary
The University of Texas Investment Management Company
221 West Sixth Street, Suite 1700
Austin, Texas 78701

OR2002-2571

Dear Ms. Wallace:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 162968.

The University of Texas Investment Management Company (“UTIMCO”) received a request for (1) correspondence with Enron or Enron subsidiaries, partnerships, or trusts concerning investment possibilities; (2) other memoranda, letters, or documents regarding Enron-related investments; and (3) records of investments made by UTIMCO in Enron or Enron subsidiaries, partnerships, or trusts, “including types, amounts, and dates of transactions, and earnings or losses associated with the investments.” You indicate that UTIMCO has released some of the requested information. However, you claim that the remainder of the requested information is excepted from disclosure under sections 552.104 and 552.110 of the Government Code. Likewise, you indicate that you have notified two interested third parties—Oaktree Capital Management, L.L.C. (“Oaktree”), and AIG Highstar Capital, L.L.C.—about the request. *See* Gov’t Code § 552.305. In turn, Oaktree has submitted arguments to this office contending that a portion of the submitted information is excepted from disclosure under sections 552.101 and 552.110 of the Government Code. We have considered all of the submitted arguments and reviewed the submitted information.

We begin by addressing your argument that all of the submitted information is excepted from disclosure under section 552.104 of the Government Code. Section 552.104 excepts from public disclosure “information that, if released, would give advantage to a competitor or bidder.” When a governmental body seeks protection under section 552.104 as a competitor, the governmental body must first demonstrate that it has specific marketplace interests. Open Records Decision No. 593 at 4 (1991). The governmental body must then 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.

We have previously concluded that UTIMCO and the University of Texas Board of Regents, with whom UTIMCO contracts, have a common purpose and objective such that an agency-type relationship is created. This office has also previously determined, in the same context, that the University of Texas System may be considered a "competitor" for purposes of section 552.104. Therefore, based on this relationship and after reviewing all of your arguments, we conclude that you have demonstrated that UTIMCO has specific marketplace interests.

You state that the submitted information consists of a UTIMCO memorandum and information provided to UTIMCO by private companies to encourage UTIMCO to invest in them. Specifically, you state that the UTIMCO memorandum documents a call with a prospective investment partner and reveals UTIMCO's opinions regarding the viability of the investment. You state that the release of all of the submitted information would harm UTIMCO's competitive position in the private equity investment marketplace because it would discourage prospective investment partners from seeking UTIMCO's investment. If UTIMCO is required to release the submitted information, you contend that prospective investment partners might turn to private investors that are under no obligation to release the information provided by the prospective investment partners. Based on your arguments and our review of the submitted information, we find that you have adequately demonstrated that release of the submitted information could harm UTIMCO's competitive interest in the private equity investment marketplace. Consequently, UTIMCO may withhold the submitted information under section 552.104 of the Government Code.¹

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, within 10 calendar days of this ruling, the

¹Based on this finding, we need not reach Oaktree's arguments under sections 552.101 and 552.110 of the Government Code.

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); *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

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 Texas Building and Procurement Commission 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,



Nathan E. Bowden
Assistant Attorney General
Open Records Division

NEB/sdk

Ref: ID# 162968

Enc: Submitted documents

c: Mr. Nate Blakeslee
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(w/o enclosures)