



May 20, 2002

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

OR2002-2660

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# 163191.

The Teacher Retirement System of Texas ("TRS") received a request for information regarding the status of the Texas Growth Fund's investments. The requestor subsequently provided comments to this office and clarified his request so as to specifically exclude any information related to proposed investments. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released). The requestor also clarified with your office that he was seeking access to a specified status report. You state that some responsive information has been released to the requestor. You claim that a portion of the requested information is excepted from disclosure under sections 552.101, 552.104, and 552.111 of the Government Code. Further, you claim that the submitted information may be excepted from disclosure pursuant to section 552.110 of the Government Code. You make no arguments and take no position as to whether the submitted information is excepted from disclosure under section 552.110. You state, and provide documentation showing, that you notified the third parties whose proprietary interests may be implicated of the request for information and of their right to submit arguments to this office as to why the requested information should not be released.¹ *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Public Information Act in certain circumstances). We have considered the exceptions claimed and reviewed the submitted information.

¹The third parties that were sent notice under section 552.305 are the following: the Texas Growth Fund and those private entities in which TGF invests, Venture Economics, Venture Capital Journal, Pathway Capital Management LLC, and Lofland Acquisition, Inc.

Section 552.305(d) allows a third party ten business days after the date of its receipt of the governmental body's notice to submit its reasons, if any, as to why information relating to that party should not be released. *See* Gov't Code §552.305(d)(2)(B). The Texas Growth Fund ("TGF") responded to the notices and asserted that sections 552.104 and 552.110 of the Government Code except from disclosure responsive information of Pathway Capital Management LLC ("Pathway"), and Lofland Acquisition, Inc. ("Lofland"), two of the private entities in which TGF invests. Pathway also responded, and asserted that sections 552.101, 552.104, and 552.110 of the Government Code except its information from public disclosure. No responses were received from Venture Economics, Venture Capital Journal, or Lofland, although, as noted, TGF responded on behalf of Lofland. Because Venture Economics and Venture Capital Journal did not submit arguments in response to the section 552.305 notice, nor does TGF argue on their behalf, we have no basis to conclude that these companies' information is excepted from disclosure. *See* Open Records Decision Nos. 639 at 4 (1996) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure), 552 at 5 (1990) (party must establish prima facie case that information is trade secret), 542 at 3 (1990). To the extent that it exists, responsive information of these two companies must, therefore, be released to the requestor.

We note that Exhibit A contains information pertaining to proposed investment opportunities. The requestor has specifically excluded proposed investments from his request. Thus, the portion of the submitted information in Exhibit A that relates to proposed investments is nonresponsive to the present request, and need not be released in response to this request. To the extent that any of the submitted information in Exhibit A pertains to current investments, it is responsive to the request for information. We will therefore address your arguments for nondisclosure of such responsive information in Exhibit A.

You have noted that the submitted records in Exhibit B may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* We will therefore consider whether the information contained in Exhibit B is excepted from public disclosure.

TRS asserts section 552.104 of the Government Code for the documents contained in Exhibits A and B. 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. *See* Open Records Decision No. 593 at 4 (1991) (governmental body that has been granted specific authority to compete in the private marketplace may demonstrate marketplace interests analogous to those of a private entity). Second, the 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.

With respect to whether TRS and TGF are competitors in the private equity marketplace, you state:

TRS has marketplace interests with regard to the records at issue because the agency is constitutionally responsible for the administration of the system and investment of the funds of the system, including investments in the [TGF] and other private marketplace investments. Tex. Const. Article XVI, § 67(a)(3) and (b)(1); Texas Government Code § 825.301(a). A member of the TRS Board of Trustees serves on the [TGF] board. Tex. Const. Article XVI, § 70(c)(3). TRS is constitutionally authorized to invest in the [TGF], and is currently an active participant in the fund. TRS has an ongoing interest in the performance of the [TGF] and in the performance of its other private equity investments. . . .

Given the constitutional authority provided TRS and TGF for purposes of investment, we conclude that TRS and TGF can be considered "competitors" in the private marketplace for purposes of section 552.104. *See* Open Records Decision No. 593 (1991). Thus, TRS may avail itself of section 552.104 protection for its information, provided TRS demonstrates actual or potential harm to its competitive interests were the information at issue to be released to the public.

On the question of whether TRS has shown actual or potential harm to its competitive interests, you state that

TRS. . . competes in the private equity marketplace. The private equity marketplace requires confidentiality to achieve success. This market is extremely sensitive to any information pertaining to investors, investments, and the private companies that comprise the private equity marketplace. . . . Disclosure of financial information and related records could damage or destroy TRS's competitive position in this environment. If TRS were unable to maintain the confidentiality of sensitive information relating to its private

equity portfolio, its ability to attract favorable investment candidates in the future would be impaired.

...

It is, therefore, important that TRS preserve opportunities to diversify its assets. . . . If TRS is unable to protect the confidentiality of information related to its private equity investments, private equity investment entities could be forced to exclude TRS in order to protect the integrity of their investments. . . .

Based upon our review of the submitted information and arguments, we conclude that you have demonstrated actual or potential harm to the interests of TRS were the information at issue to be released to the general public. Therefore, the responsive information in Exhibits A and B is excepted from disclosure under section 552.104.² We have marked the information in Exhibit A that is not responsive to the request for public information.

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 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.

²As section 552.104 is dispositive, we do not address the other claimed exceptions to disclosure.

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).

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,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/seg

Ref: ID# 163191

Enc. Submitted documents

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