



August 19, 2002

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

OR2002-4567

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# 167244.

The University of Texas Investment Management Company (“UTIMCO”) received a request for all documentation provided by UTIMCO to University of Texas System officials or to regents regarding the performance of UTIMCO investments during the last completed fiscal or financial year. You advise that you will make most of the requested information available to the requestor. You claim that the remaining requested information is excepted from disclosure under section 552.104 of the Government Code. We have considered the exception you claim and have reviewed the submitted information.

Section 552.104 protects from required public disclosure “information that, if released, would give advantage to a competitor or bidder.” Gov’t Code § 552.104(a). The requirement under section 552.022(a) that certain categories of information are public and not excepted from required disclosure unless expressly confidential under law does not apply to information excepted under this section. *See id.* § 552.104(b). 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) (holding that the Teacher Retirement System, as an entity that is authorized by both constitutional and statutory law to invest its securities, may be deemed, with regard to its investments, a competitor in the marketplace for purposes

of section 552.104). 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.

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 UTIMCO invests public funds in the private equity marketplace under contract with the University of Texas Board as authorized by section 66.08 of the Education Code. You advise that UTIMCO invests in these private equities by forming partnerships with the entities in which it wants to invest. You argue that UTIMCO risks losing investment opportunities if the submitted investment return information is released because UTIMCO's partners then might not allow UTIMCO to participate in these partnerships and would instead turn to other private equity investors who are not subject to the Public Information Act for admission into the partnerships. Based upon our review of your arguments and the investment return information, we conclude that UTIMCO has demonstrated actual or potential harm to its interests in a particular competitive situation. Accordingly, we conclude that UTIMCO may withhold the submitted information from disclosure pursuant to section 552.104 of the Government Code.

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. 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,



Kristen Bates
Assistant Attorney General
Open Records Division

KAB/seg

Ref: ID# 167244

Enc. Submitted documents

c: Mr. Lucius Lomax
P.O. Box 547
Austin, Texas 78767
(w/o enclosures)