



November 6, 2002

Ms. Belinda R. Perkins  
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OR2002-6326

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# 171134.

The Teacher Retirement System of Texas ("TRS") received a request for information regarding a request for proposals for securities lending services, number 0202135Tdp.<sup>1</sup> You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, 552.104, 552.107, and 552.111 of the Government Code. You also 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.<sup>2</sup> *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

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<sup>1</sup>We note that in Open Records Letter No. 02-4577 (2002), this office ruled that the requestor's original request for this information was withdrawn by operation of law. *See* Gov't Code 552.2615(b) (request is considered to have been withdrawn if requestor does not respond in writing to itemized statement sent by governmental body to requestor pursuant to section 552.2615 within ten days after statement is sent). Accordingly, the Public Information Act (the "Act") did not require TRS to produce to the requestor any information responsive to her requests. *See id.* However, the requestor has since notified TRS that she will accept any charges for providing the responsive information, and has renewed her request for the information. Therefore, we will now address TRS' arguments for withholding the requested information from this requestor.

<sup>2</sup>The third parties that were sent notices under section 552.305 are the following: State Street Bank, Deutsche Bank/Bankers Trust Company, JP Morgan Chase Bank, Mellon Trust, and the Northern Trust Company.

exception in Public Information Act in certain circumstances). Of these third parties, State Street Bank ("State Street") was the only company that submitted briefing to this office. We have considered the exceptions claimed and reviewed the submitted information.

We will first address your argument under section 552.101. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." In asserting section 552.101, TRS essentially argues that the submitted information should be deemed confidential in its entirety because the fiduciary duty of members of the TRS Board of Trustees under the Restatement (Third) of Trusts, as well as other law, requires that the TRS trust be administered solely for the benefit of the trust beneficiaries, and that release of the information at issue has the potential to harm the trust, and therefore, its beneficiaries. As a general rule, however, statutory confidentiality requires express language making certain information confidential or stating that the information shall not be released to the public. Open Records Decision No. 478 at 2 (1987). None of the provisions of law cited with respect to the section 552.101 assertion contain language that makes any of the information at issue expressly confidential, nor do any of the provisions state that the information shall not be released to the public. As we are aware of no provision that makes any of the information expressly confidential, we conclude the information is not excepted by section 552.101.

We will next address your argument under section 552.104 for Exhibits C, D, D-1, and E, as well as the bid materials you have submitted as Exhibit 3. Section 552.104 states that information is excepted from required public disclosure if release of the information would give advantage to a competitor or bidder. The purpose of this exception is to protect the interests of a governmental body, usually in competitive bidding situations. *See* Open Records Decision No. 592 (1991). 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. Generally, section 552.104 does not except bids from public disclosure after bidding is completed and the contract has been awarded. *See* Open Records Decision 541 (1990).

In this case, you inform us that the contract at issue has been awarded. Thus, we will address your arguments under section 552.104 pertaining to TRS as a competitor in the marketplace.

When a governmental body seeks protection as a competitor, 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.

You argue that

TRS has marketplace interests . . . because the agency, as trustee, is responsible for the implementation and administration of the trust fund established by Title 8 of the Government Code. Administration of the trust necessarily involves contracting for custodian and lending services. (Citations omitted). TRS therefore has an ongoing competitive interest in maintaining its ability to attract the largest number of qualified bidders for custodian and lending services contracts and in obtaining information from these bidders that enhances analysis of their qualifications.

With regard to the specific harm to TRS' competitive interest that would result from release of the requested information, you state,

the ability to maintain the confidentiality of information considered sensitive or proprietary by qualified bidders directly affects TRS' ability to effectively compete for the best values in custodian and lending services. If TRS were unable to protect the confidentiality of bidder commercial and financial information, this would have a detrimental effect on TRS' ability to attract the largest number of potential vendors and diminish TRS' competitive advantage. Qualified bidders may be less likely to participate *in future opportunities* involving TRS custodian and securities lending contracts if information they view as proprietary, or potentially harmful to their reputation in the industry, is released to the public. (Emphasis added).

Although you have set forth arguments for how release of the information at issue might impair TRS' ability to contract for securities and lending services at some unspecified point in the future, you have provided no evidence that TRS has an ongoing competitive interest that would be harmed by release. Therefore, we conclude that TRS has failed to demonstrate that release of the information in Exhibits C, D, D-1, and E, or the bid materials you have submitted as Exhibit 3, would cause actual or potential harm to its interests in a particular competitive situation. Accordingly, we conclude that the information at issue may not be withheld under section 552.104.

We will next address your argument under section 552.103 for the information you have submitted as Exhibit E. Section 552.103 provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

TRS has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). TRS must meet both prongs of this test for information to be excepted under 552.103(a).

You have submitted a Notice of Appearance filed by the Office of the Attorney General on behalf of several entities, including TRS, in Civil Action No. H-01-CV-3624 (Consolidated), *Mark Newby v. Enron Corporation, et. al.*, in the United States District Court, Houston Division. You state that although TRS is not currently a party to the suit, there are TRS interests that may result in TRS becoming a party to the suit. On this basis, and upon review of the submitted information, we conclude you have established that litigation regarding TRS was reasonably anticipated on the date TRS received the request for information. Therefore, we conclude that TRS may withhold the information in Exhibit E in its entirety under section 552.103.<sup>3</sup>

Generally, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further,

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<sup>3</sup>As we are able to make this determination, we need not address your argument under section 552.107 for this information.

the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

We next address your argument under section 552.111 for the information in Exhibits C, D, and D-1. Section 552.111 excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *Arlington Indep. Sch. Dist. v. Texas Attorney Gen.*, 37 S.W.3d 152 (Tex. App.--Austin 2001, no pet.). An agency's policymaking functions do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. ORD 615 at 5-6. Additionally, section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist.*, 37 S.W.3d at 160; ORD 615 at 4-5.

Upon review of the information in Exhibit C, as well as the information in Exhibit D, we conclude that a portion of this information is excepted under section 552.111 as we find that this information generally consists of advice, opinion, and recommendations reflecting the policymaking process of the TRS with respect to issues regarding the selection of a provider of securities lending services. We have marked the information in Exhibits C and D to be withheld under section 552.111. However, a portion of the information in Exhibit D is purely factual, and therefore, this information is not excepted under section 552.111. Further, we find that the information in Exhibit D-1, consisting of information submitted by the bidders for the securities lending services contract, does not reflect the internal policymaking processes of TRS for purposes of section 552.111, and thus, this information may not be withheld under section 552.111.

We will now turn to State Street's argument under section 552.110. Section 552.110 protects: (1) trade secrets, and (2) commercial or financial information the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. See Gov't Code § 552.110(a), (b). The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.), cert. denied, 358 U.S. 898 (1958); see also Open Records Decision No. 552 at 2 (1990). Section 757 provides that a trade secret is

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be

a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business . . . . A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939). In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors. RESTATEMENT OF TORTS § 757 cmt. b (1939).<sup>4</sup> This office has held that if a governmental body takes no position with regard to the application of the trade secret branch of section 552.110 to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5-6 (1990).

The commercial or financial branch of section 552.110 requires the business enterprise whose information is at issue to make a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would result from disclosure. See Open Records Decision No. 661 (1999).

Upon review of the arguments submitted by State Street to support its section 552.110 claim, we find that State Street has failed to demonstrate that release of its commercial or financial information would cause it substantial competitive harm. Therefore, TRS may not withhold the submitted information pertaining to State Street under section 552.110.

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<sup>4</sup>The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are:

(1) the extent to which the information is known outside of [the company]; (2) the extent to which it is known by employees and others involved in [the company's] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); see also Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

State Street also contends that a portion of its information is excepted from disclosure under section 552.112 of the Government Code. Section 552.112 excepts from public disclosure "information contained in or relating to examination, operation, or condition reports prepared by or for an agency responsible for the regulation or supervision of financial institutions or securities, or both." Section 552.112 is designed to protect the interests of a governmental body, not third parties. *See Birnbaum v. Alliance of Am. Insurers*, 994 S.W.2d 766, 776 (Tex. App.--Austin 1999, pet. denied). Because TRS does not raise section 552.112, this section is not applicable to the submitted information. *Id.* Consequently, the requested information may not be withheld under section 552.112.

We note that the information that the submitted information relating to the third-party bidders contains e-mail addresses that are subject to section 552.137 of the Government Code. Section 552.137 makes certain e-mail addresses confidential and provides in pertinent part:

- (a) An e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.
- (b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

Gov't Code § 552.137. Accordingly, unless the members of the public in question have affirmatively consented to their release, TRS must withhold from disclosure all e-mail addresses that were provided for the purpose of communicating electronically with TRS, pursuant to section 552.137 of the Government Code. We have marked a representative sample of the e-mail addresses that are subject to section 552.137.

Finally, we note that some of the materials at issue are 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.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See Open Records Decision No. 550 (1990).*

To summarize, TRS may withhold the information we have marked in Exhibits C and D under section 552.111. The information submitted in Exhibit E may be withheld under section 552.103. Certain e-mail addresses must be withheld under section 552.137. The remaining information must be made available to the requestor, but TRS must comply

with the copyright law and is not required to furnish copies of information that is copyrighted.

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,



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MAP/jh

Ref: ID# 171134

Enc. Submitted documents

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