



November 20, 2002

Ms. Erin Perales
General Counsel
Houston Municipal Employees Pension System
1111 Bagby, Suite 2450
Houston, Texas 77002-2555

OR2002-6647

Dear Ms. Perales:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 172520.

The Houston Municipal Employees Pension System (the "system") received a request for (1) the system's current custody and securities lending contracts with State Street Bank and Trust Company ("State Street"), including all attachments and any amendments, and (2) Exhibit B from the July 1, 1994 "Custodian Contract" with State Street. You state that you have released certain information relating to the first category of the request. You claim, however, that some of the information relating to the first and second categories is excepted from disclosure under section 552.104 of the Government Code. Furthermore, you indicate that the requested information may invoke the proprietary rights of a third party, State Street. Accordingly, pursuant to section 552.305 of the Government Code, you have notified State Street of the request for information in order to afford it an opportunity to submit objections to release of the requested information. *See Gov't Code § 552.305* (permitting interested third party to submit to attorney general reasons why requested information should not be released); 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 you claim and reviewed the submitted information.

Initially, we note that you did not submit the information responsive to category two of the request for our review. You indicate that such information has been previously ruled upon by this office and that Open Records Letter No.2001-0030 (2001) should be relied on as a previous determination. In Open Records Letter No. 2001-0030, this office ruled that the system was required to withhold certain information under section 552.110 of the Government Code. It is unclear, however, whether the information involved in the previous

ruling is the precise information at issue in category two of the present request. Assuming the instant request for information involves the precise information at issue in Open Records Letter No. 2001-0030, we agree that Open Records Letter No. 2001-0030 may be relied on as a previous determination with respect to the information responsive to category two of the present request. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, the first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). However, if the information responsive to category two of the present request is not the precise information at issue in Open Records Letter No. 2001-0030, because you have not submitted such information for our review, and because State Street has not submitted arguments against disclosure of such information, you must release the information responsive to category two of the present request to the requestor at this time. *See* Gov't Code §§ 552.301, .302.

We turn now to your arguments with respect to the submitted information. 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 section 552.104 is to protect a governmental body's interests in competitive bidding situations. *See* Open Records Decision No. 592 (1991). Moreover, section 552.104 requires a showing of some actual or specific harm in a particular competitive situation; a general allegation that a competitor will gain an unfair advantage will not suffice. Open Records Decision No. 541 at 4 (1990). This office has long held that section 552.104 does not except information relating to competitive bidding situations once a contract is in effect. *See, e.g.*, Open Records Decision Nos. 541 (1990), 514 (1988), 306 (1982), 184 (1978), 75 (1975). Here, the contract at issue is already in effect. You argue, however, that the release of the submitted information would "impair the [s]ystem's competitive . . . position in the marketplace." This office has held that a governmental body may seek protection as a competitor in the marketplace under section 552.104 and avail itself of the "competitive advantage" aspect of this exception if it can satisfy two criteria. First, the governmental body must demonstrate that it has specific marketplace interests. *Id.* at 3. Second, the governmental body must demonstrate a specific threat of actual or potential harm to its interests in a particular competitive situation. *Id.* at 5. Thus, the question of whether the release of particular information will harm a governmental body's legitimate interests as a competitor in a marketplace depends on the sufficiency of the governmental body's demonstration of the prospect of specific harm to its marketplace interests in a particular competitive situation. *Id.* at 10. A general allegation of a remote possibility of harm is not sufficient. *See* Open Records Decision No. 514 at 2 (1988). You explain that the system is "a significant investor in the marketplace and competes with other investors, including public and private pension funds, for the best fees, rates and trading terms." You argue that release of the submitted information could "negatively [impact] the [s]ystem's ability to negotiate and compete for better rates from State Street or other providers of custodial and securities lending services." Upon review of your arguments, however, we find that you have not

demonstrated that the release of the submitted information would or could cause the system to suffer a specific harm to the system's marketplace interests as an investor in a particular competitive situation.

You also argue that State Street has a section 552.104 interest in the submitted information. Section 552.104, however, protects the interests of governmental bodies, not third parties. *Id.* Therefore, the submitted information may not be withheld under section 552.104.

An interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, State Street has not submitted to this office its reasons explaining why its information should not be released. Therefore, State Street has provided us with no basis to conclude that it has a protected proprietary interest in any of the submitted information. *See* Gov't Code § 552.110(b) (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); Open Records Decision Nos. 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). Therefore, the system must release the submitted information to the requestor.

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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Assistant Attorney General
Open Records Division

KAE/sdk

Ref: ID# 172520

Enc: Submitted documents

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