



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

December 3, 2002

Ms. Bonnie Prosser Elder
Chief Counsel
VIA Metropolitan Transit
P.O. Box 12489
San Antonio, Texas 78212

OR2002-6870

Dear Ms. Elder:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 173001.

VIA Metropolitan Transit ("VIA") received a request for information relating to VIA's pension plan, including (1) "trading history for fiscal years 2000, 2001 and 2002 for equity trades by your domestic equity managers," including information relating to broker-dealers, total number of shares traded, and total amount of commissions paid, and (2) "the managers your retirement plan uses, the dollar amounts they are responsible for investing for your plan and the fees you pay each." VIA claims that the requested information is excepted from disclosure under section 552.104 of the Government Code. VIA also believes that this request for information implicates the proprietary interests of private parties for purposes of section 552.110(b). VIA notified eleven private parties of this request for information and of their right to submit arguments to this office as to why the information should not be released.¹ VIA also submitted information that it considers to be responsive to the request. We received arguments from Austin, Calvert & Flavin, Inc. ("Austin"); Capstone Asset Management Company ("Capstone"); Davis Selected Advisers, L.P. ("Davis"); and Duncan-Hurst Capital Management, Inc. ("Duncan"). We also received comments from the requestor.² We have considered all of the submitted arguments and have reviewed the submitted information.

We first note that an interested third party is allowed 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

¹See Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under Gov't Code ch. 552 in certain circumstances).

²See Gov't Code § 552.304 (any person may submit written comments stating why information at issue in request for attorney general decision should or should not be released).

relating to that party should not be released. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this decision, we have received no correspondence from Agincourt Capital Management, LLC; Alliance Bernstein Institutional Investment Management; Ariel Capital Management, Inc; Baron Capital Management, Inc.; Invista Capital Management, LLC; Nicholas-Applegate Capital Management; or Wasatch Advisors, Inc. Therefore, none of these entities has demonstrated that any of the requested information constitutes proprietary information for purposes of section 552.110 of the Government Code. *See* Gov't Code § 552.110(a)-(b); Open Records Decision Nos. 552 at 5 (1990), 661 at 5-6 (1999).

Next, we note that Capstone and Duncan raise questions as to whether some of the submitted information is responsive to this request. Capstone asserts that the request does not encompass information relating to Capstone because Capstone manages fixed income assets only for VIA. Duncan states that it no longer manages any assets for VIA and did not manage any VIA assets at the time of the request for information. The question of whether the submitted information that relates to Capstone and Duncan is responsive to this request presents a fact issue. This office cannot resolve factual disputes in the opinion process. *See* Open Records Decision Nos. 592 at 2 (1991), 552 at 4 (1990), 435 at 4 (1986). Where a fact issue cannot be resolved as a matter of law, we must rely on the facts alleged to us by the governmental body requesting our opinion, or upon those facts that are discernible from the documents submitted for our inspection. *See* Open Records Decision No. 552 at 4 (1990). VIA indicates that it has submitted the information that VIA deems to be responsive to this request for information. Therefore, based on VIA's briefs and its submission of information that relates to Capstone and Duncan, we conclude that the submitted information that relates to Capstone and Duncan is responsive to this request.

VIA claims that 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." This exception protects a governmental body's interests in connection with competitive bidding and in certain other competitive situations.³ *See* Open Records Decision No. 593 (1991) (construing statutory predecessor). 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).

³As you do not indicate that the information in question relates to a competitive bidding situation, we do not consider this aspect of section 552.104.

VIA asserts the competitive advantage aspect of section 552.104. You inform us that the VIA Metropolitan Transit Retirement Fund contracts with and employs professional investment managers, who in turn employ broker-dealers to handle the actual investment transactions.⁴ You state that VIA competes with other public and private investors for the best trading terms, rates, commissions, and/or fees. You contend that public disclosure of the names of entities that VIA employs as investment managers, as well as the names of entities that the investment managers employ as broker/dealers, would adversely affect VIA's ability to retain first-rate investment managers at what VIA considers competitive terms, rates, commissions, and fees. You also indicate that the release of information relating to trades and the amounts of commissions and/or fees would compromise VIA's ability to competitively acquire investment management and broker/dealer services in the future. You further argue that the release of the requested information would have a negative impact on VIA's ability to compete in the marketplace by adversely affecting its investment managers' abilities to negotiate and obtain favorable trades and to get the best price for VIA's investments, including the costs of broker/dealer commissions or fees. You also claim that disclosure of the names of VIA's investment managers and of the broker/dealers that the managers employ also would enable investors to identify and contract with VIA's investment managers and thereby obtain information and trades that are available to VIA. Having considered each of your arguments and reviewed the submitted information, we find that you have not established that the release of any of the submitted information would result in a specific threat of any actual or potential harm to VIA's interests as an investor. Therefore, you have not shown that any of the submitted information is excepted from disclosure under section 552.104.

Next, we consider the arguments of the private parties. We begin by addressing the expectations of confidentiality that Capstone and Davis assert in their briefs. We note that a governmental body may not withhold information that is subject to chapter 552 of the Government Code on the basis of a governmental body's promise to keep the information confidential unless the governmental body has specific statutory authority to make such a promise. *See* Open Records Decision Nos. 514 at 1 (1988), 479 at 1-2 (1987), 444 at 6 (1986). Neither Capstone nor Davis informs us that VIA has such statutory authority, nor does VIA indicate that it has such authority. Likewise, information may not be withheld from the public under chapter 552 merely because the person that provided the information to the governmental body anticipated or requested confidentiality in doing so. *See Industrial Found. v. Texas Industrial Accident Bd.*, 540 S.W.2d 668, 676-78 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977); *see also* Open Records Decision No. 203 at 1 (1978) (mere expectation of confidentiality by person supplying information does not satisfy requirements of statutory predecessor to section 552.110). Thus, the submitted information may not be withheld from disclosure on the basis of an agreement to do so or because Capstone or Davis anticipated or requested confidentiality in providing information to VIA.

⁴You explain that the VIA retirement fund is a public retirement system created under chapter 802 of the Government Code.

The private parties also submit arguments under section 552.110 of the Government Code. This exception protects the proprietary interests of private parties by excepting from disclosure two types of information: (1) “[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision,” and (2) “[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure 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 a “trade secret” from section 757 of the Restatement of Torts, which holds a “trade secret” to be

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 a single or ephemeral event 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) (emphasis added); *see also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958), *cert. denied*, 358 U.S. 898 (1958). If the governmental body takes no position on the application of the “trade secrets” component of section 552.110 to the information at issue, this office will accept a private person’s claim for exception as valid under that component if that person establishes a *prima facie* case for the exception and no one submits an argument that rebuts the claim as a matter of law.⁵ See Open Records Decision No. 552 at 5 (1990).

⁵The Restatement of Torts lists the following six factors as indicia of whether information constitutes a trade secret:

- (1) the extent to which the information is known outside of [the company];
- (2) the extent to which it is known by employees and other 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).

Section 552.110(b) requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. *See* Open Records Decision No. 661 at 5-6 (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm); *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

Austin asserts that information relating to Austin constitutes a trade secret under section 552.110(a). Austin also asserts that this information is excepted from disclosure under section 552.110(b). Having considered Austin's arguments and reviewed the submitted information that relates to Austin, we conclude that Austin has made a sufficiently specific showing that the release of some of the information would likely result in substantial competitive harm to Austin. Therefore, that information, which we have marked, is excepted from disclosure under section 552.110(b). Austin has not shown, however, that any of the remaining information that relates to Austin constitutes a trade secret under section 552.110(a). Likewise, Austin has not made the necessary demonstration under section 552.110(b) that the release of any of the remaining information would result in substantial competitive harm to Austin. Therefore, the remaining information that relates to Austin is not excepted from disclosure under section 552.110. *See also* Open Records Decision Nos. 509 at 5 (1988) (because costs, bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts was entirely too speculative), 319 at 3 (1982) (statutory predecessor not applicable to information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing).

Capstone has submitted a brief in which it asserts that "account information should be kept confidential and would cause competitive harm if made public." Although Capstone claims no specific exception to disclosure, we have considered Capstone's arguments under section 552.110(b). We conclude, however, that Capstone has not made a specific factual or evidentiary demonstration that the release of any of the submitted information would likely result in substantial competitive harm to Capstone. Thus, Capstone has not shown that any of the submitted information is excepted from disclosure under section 552.110(b). *See also* Open Records Decision Nos. 509 at 5 (1988), 319 at 3 (1982).

Davis has submitted a brief in which it "join[s] VIA[] in requesting" that this office permit VIA to withhold the submitted information. Davis also states that it considers its trading history proprietary commercial information. Although Davis has not claimed any specific exception to disclosure, we have considered Davis's arguments under section 552.110(a) and 552.110(b). We conclude that Davis has made a sufficient showing that the release of some of the submitted information would likely result in substantial competitive harm to Davis. Therefore, that information, which we have marked, is excepted from disclosure under section 552.110(b). Davis has not demonstrated, however, that any of the remaining information is excepted from disclosure under section 552.110. *See also* Open Records Decision Nos. 509 at 5 (1988), 319 at 3 (1982).

Duncan has submitted a brief in which it relies on section 552.110(b). Having considered its arguments, we conclude that Duncan has sufficiently demonstrated that the release of some of the submitted information would likely cause Duncan substantial competitive harm. Thus, that information, which we have marked, also is excepted from disclosure under section 552.110(b). Duncan has not shown that section 552.110(b) is applicable to any of the remaining information. *See also* Open Records Decision Nos. 509 at 5 (1988), 319 at 3 (1982).

In summary, VIA must withhold the marked information that relates to Austin, Davis, and Duncan under section 552.110(b) of the Government Code. The rest of the submitted information must be released.

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).

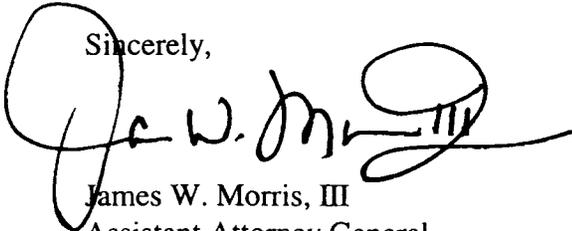
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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,

A handwritten signature in black ink, appearing to read "J. W. Morris, III". The signature is fluid and cursive, with a large initial "J" and "M".

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/sdk

Ref: ID# 173001

Enc: Marked documents

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