



OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

January 3, 2003

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

OR2003-0054

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# 174427.

The Teacher Retirement System of Texas ("TRS") received a request for "a copy of Tremont Partners response to TRS search for investment counseling services and strategic trading consultants."¹ You indicate that you are making some responsive information available to the requestor. You claim that some of the remaining requested information is excepted from disclosure under sections 552.101 and 552.104 of the Government Code. You also inform this office and provide documentation showing that you have notified Tremont Advisors, Inc. ("Tremont"), the interested third party whose proprietary interests may be implicated by the request, of the request for information. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released). This office has received a response from Tremont objecting to the release of some of its information.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." In asserting section 552.101, you essentially argue that the submitted information should be

¹ We note that this office ruled that the requestor's original request for this information was withdrawn by operation of law. *See* Gov't Code 552.2615(b) (request is considered to have been withdrawn if requestor does not respond in writing to itemized statement sent by governmental body to requestor pursuant to section 552.2615 within ten days after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 his request. *See id.* However, the requestor has since notified TRS that he will accept TRS's itemized charges for providing the responsive information, and has repeated his request for the information. Therefore, we will now address TRS's arguments for withholding the requested information from this requestor.

deemed confidential in its entirety because the fiduciary duty of members of 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 the submitted proposal. 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 indicate 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 a pension fund holding assets in trust, is constitutionally responsible for the administration

of the system and investment of the trust assets of the system, including strategically-traded investments and other private marketplace investments (Citations omitted). As the constitutional and statutory trustee of that fund, the TRS Board of Trustees has a fiduciary duty to the beneficiaries to diversify investments. . . . TRS therefore has an ongoing competitive interest in maintaining its ability to attract the largest number of qualified candidates for investment consulting contracts and in obtaining information from those candidates that enhances analysis of the proposals.

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

[t]he ability of TRS to maintain the confidentiality of information considered sensitive or proprietary by qualified candidates of national stature and reputation directly affects TRS' ability to effectively compete for the best-qualified investment consultants. If TRS were unable to protect the confidentiality of consultant candidates' commercial and financial information, it would have a detrimental effect on TRS' ability to attract the largest number of potential candidates and diminish TRS' competitive advantage. Qualified candidates would be less likely to participate *in future opportunities* involving this type of TRS consulting contract if information they view as proprietary 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 investment consulting 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 proposal information 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 now turn to Tremont's arguments that some of its information is excepted from disclosure under section 552.110. 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.² *See* Open Records Decision No. 552 at 5 (1990).

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).

Tremont claims that the following information contained in its response to TRS is excepted under section 552.110(a): 1) sample due diligence report completed for each fund manager;

²The 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 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).

2) list of clients; 3) description of the process of monitoring funds and fund managers; 4) description of the decision-making process in selection of fund managers; and 5) description of the portfolio construction process. Upon consideration of its arguments and review of the relevant information, we find that Tremont has demonstrated that a list of its clients constitutes a trade secret, and therefore, must be withheld under section 552.110(a). However, Tremont does not adequately identify which portions of its remaining information it seeks to have withheld under section 552.110(a). Thus, Tremont has not demonstrated that any of the remaining above-listed information is a trade secret, and thus, this information may not be withheld under section 552.110.

Tremont further claims that the “Outlook” portion of its “Quarterly Review and Outlook” is excepted under section 552.110(b). Upon review of its arguments and the information at issue, we find that this portion of its response constitutes commercial or financial information the disclosure of which would cause substantial competitive harm. Therefore, this information must be withheld under section 552.110(b). We have marked all of the information that must be withheld under section 552.110.

We note that the remaining information contains private e-mail addresses that must be withheld under section 552.137 of the Government Code. Section 552.137 requires TRS to withhold an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body, unless the member of the public has affirmatively consented to its release.³ See Gov’t Code § 552.137(a), (b). You do not inform us that a member of the public has affirmatively consented to the release of any of the private e-mail addresses contained in the submitted materials. Therefore, the e-mail addresses we have marked must be withheld under section 552.137.

In summary, you must withhold Tremont’s client list under section 552.110(a), and the “Outlook” portion of its “Quarterly Review and Outlook” under section 552.110(b). Private e-mail addresses contained in the information must be withheld under section 552.137. The remaining 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

³ Section 552.137 does not apply to a general e-mail address of a business or to a government employee’s work e-mail address.

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).

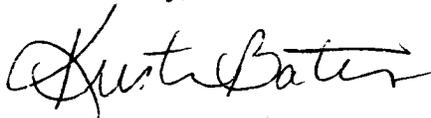
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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# 174427

Enc. Submitted documents

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