



OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

January 13, 2003

Ms. Belinda R. Perkins
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OR2003-0261

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# 174888.

The Teacher Retirement System of Texas (the "system") received a request for six categories of information relating to limited partnerships, private equity accounts, and fund-of-funds in which the system has an equity interest. You state that you have provided information responsive to the first five categories of the request. The sixth category of the request seeks "[t]he name and address of any companies in which any of the [limited partnerships, private equity accounts, and fund-of-funds] have taken an equity position, and the current market value of those equity positions." You claim that information responsive to this portion of the request is excepted from disclosure under sections 552.101 and 552.104 of the Government Code. You also assert that the release of this information may implicate the proprietary interests of the third parties involved. Pursuant to section 552.305 of the Government Code, you have notified the thirty-seven third parties of the request for their 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 to disclosure in certain circumstances). We have considered all claimed exceptions and reviewed the submitted information.

Section 552.104 excepts from required 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. *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).

You assert that you have specific marketplace interests in the information at issue because the system is constitutionally responsible for the investment of trust assets in excess of \$70 billion. *See* Tex. Const. art. XVI, §§ 67(a)(3) (requiring each statewide benefit system to have board of trustees to administer system and invest funds in accordance with prudent investor standard), (b)(1) (requiring that legislature establish “Teacher Retirement System of Texas to provide benefits for persons employed in the public schools, colleges, and universities supported wholly or partly by the state”). You state that the system has a fiduciary duty to the trust beneficiaries to diversify investments. *See* RESTATEMENT (THIRD) OF TRUSTS § 227(b), cmts. e-g (requiring trustees to diversify investments, if prudent, as part of their duty to act as prudent investors). You indicate that the system fulfills its responsibilities, in part, by investing in the private marketplace and assert that the system has an on-going interest in preserving its ability to compete effectively in this marketplace. *See* Gov’t Code § 825.301(a) (authorizing system’s board of trustees to invest in, among other things, “securities,” as that term is defined by section 4 of the Securities Act, Tex. Civ. Stat. art. 581-4). Based on these representations, we conclude that the system has demonstrated that it has specific marketplace interests and may be considered a “competitor” for purposes of section 552.104. *See* Open Records Decision No. 593 (1991).

You also list several possible ways in which the release of the submitted information would harm the system’s marketplace interests. The information at issue concerns private equity funds in which the system is a limited partner (the “system funds”). The system funds raise capital to invest in various companies (the “portfolio companies”). You state that “a primary goal of these investments is to capitalize on proprietary or specialized knowledge.” You represent that, if the system funds were required to release information about their portfolio companies, those funds might be denied the opportunity to invest in prospective portfolio companies or forced to agree to less favorable investment terms to compensate the portfolio companies for the risk that their information will be released. As an investor in these equity funds, the system would in turn suffer the consequences of being denied these investment opportunities. You also state that competitors of the portfolio companies could use the information at issue to compete with the portfolio companies and thereby harm the system’s investment. You also assert that competing equity funds could use the information at issue to compete with the system funds and thereby undermine the system funds’ negotiation

position, rob the funds of investment opportunities, or force the system funds to agree to lesser returns; these consequences would be borne by all of the investors, including the system. Based on these representations as well as other arguments contained in your brief, we conclude that the system has shown that release of the submitted information will bring about a specific harm to the system's marketplace interests. Accordingly, under section 552.104 of the Government Code, the system may withhold the submitted information. As our ruling on this issue is dispositive, we need not address the system's other arguments or the claims made by the third parties.

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).

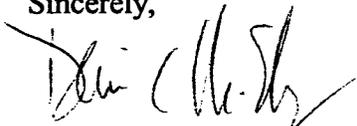
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following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



Denis C. McElroy
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Open Records Division

DCM/lmt

Ref: ID# 174888

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