



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

October 7, 2003

Ms. Heather Silver
Assistant City Attorney
City of Dallas
1500 Marilla Street
Dallas, Texas 75201

OR2003-7081

Dear Ms. Silver:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 189044.

The Dallas Police and Fire Pension System (the "system") received a request for the following four categories of information related to the system's investment in the Prudential Strategic Value Investor Fund (SVI) and Prudential Investment Management (PIM):

1. Management, advisory, or other agreements between the system and SVI/PIM;
2. All reports, prospectuses, presentations, memoranda, financial statements, or performance updates provided to the system by SVI/PIM;
3. All system staff memoranda, reports, and/or recommendations regarding SVI/PIM; and
4. Any consultant reports or studies regarding the SIV/PIM investments.

You state that some responsive information will be provided to the requestor. You claim the remaining information to be excepted from disclosure under section 552.305 of the

Government Code.¹ You state that some of the requested information may implicate the privacy or property interest of a third party. You indicate, and provide documentation showing, that the system notified Prudential Financial (Prudential), an interested third party, of the request for information in order to afford Prudential an opportunity to supply objections to release of the submitted 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 Act in certain circumstances). This office has received a response from Prudential objecting to the release of some of its information. We have considered all submitted arguments and reviewed the submitted information.

We note that the submitted documents include tax returns. Section 552.101 excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Prior decisions of this office have held that section 6103(a) of title 26 of the United States Code renders tax return information confidential. *See* Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision No. 226 (1979) (W-2 forms). Tax return information is defined as data furnished to or collected by the IRS with respect to the determination of possible existence of liability of any person under title 26 of the United States Code for any tax. *See* 26 U.S.C. § 6103(b). We determine that the submitted tax forms are tax return information and are excepted from disclosure under section 552.101 of the Government Code as information made confidential by federal law.

Prudential contends that release of information responsive to categories (1), (3), and (4) and certain information responsive to category (2) would "substantially impair its competitive position in the marketplace" and that disclosure of this information is therefore excepted under section 552.110 of the Government Code. Section 552.110 protects the property interests of private persons by excepting from disclosure two types of information: (1) trade secrets obtained from a person and privileged or confidential by statute or judicial decision and (2) commercial 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. The commercial and financial information prong of section 552.110 requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would result from disclosure. Gov't Code § 552.110(b); *see* Open Records Decision No. 661 (1999).

¹We note that section 552.305 is not an exception to the disclosure of information under the Act. Rather, section 552.305 permits a governmental body to rely on an interested third party to raise and explain the applicability of exceptions in the Act in certain circumstances. *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).

Prudential contends that release of information revealing the size and rate of investor contributions, its investment strategies, consultant reports and studies, and the terms on which it is willing to do business would cause Prudential substantial competitive harm. Specifically, Prudential argues that releasing its information could allow competitors “to undercut the firm on a variety of negotiating points,” benefit from studies and reports subsidized solely by Prudential for its own use, and duplicate Prudential’s investment strategies and analyses. Prudential further contends that release of its information would disadvantage the implementation of the firm’s acquisition and liquidation plans. Lastly, Prudential explains it has never released this information to the public. After reviewing the information at issue and the arguments submitted by Prudential, we conclude that Prudential has demonstrated how release of most of the information it seeks to withhold would result in substantial competitive injury to Prudential. Therefore, the information is excepted from public disclosure as confidential commercial and financial information.

However, we find that portions of the submitted documents, which we have marked, relate to certain types of fees paid by the system. The public has a strong interest in the system’s compensation arrangement with Prudential, as reflected by these fees. *See* Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors); Open Records Decision No. 494 (1988) (requiring balancing of public interest in disclosure with competitive injury to company); *see also* Open Records Decision No. 319 (1982) (pricing proposals may only be withheld under the predecessor to section 552.110 during the bid submission process); Freedom of Information Act Guide & Privacy Act Overview (1995) 151-152 (disclosure of prices charged the government is a cost of doing business with the government). Consequently, the system may not withhold the management fees paid by the system based section 552.110(b) of the Government Code.

In summary, the system must withhold the submitted tax forms under section 552.101 in conjunction with section 6103(a) of title 20 of the United States Code. The system must withhold most of the remaining information from disclosure pursuant to section 552.110(b), with the exception of the marked portions, which 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 Dep't of Pub. 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,



Amy D. Peterson
Assistant Attorney General
Open Records Division

ADP/sdk

Ref: ID# 189044

Enc. Submitted documents

c: Mr. Ian Lewis
Hotel Employees & Restaurant Employees Union
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(w/o enclosures)