



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

April 6, 2004

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

OR2004-2769

Dear Ms. Perales:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 198856.

The Houston Municipal Employees Pension System (the "system") received a request for information pertaining to the system's real estate investments. The requestor subsequently amended the request to exclude valuation of investments. Thus, such valuation information is not responsive to the present request and this ruling will not address that information. You state that some of the submitted records are not responsive to the instant request for information. Additionally, you have submitted information that you state "was not requested by the requestor," which is also not responsive to the instant request.¹ Furthermore, your February 19th letter references Exhibits C and D that you state were submitted to the system by a third party on February 20, 2004, which is after the date that the system received the request for information. Thus, Exhibits C and D are also nonresponsive. This decision is not applicable to those nonresponsive records, and the system need not release those records in response to this request.

You inform this office that some responsive information has been made available to the requestor, but claim that the remaining submitted information is excepted from disclosure under sections 552.101, 552.104, and 552.110 of the Government Code. In addition, you

¹This information is submitted as Exhibit A to your February 19, 2004 letter.

indicate that you notified eleven interested third parties of the request for information and of each party's right to submit arguments as to why the requested information should not be released. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); *see also* 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). We received correspondence from four of the eleven interested third parties. We have considered all of the submitted arguments and have reviewed the submitted representative sample of information.²

Section 552.104 of the Government Code is applicable to "information that, if released, would give advantage to a competitor or bidder." This exception protects a governmental body's interests in competitive bidding and 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).

The system claims an exception to disclosure under section 552.104 for investment information. You inform us that the system competes as a limited partner with other investors in the public and private real estate marketplaces. You assert that the system "is a significant investor in the private real estate marketplace and competes with other investors, including private pension funds, private endowments and individuals, for access to the top-performing partnerships and subsequent funds of top-quartile managers." Further, you assert that the system "is a significant investor in the public real estate marketplace and . . . competes with other investors, including private pension funds, for the best rates, commissions, and trading terms." You argue that release of the submitted information would likely cause specific harm to the system's legitimate marketplace interests and could significantly hinder the system's ability to compete in the marketplace "by negatively impacting [the system's] opportunities to invest with top-performing managers." You state

²We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Gov't Code § 552.301(e)(1)(D); Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

that if the system were to disclose the submitted information, “it would cause competitive harm to [the system] because private real estate funds would be less willing to seek or retain [the system] as an investor [and the system’s] investment manager would avoid retaining [the system] as a client.”

Having carefully considered all of your arguments, we find that you have demonstrated that the system has specific marketplace interests and that the prospective release of the information at issue poses a specific threat of harm to the system’s interests in a particular competitive situation. We therefore conclude that the system may withhold the submitted information under section 552.104. Because our ruling is dispositive, we need not address the remaining claimed exceptions.

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,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/jh

Ref: ID# 198856

Enc. Submitted documents

c: Ms. Becky Perrine
HERE International Union
243 Golden Gate Avenue
San Francisco, California 94102
(w/o enclosures)