



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 24, 2004

Mr. Dan Junell
Assistant General Counsel
Teacher Retirement System of Texas
1000 Red River Street
Austin, Texas 78701-2698

OR2004-4213

Dear Mr. Junell:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 201113.

The Teacher Retirement System of Texas (the "TRS") received a request for materials regarding the investment of TRS in the Texas Growth Fund II-2004 Trust (the "trust"), which is operated by the Texas Growth Fund (the "TGF"). You indicate that you have made some of the information available to the requestor, but claim that the submitted information is excepted from disclosure under section 552.104 of the Government Code. You state, and provide documentation showing, that you notified third parties Pathway Capital Management, LLC ("Pathway") and TGF Management Company, whose proprietary interests may be implicated by the request for information, of their right to submit arguments to this office as to why the submitted information should not be released. *See* Gov't Code § 552.305(d); *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 Public Information Act in certain circumstances). Pathway has responded to the notice and argues that its information is excepted by sections 552.101, 552.104, and 552.110 of the Government Code. We have considered the exceptions claimed and reviewed the submitted information.

Initially, we note that the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a)(1) states that a completed report, audit, evaluation, or investigation made of, for, or by a governmental body is expressly public unless it is

excepted under section 552.108 of the Government Code or is expressly confidential under other law. The submitted information consists of two completed evaluations of the trust. One is an internal evaluation written by TRS staff, and the other was prepared for TRS by Pathway. Both evaluations are subject to section 552.022; however, section 552.022 does not apply to information that is excepted under section 552.104. Gov't Code §552.104(b). Therefore, we will consider whether section 552.104 excepts the submitted evaluations from disclosure.

Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." The purpose of section 552.104 is to protect a governmental body's interests in competitive bidding situations, including when a governmental body competes with private entities in the marketplace. *See* Open Records Decision No. 592 (1991). Under section 552.104, a governmental body may withhold information in order to maintain its competitive advantage in the marketplace if it can demonstrate (1) it has specific marketplace interests and (2) there is a possibility of specific harm to those marketplace interests if the requested information is released. *See* Open Records Decision No. 593 ("competitive aspect" of previous version of section 552.104 applies to governmental bodies as bidders).

With respect to whether TRS has specific interests in the private equity marketplace, you assert that

[T]he agency, as a pension fund holding assets in trust, is constitutionally responsible for investment of the trust assets of the system, including Texas Growth Fund investments. ... TRS is constitutionally authorized to invest in the [TGF]. ... TRS has an on-going interest in the performance of these [TGF] funds and in preserving its ability to effectively compete in the private-equity market.

Based on our review of your arguments and the submitted information, we conclude you have demonstrated that TRS has specific interests in the private equity marketplace for purposes of section 552.104. *See, e.g.,* Open Records Decision No. 593 (1991) (TRS and TFG are competitors in the private marketplace for purposes of section 552.104).

For information to be excepted under section 552.104, the governmental body must demonstrate that there is a possibility of specific harm to its marketplace interests if the requested information is released. *See id.* 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. On the question of whether TRS has shown actual or potential harm to its competitive interests, you assert that the release of the evaluations would seriously harm the ability of TRS to assess and compete for high quality private investments. Further, you state

“disclosure ... would make TRS less competitive in relation to other investors in the private equity marketplace.” The information you seek to withhold consists of evaluations produced by and for TRS analyzing a pending investment opportunity in the trust. You argue that the TRS Board of Trustees remains in a competitive situation because it has not yet decided whether or not to invest in the trust, and will decide whether to do so no later than the third quarter of 2005. TRS informs us that the opportunity to invest in the trust should remain available to TRS through the third quarter of 2005.

Based on our review of your arguments and the submitted information, we conclude that you have demonstrated that the release of the submitted evaluations would cause actual or potential harm to the interests of TRS. Therefore, because TRS has shown it has specific interests in the private equity marketplace and that the release of the submitted evaluations would cause harm to those interests, we conclude that the submitted evaluations are excepted from disclosure under section 552.104.¹

You ask this office to issue a previous determination authorizing TRS to withhold all evaluations of the trust prepared by Pathway or TRS. We decline to issue such a previous determination at this time. *See* Open Records Decision No. 673 (2001). Therefore, this letter ruling is limited to the particular records at issue in this request and to the facts as presented to us. 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

¹Because we are able to resolve this matter under section 552.104, we do not address the other arguments for exception.

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,



James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/seg

Ref: ID# 201113

Enc. Submitted documents

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