



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

June 25, 2004

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

OR2004-5223

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# 203188.

The Teacher Retirement System of Texas (the "system") received a request for information pertaining to specified real estate investments. You state that you have provided the requestor with some of the requested information. You indicate that some of the requested information does not exist.<sup>1</sup> You claim, however, that portions of the remaining requested information are excepted from disclosure pursuant to sections 552.104, 552.105, and 552.111 of the Government Code. In addition, because the system asserts that the proprietary rights of LaSalle Investment Management ("LaSalle") under section 552.110 of the Government Code may be implicated by the release of these portions of the remaining requested information, you notified LaSalle of the system's receipt of the request and of LaSalle's right to submit arguments to us as to why any portion of the remaining requested information should not be released to the requestor. *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 section 552.305 permits governmental body to rely on interested third party

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<sup>1</sup> We note that it is implicit in several provisions of the Public Information Act (the "Act") that the Act applies only to information already in existence. *See* Gov't Code §§ 552.002, .021, .227, .351. The Act does not require a governmental body to prepare new information in response to a request. *See* Attorney General Opinion H-90 (1973); *see also* Open Records Decision Nos. 572 at 1 (1990), 555 at 1-2 (1990), 452 at 2-3 (1986), 416 at 5 (1984), 342 at 3 (1982), 87 (1975); *Economic Opportunities Dev. Corp. of San Antonio v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed). A governmental body must only make a good faith effort to relate a request to information which it holds. *See* Open Records Decision No. 561 at 8 (1990).

to raise and explain applicability of exception in Act in certain circumstances). We have considered the exceptions you claim and have reviewed the submitted information.

Initially, we note that portions of the submitted information, which you have marked, are not responsive to the instant request for information. Accordingly, this ruling does not address the public availability of this particular marked information and the system need not release it to the requestor in response to this ruling.

We now address your claims regarding the submitted information that is responsive to the request. You claim that portions of this information are excepted from disclosure pursuant to section 552.105 of the Government Code. Section 552.105 excepts from disclosure information relating to:

- (1) the location of real or personal property for a public purpose prior to public announcement of the project; or
- (2) appraisals or purchase price of real or personal property for a public purpose prior to the formal award of contracts for the property.

Gov't Code § 552.105. Section 552.105 is designed to protect a governmental body's planning and negotiating position with regard to particular transactions. *See* Open Records Decision Nos. 564 (1990), 357 (1982), 310 (1982). Information excepted from disclosure under section 552.105 pertaining to such negotiations may be excepted, so long as the transaction relating to those negotiations is not complete. *See* Open Records Decision No. 310 (1982). A governmental body may withhold information "which, if released, would impair or tend to impair [its] 'planning and negotiating position in regard to particular transactions.'" Open Records Decision No. 357 at 3 (1982) (quoting Open Records Decision No. 222 (1979)). The question of whether specific information, if publicly released, would impair a governmental body's planning and negotiation position in regard to particular transactions is a question of fact. Accordingly, this office will accept a governmental body's good faith determination in this regard, unless the contrary is clearly shown as a matter of law. *See* Open Records Decision No. 564 (1990).

You state that a portion of the submitted information that is responsive to the request pertains to the appraisal and sale price of real property that the Red River Limited Partnership, a partnership established by the system, is in the process of selling. You also state that the release of this information would harm the partnership's ability to negotiate terms regarding the sale of this property, especially should the pending sale of the property not be consummated. Based on your representations and our review of this particular information, we agree that section 552.105 is applicable to this information. Accordingly, we conclude that the system may withhold the information that we have marked pursuant to section 552.105 of the Government Code.

You claim that other portions of the submitted information that are responsive to the request are excepted from disclosure pursuant to section 552.104 of the Government Code. Section 552.104 excepts from disclosure “information that, if released, would give advantage to a competitor or bidder.” Gov’t Code § 552.104. Section 552.104 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. *See 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. *See 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. *See 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 the system has specific marketplace interests in the information at issue because the system is constitutionally responsible for the investment of trust assets in excess of \$80 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 indicate 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 also 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 at stake in the release of the information at issue and that it may be considered a “competitor” in the private marketplace for purposes of section 552.104 of the Government Code. *See* Open Records Decision No. 593 (1991).

You argue that release of the information at issue would harm the system’s marketplace interests. You explain that the information at issue concerns a real estate portfolio consisting of eight mortgage loans and one owned real estate asset in which the system is a limited partner. You state that the property value information that the system seeks to withhold constitutes the market value of the underlying assets of the limited partnership in which the system invests. You explain that the estimated market value of these investments is tied, in part, to the valuation of the underlying collateral securing the loans or of the property in

which the partnership has an equity ownership interest. You assert that “disclosing valuation information for any of the assets in [the system’s] real estate portfolio would damage the system’s on-going competitive interest in protecting its evaluation of the market value of these assets.” You also explain that:

Obviously, the ultimate goal of the limited partnership is to have the borrower pay off the mortgages. A borrower might seek a purchaser for the mortgage or another lender to repay the loan. A borrower might put the property on the market for sale. [The system’s] ability to maximize its return as a limited partner in the partnership through favorable transaction terms would be harmed if prospective lenders or purchasers had access to [the system’s] information relating to the value of the mortgages and underlying assets [associated with these portfolios].

Based on your representations and our review of the information at issue, we find that the system has adequately demonstrated that the release of this information would cause the system harm to its marketplace interests for purposes of section 552.104. Accordingly, we conclude that the system may withhold the information that we have marked pursuant to section 552.104 of the Government Code.<sup>2</sup>

In summary, the system may withhold the information that we have marked pursuant to sections 552.104 and 552.105 of the Government Code. The system must release to the requestor the remaining portions of the submitted information that are responsive to the request to the extent that it has not already done so.

You request that we issue the system a previous determination that would allow it to withhold information contained in a management report or business plan prepared for or by the system relating to a specified limited partnership in response to future requests for such information without the necessity of seeking a decision from us as to the public availability of the information. We decline to issue such a previous determination at this time.

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

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<sup>2</sup> Because we base our ruling with regard to this particular information on section 552.104 of the Government Code, we need not address your remaining claimed exception to disclosure.

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).

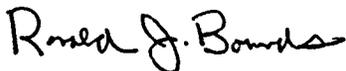
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following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



Ronald J. Bounds  
Assistant Attorney General  
Open Records Division

RJB/seg

Ref: ID# 203188

Enc. Marked documents

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