



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 4, 2006

Ms. Noelle Letteri
Legal Services Division
Texas General Land Office
P. O. Box 12873
Austin, Texas 78701-1495

OR2006-11580

Dear Ms. Letteri:

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# 261064.

The Texas General Land Office (the "land office") received a request for the contracts between the land office and the following companies: Blackstone Real Estate Partners ("Blackstone"), GMAC Commercial Realty Partners ("GMAC"), Guggenheim Structured Real Estate Fund ("Guggenheim"), Townsend Group ("Townsend"), TA Associates Realty ("TA"), and Walton Real Estate Fund ("Walton"). You inform us that the land office does not have contracts with Blackstone or TA.¹ You state that the land office will release some of the requested information to the requestor, including the information required to be released under section 552.0225 of the Government Code. *See Gov't Code* § 552.0225 (certain categories of information held by a governmental body relating to its investments are public information and not excepted from disclosure). You claim that the remaining submitted information is excepted from disclosure under section 552.104 of the Government Code. You have notified Capmark Investment, LP (formerly GMAC), Guggenheim,

¹We note that the Act does not require a governmental body to disclose information that did not exist at the time the request was received or to prepare new information in response to a request for information. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986).

Townsend, and Walton of the request for information pursuant to section 552.305 of the Government Code. *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 section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have considered the exception you claim and reviewed the submitted information.

The land office argues that the remaining submitted information is excepted from disclosure under section 552.104 of the Government Code. This section excepts from required public disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104. The purpose of this exception is to protect a governmental body's interests in competitive bidding situations. *See* Open Records Decision No. 592 (1991). Section 552.104 requires a showing of some actual or specific harm in a particular competitive situation; a general allegation that a competitor will gain an unfair advantage will not suffice. *See* Open Records Decision No. 541 at 4 (1990). Section 552.104 does not protect information relating to competitive bidding situations once a contract has been awarded. *See* Open Records Decision Nos. 306 (1982), 184 (1978). When a governmental body seeks protection as a competitor, however, we have stated that it must be afforded the right to claim the "competitive advantage" aspect of section 552.104 if it meets two criteria. The governmental body must first demonstrate that it has specific marketplace interests. *See* Open Records Decision No. 593 at 4 (1991) (governmental body that has been granted specific authority to compete in the private marketplace may demonstrate marketplace interests analogous to those of a private entity). Second, the governmental body must demonstrate actual or potential harm to its interests in a particular competitive situation. A general allegation of a remote possibility of harm is not sufficient to invoke section 552.104. *See 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.

The land office asserts it has specific marketplace interests in the remaining submitted information because these documents were created in order to invest the funds designated under section 51.401 of the Natural Resources Code in commercial income-producing real estate investments as authorized by section 51.4021 of the Natural Resources Code. *See* Nat. Res. Code § 51.4021. You state that the land office "competes with the private sector investors for top fund managers and investment opportunities." Based on these representations, we find that the land office 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).

The land office informs us that the remaining submitted documents reveal the method by which it participates in the real estate investment marketplace. You argue that release of information relating to investment strategy, financing rates made available to the land office's fund managers, and potential investment opportunities would negatively impact the land office's ability to compete in the real estate market as it would artificially create

competition, resulting in higher prices and a diminished rate of return. Based on the submitted representations and arguments, we conclude that the land office has shown that release of the remaining submitted information would cause specific harm to the land office's marketplace interests. *Id.* We therefore conclude that the land office may withhold the remaining submitted information under section 552.104 of the Government Code. As our ruling is dispositive, we need not address the remaining arguments against disclosure.

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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 Office of the Attorney General 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. 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,



Jaime L. Flores
Assistant Attorney General
Open Records Division

JLF/eb

Ref: ID# 261064

Enc. Submitted documents

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