



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 9, 2012

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

OR2012-05034

Dear Mr. Junell:

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# 450006.

The Teacher Retirement System of Texas ("TRS") received a request for information regarding real estate and private equity investments made by TRS. You state you have made some of the requested information available to the requestor. You state you will redact information subject to section 552.117 of the Government Code, as permitted by section 552.024(c) of the Government Code.¹ You further state you will redact certain information pursuant to Open Records Decision No. 684 (2009)² and 552.136³ of the Government Code. You claim some of the submitted information is not subject to the Act or is excepted from disclosure under federal copyright law and sections 552.101, 552.104, 552.110, 552.111, and 552.143 of the Government Code. You inform us, and provide

¹Section 552.117 of the Government Code exempts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former officials or employees of a governmental body. Gov't Code § 552.117(a). Section 552.024 of the Government Code authorizes a governmental body to withhold information subject to section 552.117 without requesting a decision from this office if the employee or official or former employee or official chooses not to allow public access to the information. *See id.* § 552.024(c)(2).

²This office issued Open Records Decision No. 684, a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

³We note on September 1, 2011, the Texas legislature amended section 552.136 of the Government Code to allow a governmental body to redact the information described in section 552.136(b) without the necessity of seeking a decision from the attorney general. *See* Gov't Code § 552.136(c).

documentation showing, you notified Credit Suisse Securities USA (“Credit Suisse”), Camden Property Trust (“Camden”), Altius Associates (“Altius”), and Colony Capital, LLC (“Colony”) of the request and of their right to submit comments to this office as to why the requested information should not be released to the requestor. *See* Gov’t Code § 552.305(d); *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 to raise and explain applicability of exception to disclosure under the Act in certain circumstances). We have received comments from Colony. We have also received and considered comments from the requestor. *See* Gov’t Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have considered the submitted arguments and reviewed the submitted representative sample of information.⁴

Initially, you state a portion of the responsive information was the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2008-06054 (2008). In Open Records Letter No. 2008-06054, we determined TRS must withhold the information in Exhibit 1 that is not subject to section 552.0225(b) of the Government Code pursuant to section 552.143(b) of the Government Code. We have no indication there has been any change in the law, facts, or circumstances on which the prior rulings were based. Accordingly, for the requested information that is identical to the information previously requested and ruled upon by this office contained in Exhibit 1, we conclude TRS must rely on Open Records Letter No. 2008-06054 as a previous determination and withhold the identical information in accordance with that ruling.⁵ *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

You argue portions of the submitted information are not subject to the Act. The Act is applicable only to “public information.” *See* Gov’t Code §§ 552.002, .021. Section 552.002(a) defines “public information” as:

[I]nformation that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

(1) by a governmental body; or

⁴We assume the “representative sample” of records submitted to this office is truly representative of the requested records as a whole. *See* 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 those records contain substantially different types of information than that submitted to this office.

⁵As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

(2) for a governmental body and the governmental body owns the information or has a right of access to it.

Id. § 552.002(a). Thus, virtually all of the information in a governmental body's physical possession constitutes public information and, thus, is subject to the Act. *Id.* § 552.002(a)(1); *see* Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). You state that portions of the submitted information reflect personal appointments and information on the TRS directors' private calendars, which are unrelated to TRS business. Based on your representations and our review, we agree the information we have marked does not constitute public information for the purposes of section 552.002. *See* Open Records Decision No. 635 at 4 (1995) (section 552.002 not applicable to personal information unrelated to official business and created or maintained by state employee involving *de minimis* use of state resources). As such, the information we have marked is not subject to the Act, and TRS need not release it in response to this request.⁶

Next, we must address TRS's obligations under section 552.301 of the Government Code when requesting a decision from this office under the Act. Pursuant to section 552.301(b) of the Government Code, the governmental body must request a ruling from this office and state the exceptions to disclosure that apply within ten business days after receiving the request. *See* Gov't Code § 552.301(b). TRS received the initial request for information on January 17, 2012, sought clarification, and received the clarified request for information on January 19, 2012. *See id.* § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information); *see also City of Dallas v. Abbott*, 304 S.W.3d 380 (Tex. 2010) (holding when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or overbroad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed). You inform us the TRS office was staffed by a skeleton crew on January 19, 2012. We note, this office does not count any holidays, including skeleton crew days observed by a governmental body, as business days for the purpose of calculating a governmental body's deadline under the Act. Therefore, TRS was required to raise the exceptions to disclosure that apply to the requested information by February 3, 2012. *See* Gov't Code § 552.301(b). However, you did not raise any exceptions until February 9, 2012. Therefore, because you did not raise any exceptions to disclosure within the ten-business day deadline, we conclude TRS failed to comply with the procedural requirements mandated by section 552.301 of the Government Code.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301 results in the legal presumption that the requested information is public and must be released unless a compelling reason exists to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling

⁶As our ruling is dispositive, we need not address your argument against disclosure of this information.

demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); *see also* Open Records Decision No. 630 (1994). Generally, a compelling reason to withhold information exists where some other source of law makes the information confidential or where third party interests are at stake. Open Records Decision No. 150 at 2 (1977). Although you raise sections 552.104 and 552.111 of the Government Code for the requested information, these sections are discretionary exceptions to disclosure that protect a governmental body's interests and may be waived. *See* Gov't Code § 552.007; Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions in general), 663 at 5 (1999) (untimely request for decision resulted in waiver of discretionary exceptions including section 552.111), 592 (1991) (stating that governmental body may waive section 552.104). Thus, in failing to comply with the procedural requirements of section 552.301, you have waived your claims under sections 552.104, and 552.111, and TRS may not withhold any of the requested information on these bases. However, because third party interests and TRS's claims under sections 552.101 and 552.143 of the Government Code can provide a compelling reason for non-disclosure under section 552.302, we will address your arguments regarding these exceptions and the submitted third-party arguments against disclosure.

Next, we note an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have only received comments from Colony explaining why the company's submitted information should not be released. Therefore, we have no basis to conclude Credit Suisse, Camden, or Altius have protected proprietary interests in the submitted information. *See id.* § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3. Accordingly, TRS may not withhold any portion of the submitted information on the basis of any proprietary interest Credit Suisse, Camden, or Altius may have in it.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses the doctrine of common-law privacy, which protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *Id.* at 681-82. The type of information considered highly intimate or embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. This office has found some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under

common-law privacy. *See* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). You seek to withhold marked portions of the submitted responsive information under section 552.101 of the Government Code in conjunction with common-law privacy. Upon review, however, we find you have failed to demonstrate this information is highly intimate or embarrassing and of no legitimate public concern. Accordingly, TRS may not withhold any of the submitted information on the basis of section 552.101 of the Government Code in conjunction with common-law privacy.

You and Colony assert some the submitted information is excepted from disclosure under section 552.143 of the Government Code. Section 552.143 provides, in part, the following:

(a) All information prepared or provided by a private investment fund and held by a governmental body that is not listed in Section 552.0225(b) is confidential and excepted from the requirements of Section 552.021.

(b) Unless the information has been publicly released, pre-investment and post-investment diligence information, including reviews and analyses, prepared or maintained by a governmental body or a private investment fund is confidential and excepted from the requirements of Section 552.021, except to the extent it is subject to disclosure under Subsection (c).

Gov't Code § 552.143 (a), (b). You state some of the submitted information consists of information held by TRS that was prepared and provided by private investment funds. You inform us that the information you seek to withhold is not subject to section 552.0225(b). *See id.* § 552.0225(b) (listing categories of information held by governmental body relating to its investments that are public and not excepted from disclosure under the Act). Based on your representations and our review, we agree TRS must withhold the information you have marked under section 552.143(a). You also state some of the remaining information consists of pre-investment due diligence information about TRS's proposed investment opportunities. You inform us that the information at issue has not been released to the public. Based on your representations and our review of the information at issue, we agree TRS must withhold the remaining information you have marked under section 552.143(b) of the Government Code.

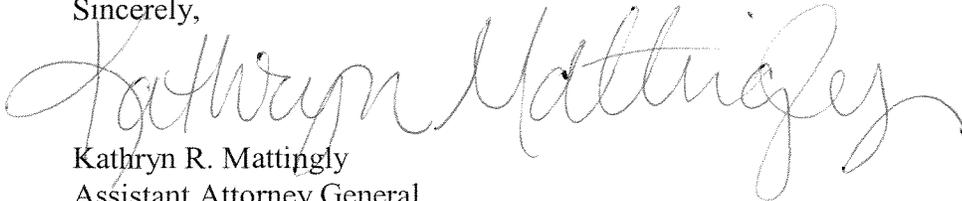
You note some of the information at issue may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; *see* Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

In summary, for the requested information that is identical to the information previously ruled upon by this office in Exhibit 1, TRS may rely on Open Records Letter No. 2008-06054 and withhold the identical information in accordance with that ruling. TRS need not release the information we have marked that is not subject to the Act. TRS must withhold the information you have marked under section 552.143 of the Government Code. The remaining information must be released, however, any information subject to copyright may be released only in accordance with copyright law.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free at (888) 672-6787.

Sincerely,



Kathryn R. Mattingly
Assistant Attorney General
Open Records Division

KRM/dls

Ref: ID# 450006

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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