

February 12, 1999



OFFICE OF THE
ATTORNEY GENERAL
STATE OF TEXAS

— * —
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Mr. Thomas Ricks
President
University of Texas Investment
Management Company
210 West Sixth Street, 2nd Floor
Austin, Texas 78701

OR99-0446

Dear Mr. Ricks:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 121991.

The University of Texas Investment Management Company ("UTIMCO") received a request for information relating to the operation and documentation of UTIMCO "absolute return funds." You indicate that you have released some information responsive to the request. You claim, however, that the responsive information regarding the characteristics of individual alternative marketable equity funds invested in by UTIMCO is excepted from disclosure by sections 552.104 and 552.110 of the Government Code. You have provided a marked sample of the information you seek to withhold as Exhibit 1.¹ You state that the material at issue consists of information specific to individual funds in the alternative equities program. You advance several arguments as to why release of the marked

¹In reaching our conclusion here, we assume that 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 that those records contain substantially different types of information than that submitted to this office.

information would harm UTIMCO and ask that we consider your previous arguments submitted in response to similar requests for information.

Section 552.104 of the Government Code protects from required public disclosure “information that, if released, would give advantage to a competitor or bidder.” The purpose of section 552.104 is to protect the government’s interests when it is involved in certain commercial transactions. For example, section 552.104 is generally invoked to except information submitted to a governmental body as part of a bid or similar proposal. *See, e.g.,* Open Records Decision No. 463 (1987). In these situations, the exception protects the government’s interests in obtaining the most favorable proposal terms possible by denying access to proposals prior to the award of a contract. 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. Open Records Decision No. 593 at 4 (1991). Second, a 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. *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.

In Open Records Letter No. 97-1776 (1997), we concluded that UTIMCO and the University of Texas Board of Regents with whom UTIMCO contracts have a common purpose and objective such that an agency-type relationship is created. This office has also previously determined, in the same context, that the University of Texas System may be considered a “competitor” for purposes of section 552.104. Open Records Letter No. 92-0613 (1992). Therefore, based on this relationship and after reviewing all of your arguments, we conclude that you have demonstrated that UTIMCO has specific marketplace interests. You also argue:

The Alternative Marketable Equities Program consists of investments by UTIMCO into numerous funds managed by private managers that invest in a variety of companies pursuant to a particular investment strategy. The investment contracts governing the investment by UTIMCO into the funds are heavily negotiated. Each investment contract has a different structure and delineates a different investment strategy, and if this information was released to the public, both UTIMCO and the managers of the fund from whom the information was obtained would lose competitive advantages they had developed due to their negotiation skills. In addition, release of information concerning the investment strategy of the funds would eliminate any competitive advantage currently enjoyed by UTIMCO and the managers.

Based upon our review of the submitted information and your arguments, we conclude that you have demonstrated actual or potential harm to UTIMCO's interests in a particular competitive situation. You have shown that releasing the documents will bring about a specific harm. You may withhold the information you have marked to redact in Exhibit 1.²

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Don Ballard
Assistant Attorney General
Open Records Division

JDB\nc

Ref: ID# 121991

Enclosures: Submitted documents

cc: Mr. Stephen Lisson
Initiate!!
P.O. Box 2013
Austin, Texas 78768-2013
(w/o enclosures)

²Because we are able to make a determination under section 552.104, we do not address your additional argument against disclosure.