



February 16, 1999

Mr. David Anderson
Texas Education Agency
1701 North Congress Avenue
Austin, Texas 78701-1494

OR99-0453

Dear Mr. Anderson:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 121032.

On September 25, 1998, the Texas Education Agency received a request to review the agency's "records and files related to the Texas Growth Fund" (the Fund). You explain that the State Board of Education and the Texas Education Agency (collectively the agency) are charged with the oversight and administration of the Texas Permanent School Fund. The Permanent School Fund is authorized to invest in and has received information from the Texas Growth Fund. The requestor, in this instance, claims that the agency failed to seek an attorney general decision from this office within the statutorily mandated ten business days. Gov't Code § 552.301; *see Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.--Austin 1990, no writ). When a request for an open records decision is not made within the time period prescribed by section 552.301, the requested information is presumed to be public. *See Gov't Code § 552.302.*

It appears that the agency sent a letter to the requestor on September 30, 1998 to determine which particular records were sought. The agency asked the requestor to "specify the subject matter of information related to the Texas Growth Fund and the time period of information" sought. When a governmental body is presented with a broad request for information rather than specific records, we have stated that the governmental body may advise the requestor of the types of information available so that he may properly narrow his request. Open Records Decision Nos. 561 at 8,9 (1990), 31 (1974). Although the agency did not follow this course in its letter to the requestor, the requestor responded on October 1, 1998 by enumerating the information he sought. The requestor asked for:

1. All completed reports, audits, evaluations, and investigations.
2. All information in the accounts, vouchers, and contracts relating to the receipt and expenditure of public funds;
3. The name of each official and the final record of voting on all relevant proceedings;
4. All working paper, research material and information used to estimate the need for or expenditure of public funds;
5. A description of the Permanent School Fund's relationship to the Texas Growth Fund, together with a statement of the general course and method by which all relevant functions are channeled and determined, including the nature and requirements of all formal and informal policies and procedures;
6. All attorney, accountant, consultant and other professional and technical services information, fees, and bills;
7. Any relevant settlement agreement.

The agency then sought an attorney general decision on October 15, 1998. The initial request for information did not specify particular documents and may be characterized as seeking a large amount of information. The Open Records Act permits a governmental body to "clarify a request" and to "discuss with the requestor how to" narrow the scope of a request:

If what information is requested is unclear to the governmental body, the governmental body may ask the requestor to clarify the request. If a large amount of information has been requested, the governmental body may discuss with the requestor how the scope of a request might be narrowed, but the governmental body may not inquire into the purpose for which information will be used.

Gov't Code § 552.222(b); *see* Open Records Decision No. 304 (1982) (governmental body may require requestor to identify particular kind of document sought). This office has determined that the time for the ten-day deadline does not run while a governmental body attempts to informally resolve a request and there is legitimate confusion about the scope of a request. *See* Open Records Decision No. 333 (1982). In Open Records Decision

No. 333 (1982), we concluded that because there was legitimate confusion on the part of a governmental body about the scope of a request for police blotters and about whether the request could be resolved without requesting an open records decision on the matter, the operative request for information was the requestor's subsequent letter in which the request was clarified. In this case, the agency required clarification of the initial request, received it, and sought a decision. The operative request here is the requestor's response to the agency on October 1, 1998 when he specified the particular information he sought. The agency sought an attorney general decision on October 15, 1998, ten business days after the clarified request was received. The agency has met the statutory requirements of section 552.301.

The agency states that it will release all of the requested information to the requestor except for certain categories of material. The agency identifies four responsive categories of information that it wishes to protect from disclosure:

1. All summaries, "due diligence notebooks" investment recommendations, investment memorandums, valiative summaries, and any documents that provide information on the internal operations of any of the private companies;
2. All materials and information prepared for the attendees of any briefing session of the Fund that was provided before or during such briefing session;
3. All quarterly and annual financial statements of either the Fund or the Fund Management Corp.;
4. Any other letters or communications from the Fund Management Corp, or any representatives of the Fund Management Corp. or the Fund that provides any information regarding the internal operations of the private companies or the Fund Management Corp.

You have submitted a representative sample of the types of information you seek to withhold.¹ You argue that the information is excepted from disclosure based on sections 552.101, 552.104, and 552.110 of the Government Code. The Fund also argues that the four categories listed above should be withheld from disclosure. The Fund argues that release of

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.

the information would be harmful to its and the agency's competitive position and that the information must be withheld under section 552.110 of the Government Code. We consider both entities' arguments together.

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.

The agency is constitutionally responsible for the oversight and investment of the Permanent School Fund, including in the Fund and the private marketplace. Tex. Const. article VII, § 5(d); Educ. Code 43.003. A member of the State Board of Education serves on the Fund's board. Tex. Const. article XVI, § 70(c)(5). The agency also explains that it has elected to not invest any funds of the [Permanent School Fund] in the private equity marketplace. However, in the future, [it] may decide to do so and must act diligently to retain this investment option. If the [agency] were required to disclose the proprietary and confidential information related to the [Fund], the [Fund] and other private investment vehicles would eliminate the [Permanent School Fund] as a potential investor. This result would prevent the [Permanent School Fund] from being a competitor in the private equity marketplace, which is an investment arena in which the Texas Constitution has provided the [agency] specific authority to invest.

The Fund additionally argues that it is a competitor in the private equity marketplace. The submitted records reflect that the Fund does invest in and obtain information about the private marketplace. The Fund states that submitted material is a compilation of both the information the private investment portfolio managers obtain from potential investment vehicles and their opinions and analysis of the vehicles. We believe that the agency, while

administering the Permanent School Fund, and the Fund may be considered "competitors" for purposes of section 552.104. *See* Open Records Decision No. 593 (1987); Open Records Letter Nos. 92-0613 (1992); 91-606 (1991).

After reviewing your arguments, we also conclude that you have demonstrated that the agency and the Fund have specific marketplace interests. You argue:

Disclosure of the [four categories of requested information] would essentially put the [Fund] out of business. In the private equity marketplace, companies seeking private equity investors share confidential business plans and financial information with the [Fund and the Permanent School Fund]. The companies trust that the [Fund] will keep this information from other potential competitors. If the [Fund] were to allow this confidential information to become public, the competitive position of the companies providing the information would be harmed in the private equity marketplace. These companies would then no longer provide desired information to the [Fund] on potential investments, thus harming the [Fund's and the agency's] competitive position in the marketplace.

The Fund argues that release of the requested four categories of information would eliminate its competitive position. The Fund contends that

[t]he whole point of investing in the private equity marketplace is to capitalize on the individual knowledge each investor has as to the financial strength and possible future activities of certain private companies. If this knowledge were provided to the entire marketplace, the private investment vehicles would lose their 'private' nature and all the information that was so diligently and carefully assimilated would be available to any other investor, thus destroying any competitive advantage. The compelled release of such confidential information by the [Permanent School Fund] would seriously harm the ability of the [Fund] to compete for high quality private investments.

Based upon our review of the submitted information and arguments, we conclude that you have demonstrated actual or potential harm to the agency's interests in a particular competitive situation. You have shown that releasing the documents will bring about a specific harm. You may withhold the submitted information under section 552.104.²

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

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# 121032

Enclosures: Submitted documents

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