



September 16, 1999

Mr. Thomas G. Ricks
University of Texas Investment Management Company
210 West Sixth Street, Second Floor
Austin, Texas 78701

OR99-2571

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# 127293.

The University of Texas Investment Management Company ("UTIMCO") received a request for certain information regarding "UTIMCO's use of external consultants, fund managers, and any others who assist UTIMCO with its investments." You state that you have provided the requestor with most of the requested information. However, you seek to withhold the following information under sections 552.104 and 552.110 of the Government Code:

- 1) the specific details of the fees paid to Cambridge [Associates, Inc.] by UTIMCO, except for information on the total amount of money paid to Cambridge by UTIMCO in each fiscal year (which has been provided to Ms. Roser);
- 2) certain information contained in the attached Asset Allocation Policy Review Discussion Materials, August 22, 1996 (specifically pages 3 and 22-26);
- 3) Certain information contained in the attached asset Allocation Policy Review, April 29, 1999 (specifically pages 10-15, 18-20, 22-25, 30-31, 33, 38-39, and 48-49); and
- 4) all information contained in the attached Memorandum on Permanent University Fund Spending Policy Review, October 14, 1998.

We have considered the exceptions you claim and reviewed the information at issue. Section 552.104 excepts from required public disclosure "information that, if released, would give advantage to a competitor or bidder." In order for a governmental body to be deemed a competitor for purposes of section 552.104, it must have a specific market place interest that would be harmed by disclosure. A general allegation of a remote possibility of harm is not sufficient to invoke section 552.104. Open Records Decision No. 593 (1991).

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 that the University of Texas System may be considered a "competitor" for purposes of section 552.104. Open Records Letter No. 92-613 (1992). Having reviewed the documents and your arguments that releasing this information will bring about specific harm, we conclude that, except for the October 3, 1986 letter from Cambridge Associates, Inc. ("Cambridge") detailing the services to be provided by Cambridge and the fees for such services, you may withhold the information under section 552.104. As for the October 3, 1986 letter from Cambridge, we conclude that UTIMCO has not established that release of the requested information could cause specific harm to its marketplace interests in a particular competitive situation. Accordingly, UTIMCO may not withhold the October 3, 1986 letter from the requestor based on section 552.104 of the Government Code. Furthermore, the general terms of a contract with a governmental body are not usually excepted from disclosure. Gov't Code § 552.022(3); see Open Records Decision No. 541 at 8 (1990) (terms of contract with state agency). Cf. Open Records Decision No. 514 (1988) (public has an interest in knowing prices charged by government contractors).

Because the October 3, 1986 letter is not excepted from disclosure under section 552.104, we will consider UTIMCO's and Cambridge's arguments under section 552.110. Section 552.110 protects the property interests of third parties by excepting from disclosure two types of information: (1) trade secrets, and (2) commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision. In Open Records Decision No. 639 (1996), this office announced that it would follow the federal courts' interpretation of exemption 4 to the federal Freedom of Information Act when applying the second prong of section 552.110 for commercial and financial information. Thus, this office relied on *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), as a judicial decision and applied the standard set out in *National Parks* to determine whether information is excepted from public disclosure under the commercial and financial prong of section 552.110. However, the Third Court of Appeals recently held that *National Parks* is not a judicial decision within the meaning of section 552.110. *Birnbaum v. Alliance of Am. Insurers*, 994 S.W.2d 766 (Tex. App.—Austin 1999, no pet. h.). Because neither you nor Cambridge has cited to a statute or judicial decision that makes the commercial or financial information privileged or

confidential, you may not withhold the October 3, 1986 letter under the commercial or financial information prong of section 552.110.

The Texas Supreme Court has adopted the definition of "trade secret" from the Restatement of Torts, section 757, which holds a "trade secret" to be

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to a single or ephemeral event in the conduct of the business A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

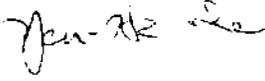
RESTATEMENT OF TORTS § 757 cmt. b (1939); *see Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958). If a governmental body takes no position with regard to the application of the "trade secrets" branch of section 552.110 to requested information, we accept a private person's claim for exception as valid under that branch if that person establishes a prima facie case for exception and no one submits an argument that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5 (1990).¹

After reviewing UTIMCO's and Cambridge's arguments, we conclude that neither party has established that the October 3, 1986 letter is protected as a trade secret under section 552.110. As we state above, the general terms of a contract with a governmental body are not usually excepted from disclosure. Gov't Code § 552.022(3); *see* Open Records Decision No. 541 at 8 (1990) (terms of contract with state agency). *Cf.* Open Records Decision No. 514 (1988) (public has an interest in knowing prices charged by government contractors). Thus, the October 3, 1986 letter is not excepted from disclosure under the trade secret prong of section 552.110 and must be released.

¹The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are: "(1) the extent to which the information is known outside of [the company]; (2) the extent to which it is known by employees and other involved in [the company's] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others." RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

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. You need not ask this office for additional rulings regarding the submitted records, but this ruling should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Sincerely,

A handwritten signature in black ink, appearing to read "Yen-Ha Le".

Yen-Ha Le
Assistant Attorney General
Open Records Division

YHL/nc

Ref: ID# 127293

Encl.: Submitted documents

cc: Ms. Mary Ann Roser
Higher Education Writer
Austin American-Statesman
P.O. Box 670
Austin, Texas 78767
(w/o enclosures)