



October 23, 2000

Ms. Belinda R. Perkins  
Teacher Retirement System of Texas  
1000 Red River Street  
Austin, Texas 78701-2698

OR2000-4113

Dear Ms. Perkins:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 140324.

The Teacher Retirement System of Texas ("TRS") received a request for the following information:

- 1) The minutes from the July 28, 2000, meeting of the Board;
- 2) The memorandum(s) regarding the Alternative Assets Program which was discussed at the July 28, 2000 board meeting (including all information provided by Mr. Sewell and/or Mr. Garrison);
- 3) The exhibits to the memorandum(s);
- 4) The resolution(s) voted on by the board (resolution #2);
- 5) The proposed or draft of the proposed partnership regarding the TRS Real Estate Assets;
- 6) The most recent appraisal of the Sage Plaza One Office Building in Houston Texas and the appraisal of the promissory note held by TRS and secured by the Sage Plaza One building.

You state that information responsive to request item 1 does not exist. You also state that TRS has released the information responsive to request item 4. In regard to information responsive to the remaining request items, you claim that the information is excepted from

disclosure under sections 552.101, 552.104, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.<sup>1</sup>

We begin our discussion of the submitted appraisal. The Seventy-sixth Legislature amended section 552.022 of the Government Code to make certain information expressly public, and therefore not subject to discretionary exceptions to disclosure. Gov't Code § 552.022. Section 552.022 now states in relevant part:

- (a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and are not excepted from required disclosure under this chapter unless they are expressly confidential under other law.

Gov't Code § 552.022. One such category of expressly public information under section 552.022 is "a completed report, audit evaluation, or investigation made of, for, or by a governmental body, except as provided by [s]ection 552.108 . . . ." Gov't Code § 552.022(a)(1). The submitted appraisal is a completed report made for TRS. Therefore, as prescribed by section 552.022, the submitted appraisal must be released to the requestor unless it is confidential under other law.

You argue that the appraisal is excepted from disclosure under sections 552.104 and 552.111, and that the appraisal is confidential under section 552.101 in conjunction with various laws regarding TRS' fiduciary duties. Sections 552.104 and 552.111 are discretionary exceptions and not "other law" for purposes of section 552.022.<sup>2</sup> Section 552.101 excepts from required public disclosure "information that is confidential by law, either constitutional, statutory, or by judicial decision." Accordingly, section 552.101 encompasses confidentiality provisions. However, while all of the provisions you have raised in conjunction with section 552.101 pertain to TRS' fiduciary duties, none is a confidentiality provision that actually prohibits TRS

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<sup>1</sup>The submitted information consists of a memorandum dated July 19, 2000 directed to TRS Board of Trustees, with exhibits; the initial draft of a limited partnership agreement dated May 24, 2000; and the prospective market value appraisal of Halliburton Center (the building formerly known as Sage Plaza One Office Building).

<sup>2</sup>Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.*, Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 592 at 8 (1991) (governmental body may waive section 552.104, information relating to competition or bidding), 549 at 6 (1990) (governmental body may waive informer's privilege), 522 at 4 (1989) (discretionary exceptions in general). Discretionary exceptions therefore do not constitute "other law" that makes information confidential.

from releasing information such as the submitted appraisal.<sup>3</sup> Moreover, we know of no other law that would make the submitted appraisal confidential. Accordingly, TRS must release the submitted appraisal under section 552.022(a)(1).

We now turn to the remaining submitted information. Section 552.104 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 exempt 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.

You argue that TRS has a specific marketplace interest because it “is constitutionally responsible for the administration of the system and investment of the funds of the system, including its mortgage portfolio . . . and other private marketplace investments.” *See* Tex. Const. art. XVI, §67(a)(3), (b)(1); Gov’t Code § 825.301(a). Furthermore, you explain that the TRS mortgage portfolio consists of fourteen mortgage loans, all of which involve commercial real estate owned by private entities. One such mortgage loan is secured by Halliburton Center. We agree that TRS has a specific marketplace interest in its mortgage portfolio as a whole as well as in its loan involving Halliburton Center. *See* Open Records Decision No. 593 (1991).

You also argue that TRS’ marketplace interest would be harmed by the release of the submitted information. You explain that TRS is involved in ongoing negotiations for a limited partnership arrangement relating to the TRS mortgage portfolio. You explain further that because the submitted memorandum and draft agreement reflect the current negotiations release of these documents would put TRS “at a disadvantage in its efforts to obtain the most

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<sup>3</sup>*See* Tex. Const. art. XVI, § 67(a)(1) (requiring that the assets of retirement system are held in trust for the benefit of members and may not be diverted); Gov’t Code § 825.506 (construing the retirement system’s benefit plan as a qualified plan under section 401(a) of the Internal Revenue Code); 26 U.S.C. § 401(a) (defines and lists requirements regarding qualified plans); RESTATEMENT (THIRD) OF TRUSTS § 170(1) (noting the trustee is under a duty to administer the trust solely in the interest of the beneficiaries).

advantageous proposal, or investment terms.” We believe this argument has merit, and we therefore find that TRS’ marketplace interests would be harmed by the release of the memorandum, including its attached exhibits, and the draft agreement.

The requestor, having submitted comments, agrees that TRS has a specific marketplace interest, but argues that TRS’ interest would not be harmed by release of the memorandum or draft agreement. However, the requestor generally bases his arguments on his belief that TRS’ negotiations have ended. TRS has responded to the requestor’s comments, reiterating that its negotiations for a limited partnership arrangement are currently ongoing, and that failure to form an agreement with the current entity may result in TRS’ seeking out an alternative entity with which to negotiate. We find that TRS has made a sufficient showing that release of the memorandum and draft agreement would harm TRS’ specific marketplace interest. Accordingly, TRS may withhold the memorandum, including its attached exhibits, and the draft agreement under section 552.104.<sup>4</sup> However, we note that once the competitive bidding process is completed, TRS may not continue to withhold this information under section 552.104. Open Records Decision No. 541 at 5 (1990).

In conclusion, TRS must release the submitted appraisal under section 552.022(a)(1). TRS may withhold the submitted memorandum with exhibits and the submitted draft agreement under section 552.104, until the competitive bidding process regarding the proposed limited partnership is complete.

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, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public

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<sup>4</sup>Because section 552.104 is dispositive of this matter, it is not necessary to address TRS’ other arguments.

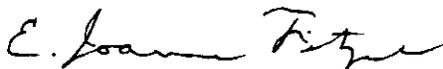
records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, 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 Department of Public 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 the General Services Commission 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,



E. Joanna Fitzgerald  
Assistant Attorney General  
Open Records Division

EJF\er

Ref: ID# 140324

Encl: Submitted documents

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(w/o enclosures)