



March 5, 2001

Mr. Thomas G. Ricks
President
The University of Texas Investment Management Company
210 West 6th Street, Second Floor
Austin, Texas 78701

OR2001-0844

Dear Mr. Ricks:

You ask whether certain information is subject to required public disclosure under the Public Information Act, chapter 552 of the Government Code. Your request was assigned ID# 144667.

The University of Texas Investment Management Company ("UTIMCO") received a request for "any correspondence between UTIMCO and the Texas Growth Fund for the past three years," as well as "any reports or memoranda regarding UTIMCO interests, if any, in the Texas Growth Fund for the same period." You inform us that UTIMCO is releasing a large quantity of responsive information to the requestor, but claim that the remaining requested information is excepted from disclosure under sections 552.104 and 552.110 of the Government Code. In addition, because you believe the privacy and/or property rights of the Texas Growth Fund ("TGF") and those private entities in which TGF invests may be implicated (the "private companies"), you notified TGF of the request. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Public Information Act in certain circumstances). TGF responded by arguing that the requested information is confidential pursuant to sections 552.104 and 552.110. You inform us that TGF provided notice to the private companies on UTIMCO's behalf. However, none of the 35 private companies which received notice from TGF under 552.305 submitted reasons why the requested information should be withheld from disclosure.

You have submitted representative samples of the requested information¹ and you identify four responsive categories of information that UTIMCO, as well as TGF, wish to protect from disclosure:

(A) all summaries, "due diligence notebooks," investment recommendations, investment memorandums[sic], valiative summaries and any documents prepared by the TGF, UTIMCO, the Teachers Retirement System of Texas ("TRS"), their agents, or any third party that provide information on the internal operations of the Private Companies ("Internal Operations Information");

(B) all materials and information prepared for the attendees of any briefing session of the TGF that was provided before or during such briefing session ("Briefing Materials");

(C) all quarterly and annual financial statements of the TGF or the private companies ("Financial Statements"); and

(D) any other letter or communication from the TGF, TGF Corp., UTIMCO, TRS, or any of the private companies or any representatives of the TGF, TGF Corp., UTIMCO, TRS or any of the private companies that provides any information regarding the internal operations of the private companies or the TGF ("Other Private Communications").

Initially, we note that 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. 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[.]

Upon review of the submitted information, we note that it contains information that is made expressly public by section 552.022. Section 552.110 of the Government Code, which you raise, is considered "other law" for purposes of section 552.022. Section 552.110 protects: (a) trade secrets, and (b) commercial or financial information the disclosure of which would

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 No. 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.

cause substantial competitive harm to the person from whom the information was obtained. The commercial or financial branch of section 552.110 requires the entity raising the exception to make a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would result from disclosure. *See* Open Records Decision No. 661 (1999). In this regard, you argue:

the TGF, UTIMCO (as manager of the PUF), and the TRS (both individually and through the TGF) compete in the private equity marketplace, which requires complete confidentiality to achieve success. The [responsive information] is a compilation of both (i) the information the private investment portfolio managers obtain from potential portfolio companies and (ii) the portfolio managers' opinions and analysis of such information. The disclosure of the detailed financial and other information . . . would completely eliminate the competitive position of the TGF, UTIMCO and the TRS. The 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 TGF, UTIMCO, and/or the TRS would seriously harm the ability of the TGF, UTIMCO, and the TRS to compete for high quality private investments. . . . The TGF, UTIMCO and the TRS, as competitive investors in private securities, and the Private Companies all share an essential interest in maintaining the confidentiality of the Private information for several reasons. Obviously, the Private Companies, will suffer competitively if information about their strategies, strengths and weaknesses is made public. As investors in the Private Companies, the TGF, UTIMCO and the TRS would suffer financially if the Private Companies suffer due to the disclosure of this financial information

Based upon our review of the submitted information and arguments, we conclude that you have demonstrated that substantial competitive injury would result to the interests of TGF and the private companies, the entities from whom you have obtained the submitted information, if the bulk of the submitted information were released. Therefore, you may withhold the majority of the submitted information under section 552.110(b). We find, however, that a portion of the submitted information is made public under section 552.022, is not excepted under section 552.110(b), and must be released. Section 552.104, which you also raise, is a discretionary exception, not "other law" for purposes of 552.022, and therefore

the information made public under section 552.022 may not be withheld under this section.² For a few other documents, we find that you have not demonstrated how release of this information would cause substantial competitive harm for purposes of either section 552.104 or 552.110(b), and it, too, must be released. For your convenience, we have marked with blue tags the information to be released.

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 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

²Discretionary 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.

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 Hadassah Schloss at 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,



Michael A. Pearle
Assistant Attorney General
Open Records Division

MAP/seg

Ref: ID# 144667

Encl. Submitted documents

cc: Mr. Lucius Lomax
P.O. Box 547
Austin, Texas 78767
(w/o enclosures)

Mr. Jim Kozlowski
President
Texas Growth Fund
111 Congress Avenue, Suite 2900
Austin, Texas 78701
(w/o enclosures)

Ms. Kimberly Frost
Vinson & Elkins
600 Congress Avenue, Suite 2700
Austin, Texas 78701
(w/o enclosures)