



June 14, 2001

Ms. Paula A. Jones  
General Counsel  
Employees Retirement System of Texas  
P.O. Box 13207  
Austin, Texas 78711-3207

OR2001-2533

Dear Ms. Jones:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 148437.

The Employees Retirement System of Texas (“ERS”) received a request for “all documentation, including reports, correspondence and memoranda, related to [ERS] investment in the Texas Growth Fund.” You inform us that ERS has made available most of the information sought by the requestor, but claim that the remaining requested information is excepted from disclosure under sections 552.101, 552.104, 552.107, 552.110, and 552.111 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.<sup>1</sup> TGF responded by arguing that the requested information is confidential pursuant to sections 552.104 and 552.110 of the Government Code. TGF also informed us that it provided notice to the private companies on ERS’s behalf. However, none of the private companies which received notice from TGF under 552.305 submitted arguments to this office for withholding the requested information.

You have submitted representative samples of the requested information<sup>2</sup> and identify four responsive categories of information that ERS, as well as TGF, wish to protect from disclosure:

---

<sup>1</sup>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).

<sup>2</sup>In 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.

(A) All tables, "due diligence notebooks," investment recommendations, investment memoranda, evaluative summaries and any documents that provide or include information on the internal operations of the private companies . . . in which the [TGF] invests or considers investing in, whether prepared by the TGF, ERS, their respective agents, any third party, or the Private Companies.

(B) All materials and information prepared for attendees of any briefing session of the TGF and provided before or during such briefings.

(C) All quarterly and annual financial statements and financial reviews of the TGF and Private Companies; and

(D) Any other letter or communication that provides or includes any information regarding the internal operations of TGF or the Private Companies, or any representatives of TGF, TGF Management Corp., ERS, or any Private Companies.

In addition, you have identified two additional categories of responsive information for which you alone assert one or more exceptions:

1. Certain communications of or among ERS staff attorneys, ERS General Counsel and ERS Board of Trustees, Executive Director or other ERS personnel directly involved with the TGF; and
2. Certain agency memoranda.

You have submitted the above categories of information to this office for our review in Exhibits labeled A-F. We have considered the asserted exceptions and the submitted comments, and we have reviewed the submitted information.

We will first address your argument under section 552.101. Section 552.101 excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 encompasses information made confidential by other statutes. You assert that section 551.075 of the Government Code applies to make the information in Exhibits A through D confidential. Section 551.075 provides that the board of trustees of the TGF need not meet in an open meeting "to confer with one or more employees of the [TGF] or with a third party . . . if the only purpose of the conference is to receive information . . . relating to an investment or a potential investment by the [TGF] in a private business entity, if disclosure would give advantage to a competitor. . . ." Gov't Code § 551.075(a)(1)(A). We note, however, that the proceedings of a governmental body during an executive session are not absolutely confidential. *See* Attorney General Opinion JM-1071 (1989) (stating that statutory predecessor to section 551.146 of the Government Code does not prohibit members of a governmental body or other individuals in attendance

at an executive session from making public statements about the subject matter of that session). We further note that records held by a governmental body are not made confidential merely because they were discussed during an executive session. Open Records Decision Nos. 605 (1992), 485 (1987). Thus, we conclude that section 551.075 of the Government Code does not prohibit ERS from disclosing the information contained in Exhibits A through D.

We will next address your argument under section 552.104 of the Government Code for the documents contained in Exhibits A through D. 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 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. *See* Open Records Decision No. 593 at 4 (1991) (governmental body that has been granted specific statutory authority to compete in the private marketplace may demonstrate marketplace interests analogous to those of a private entity). Second, the 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. As a discretionary exception, a governmental body may release information which may otherwise be subject to section 552.104 protection. *See* Open Records Decision Nos. 592 at 8 (1991) (governmental body may waive section 552.104); *see also* Gov't Code § 552.007.

With respect to the section 552.104 assertion, and as to whether ERS and TGF have specific marketplace interests, TGF advises us that

TGF is an investment trust created to allow public pension funds and permanent education funds in Texas to invest in the private equity marketplace. On November 8, 1988, the voters of Texas approved a constitutional amendment that provided the authority for certain public pension funds and permanent education funds to make private equity investments through a trust established pursuant to the requirements of Article XVI, Section 70 of the Texas Constitution. In December of 1991, the TGF was established through the execution of a Declaration of Trust executed by the participating public funds. A second Declaration of Trust was established in 1995, and a third Declaration of Trust was established in 1998.

Further, you state:

. . . ERS has a constitutionally created marketplace interest. ERS is constitutionally responsible for the administration of the investment of the funds of the system, including investments in the TGF and other investments permitted in accordance with Article XVI, § 67(a)(1) and applicable law. ERS is constitutionally authorized to invest in the TGF, and is currently an active participant in the TGF. TRS has an ongoing interest in the performance of the TGF.

Given the constitutional authority provided ERS and TGF for purposes of investment, we conclude that ERS and TGF can be considered “competitors” in the private marketplace for purposes of section 552.104. Thus, ERS may avail itself of section 552.104 protection for its information, provided ERS demonstrates actual or potential harm to its competitive interests if the information at issue was released to the public. On this question, you state that

the TGF and the ERS . . . compete in the private equity marketplace, which requires complete confidentiality to achieve success. The responsive information contains Private Information about the Private Companies as potential investment opportunities. This Private Information contains opinions and analyses of these Private Companies and their potential as investments that the TGF and ERS, through its investment in the TGF, are considering. The disclosure of the detailed financial information of the Private Companies and the investment strategies used to select the Private Companies would completely eliminate the competitive position of ERS.... The whole purpose of private equity marketplace investing is to capitalize on the Private Information to identify and invest in sound private investment vehicles to maximize returns to ERS, both short and long term. If the Private information held by ERS and the TGF were provided to the entire marketplace, these private investment vehicles would lose their “private” status and all the information that had been gathered, interpreted and evaluated on these Private Companies would become available to any investor. This publication of Private Information would destroy the competitive advantage gained through diligent efforts and capital expenditure of the TGF, and of ERS by virtue of its investment in the TGF . . . . To compel the release of the Private Information by ERS would seriously harm the ability of the TGF, ERS and other entities utilizing the TGF 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 interests of ERS if most of the information in Exhibits A through D, and a portion of the information in Exhibit F, were released to the public. We have marked the information in these exhibits that is excepted from disclosure under section 552.104. For the remainder of the information for which you assert

section 552.104, we conclude that neither you nor TGF have demonstrated how disclosure would harm the competitive interests of TGF or ERS. Therefore, this information may not be withheld under section 552.104, nor section 552.110(b), which excepts from disclosure information “the disclosure of which would cause substantial harm to the person from whom the information was obtained.”

You also argue that the information in Exhibit E is excepted from disclosure under section 552.107. Section 552.107(1) excepts information from disclosure if:

it is information that the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the [Texas Rules Evidence], or the Texas Disciplinary Rules of Professional Conduct.

Gov't Code § 552.107(1). In Open Records Decision No. 574 (1990), this office concluded that section 552.107 excepts from public disclosure only “privileged information,” that is, information that reflects either confidential communications from the client to the attorney or the attorney’s legal advice or opinions; it does not apply to all client information held by a governmental body’s attorney. *Id.* at 5. Section 552.107(1) does not protect purely factual information. *Id.* Upon review of the information in Exhibit E, we conclude that a portion of it is excepted from disclosure under section 552.107(1). We have marked this information, which you have designated Exhibit E1.

You also raise section 552.111 of the Government Code. Section 552.111 excepts from disclosure “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *Arlington Indep. Sch. Dist. v. Texas Attorney Gen.*, No. 03-00-00219-CV, 2001 WL 23169, at \* 5 (Tex. App.--Jan. 11, 2001, no pet. h.). An agency’s policymaking functions do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. ORD 615 at 5-6. Additionally, section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist.* at \* 6-7; ORD 615 at 4-5. The preliminary draft of a policymaking document that has been released or is intended for release in final form is excepted from disclosure in its entirety under section 552.111 because such a draft necessarily represents the advice, recommendations, or opinions of the drafter as to the form and content of the final document. Open Records Decision No. 559 at 2 (1990).

Upon review of the information in Exhibit E, we conclude you may withhold all of the information you have designated Exhibits E2 through E4 pursuant to section 552.111. We also conclude that you may withhold under section 552.111 a portion of the information that you have designated as Exhibit A2, as well as a portion that you have designated as Exhibit F. We have marked this information.

To summarize, ERS may not withhold any of the submitted information pursuant to section 552.101 in conjunction with section 551.075 of the Government Code. Most of the information in Exhibits A through D may be withheld under section 552.104. The information contained in Exhibit E1 may be withheld under section 552.107(1). A portion of the information contained in Exhibits A2 and F, as well as all of the information in Exhibits E2 through E4, may be withheld under section 552.111. The remainder of the information must be released to the requestor.

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 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# 148437

Enc. Submitted documents

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