



October 29, 2001

Ms. Paula A. Jones
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Employees Retirement System of Texas
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OR2001-4949

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# 154071.

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

- a. Documents reflecting all standards utilized in review, evaluation and/or analysis of entities offering to provide brokerage services for the [system].
- b. Copies of all completed questionnaires, and any documents submitted in connection therewith, from any person or entity seeking to provide brokerages services for [the system] from 1999 to the present.
- c. Copies of any documents evidencing reviews, evaluations and/or analyses of the questionnaires referenced in item "b" above.
- d. Copies of all documents evidencing review, evaluation and/or analysis of the application of Southwestern Capital Markets, Inc., to provide brokerages services for [the system].

You state that you have made part of the requested information available to the requestor. You claim that information responsive to categories b and c are excepted from disclosure under sections 552.110 and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

You advise this office that the requested information may involve the proprietary interests of third parties. You state that the system has notified the third parties about the request as required by section 552.305(d). 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). We have received briefs from State Street Capital Markets, L.L.C. ("SSCM"), Zions Bank, and Dresdner Kleinwort Wasserstein Grantchester, Inc. ("Dresdner").²

Initially, you assert that the references were provided with the understanding that they would remain confidential. It is well-settled, however, that a governmental body's promise to keep information confidential is not a basis for withholding that information from the public, unless the governmental body has specific authority to keep the information confidential. See Open Records Decision Nos. 514 at 1 (1988), 476 at 1-2 (1987, 444 at 6 (1986)). Further, information that is subject to disclosure under the Public Information Act may not be withheld simply because the party submitting it anticipates or requests confidentiality. See *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 676-78 (Tex. 1976), cert. denied, 430 U.S. 931 (1977). You have not provided any specific authority that allows the system to keep the references confidential. Consequently, the submitted information must fall within an exception to disclosure in order to be withheld from disclosure.

You assert that Exhibits A and B are excepted under section 552.110 of the Government Code. Section 552.110 protects the property interests of private parties by excepting from disclosure two types of information: (a) trade secrets obtained from a person and privileged or confidential by statute or judicial decision; and (b) commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained. This office must accept a claim that information is excepted as a trade secret if a *prima facie* case for exemption is made and no argument is submitted that rebuts the claim as a matter of law.

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.

²Dresdner was formerly Wasserstein Perella Securities, Inc.

Open Records Decision No. 552 (1990). However, where no demonstration of the factors necessary to establish a trade secret claim is made we cannot conclude that section 552.110 applies. Open Records Decision No. 402 (1983).³

You explain that the responsive information contains the identities of references and their opinions about the qualifications of brokerage services. You state that the system uses these opinions to make prudent investment decisions. You contend that disclosure of the references and their opinions would eliminate the competitive position of the system and make it difficult to obtain opinions in the future. This argument, expressing the commercial interests of the system, evidently relies on the test announced in *National Parks* pertaining to the applicability of the section 552(b)(4) exemption of the federal Freedom of Information Act to third party information held by a federal entity. See *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). Although this office at one time applied this aspect of the *National Parks* test to the statutory predecessor to section 552.110, that standard was overturned by the Third Court of Appeals when it held that *National Parks* was not a judicial decision within the meaning of former section 552.110. See *Birnbaum v. Alliance of American Insurers*, 994 S.W.2d 766 (Tex. App.—Austin 1999, pet. denied). Section 552.110(b) now expressly requires a demonstration, based on specific factual evidence, that disclosure would cause substantial competitive harm to the person from whom the information was obtained. See also Open Records Decision No. 661 at 5-6 (1999). Therefore, it must be demonstrated that release of the information at issue would cause substantial competitive harm to the third parties who submitted the references or the individuals who provided the opinions.

Zions Bank contends that its references are proprietary and should be not released under section 552.101 of the Government Code. SSCM states that its financial information is proprietary and Dresdner claims that its information is confidential and proprietary trade secrets. Zions Bank, SSCM, and Dresdner, however, have not provided specific factual evidence that disclosure of their information would cause these companies substantial competitive harm nor have they demonstrated the necessary trade secret factors to withhold the submitted under section 552.110 of the Government Code. See also Open Records Decision No. 319 (1982) (concluding that information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing ordinarily

³There are six factors to be assessed in determining whether information qualifies as a trade secret: (1) the extent to which the information is known outside of [the company's] business; (2) the extent to which it is known by employees and others 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 to [its] competitors; (5) the amount of effort or money expended by [the company] in developing this information; and (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 No. 232 (1979).

may not be withheld under predecessor statute to section 552.110). Accordingly, we conclude that the submitted information of Zions Bank, SSCM, and Dresdner is not excepted under section 552.110 of the Government Code.

As of the date of this letter, the remaining third parties have not submitted to this office any reasons explaining why the requested information should not be released. Therefore, we have no basis to conclude that their information is excepted from disclosure. See Gov't Code § 552.110(b) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure); Open Records Decision Nos. 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). Thus, the system may not withhold any of the submitted information under section 552.110 of the Government Code.

SSCM also contends that certain submitted financial reports are excepted under section 552.112 of the Government Code. Section 552.112(a) excepts from disclosure "information contained in or relating to examination, operating, or condition reports prepared by or for an agency responsible for the regulation or supervision of financial institutions or securities, or both." The system, however, does not seek to withhold the submitted information under section 552.112. Because the system has the discretion to raise this permissive exception, we conclude that SSCM's submitted information may not be withheld under section 552.112 of the Government Code. See *Birnbaum*, 994 S.W.2d at 776 (providing that section 552.112 is a permissive exception); see also Open Records Decision No. 522 at 4 (1989) (finding that governmental body may decide not to raise permissive exceptions).

The system also claims that Exhibits A and B are excepted under 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.*, 37 S.W.3d 152 (Tex. App.--Austin 2001, no pet.). 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.*, 37 S.W.3d at 160; ORD 615 at 4-5. We agree that a portion of the Initial Broker/Dealer Integrity Screen in Exhibit A contains advice, recommendations, opinions, and other material reflecting the policymaking processes of the system and, therefore, may be withheld. We have marked the

information that you may withhold under section 552.111 of the Government Code. We conclude that the remaining information in this document is purely factual information and may not be withheld under section 552.111 of the Government Code.

Next, we address the applicability of section 552.111 of the Government Code to the communications from the brokers and the references to the system. Section 552.111 applies not only to internal memoranda, but also to memoranda prepared by consultants of a governmental body. Open Records Decision Nos. 462 at 14 (1987), 298 at 2 (1981). In Open Records Decision No. 429 (1985), this office stated that information protected by section 552.111 must be prepared by a person or entity with an official reason or duty to provide the information. *See also* Open Records Decision No. 466 at 3 (1987). This requirement assures that the information plays a role in the deliberative process of the governmental body. *See generally Wu v. National Endowment for Humanities*, 460 F.2d 1030, 1032 (5th Cir. 1972), *cert. denied*, 410 U.S. 926 (1973). In the context of "outside" recommendations and evaluations, this "test" may be met by assuring that (1) the governmental body has the authority to conduct the evaluation, (2) the governmental body initiated the evaluation or recommendation, and (3) the governmental body had a purpose for seeking the information from the source in question. *See* Open Records Decision No. 466 at 3 (1987).

You explain that the system solicits the references' opinions to determine whether or not to retain a brokerages service to effect investment trades for the system. Further, you explain that this process relates to the system's broad mission to administer the trust for the benefit of system beneficiaries. Therefore, we conclude that the system had the authority to conduct the evaluation, initiated the evaluation, and used the questionnaire to make a policy decision. Accordingly, we conclude that the portion of the reference questionnaires in Exhibit B, which we have marked, may be withheld under section 552.111 of the Government Code. However, since the broker/dealer questionnaire submitted by the prospective brokers does not contain advice, recommendations, or opinion, those documents are not excepted under section 552.111 of the Government Code.

We note, however, that the submitted documents contain some e-mail addresses of third parties that are excepted from public disclosure. The Seventy-seventh Legislature recently added section 552.137 to chapter 552 of the Government Code. This new exception makes certain e-mail addresses confidential.⁴ Senate Bill 694, as passed May 14, 2001, signed by the Governor May 26, 2001, and made effective immediately, provides in relevant part:

Sec. 552.137. CONFIDENTIALITY OF CERTAIN E-MAIL ADDRESSES.

⁴House Bill 2589, which also makes certain e-mail addresses confidential, took effect on September 1, 2001. *See* Act of May 22, 2001, 77th Leg., R.S., H.B. 2589, § 5 (to be codified at Gov't Code § 552.136). The language of section 552.136, as added by House Bill 2589, is identical to that of section 552.137.

(a) An e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.

(b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

Act of May 14, 2001, 77th Leg., R.S., S.B. 694, § 1 (to be codified at Gov't Code § 552.137). Section 552.137 requires the system to withhold an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body, unless the member of the public has affirmatively consented to its release. As there is no indication that the members of the public have consented to their release, the system must withhold the e-mail addresses of the third parties in the submitted documents under section 552.137 of the Government Code.

In conclusion, the system may withhold the marked information in Exhibits A and B under section 552.111 and must withhold the e-mail addresses of members of the public under section 552.137 of the Government Code. The system must release the remaining submitted information.

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,



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JHB/sdk

Ref: ID# 154071

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