



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

September 18, 2003

Ms. Erin Perales
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Houston, Texas 77002-2555

OR2003-6562

Dear Ms. Perales:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 187196.

The Houston Municipal Employees Pension System (the "system") received a request for the following six categories of information concerning the private equity investments of the system:

1. A list of all private equity / venture capital partnerships in which the [system] is an investor;
2. The [system]'s total commitment to each partnership;
3. The [system]'s total contributions to each partnership to date;
4. The total distributions received by the [system] from each partnership to date;
5. The estimated remaining value of the [system]'s remaining interest in each partnership;
6. Any available information on the return earned by the [system] on each partnership to date.

Additionally, you state that the system does not seek an exception to disclosure of information responsive to items 1 and 2 of the request. Therefore, to the extent the system holds or has access to information specifically responsive to items 1 and 2 of the request, we assume that you have released it to the requestor. If you have not released any such information, you must release it to the requestor at this time. *See* Gov't Code §§ 552.301(a),

.302; Open Records Decision No. 664 (2000) (noting that if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible under circumstances).

You state that some of the submitted records are not responsive to the instant request for information. This decision is not applicable to those records, and the system need not release those records in response to this request.

You claim that the remaining submitted information, which is responsive to items 3-6 of the request, is excepted from disclosure under sections 552.101, 552.104, 552.110, and 552.111 of the Government Code. In addition, you indicate that you notified the interested third parties of the request for information and of each party's right to submit arguments as to why the requested information should not be released.¹ See Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); see also 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 ("Act") in certain circumstances). We received correspondence from thirteen third parties.² We also received correspondence from the requestor.³ We have considered all of the submitted arguments and have reviewed the submitted representative sample of information.⁴

We note that this office has previously ruled on the extent to which certain information relating to Brockway, Oaktree, and Wilshire is subject to required public disclosure. See Open Records Letter No. 2003-5957 (2003). Therefore, as we understand you to assert that the four criteria for a "previous determination" established by this office in Open Records

¹The following third parties received notice pursuant to section 552.305: Adams Street Partners; Brera Capital Partners, L.L.C. ("Brera"); Brockway Moran & Partners, Inc. ("Brockway"); Goldman Sachs Capital Partners ("GoldmanSachs"); HarbourVest Partners, L.L.C. ("HarbourVest"); J.W. Childs Equity Partners; MatlinPatterson Global Partners L.P. ("Matlin"); Oaktree Capital Management ("Oaktree"); PacVen; Pegasus Capital Advisors, L.P. ("Pegasus"); Pension Consulting Alliance, Inc. ("Pension"); Pharos Capital ("Pharos"); the Resolute Fund ("Resolute"); TSG Capital Group, L.L.C. ("TSG"); and Wilshire Associates ("Wilshire").

²Brera; Brockway; Munsch Hardt Kopf & Harr, P.C. (For GoldmanSachs); HarbourVest; Matlin; Oakstreet; Walden International (for PacVen); Pegasus; Pension; Pharos; the Jordan Company (for Resolute); TSG; and Wilshire.

³See Gov't Code § 552.304 (any person may submit written comments stating why information at issue in request for attorney general decision should or should not be released).

⁴We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Gov't Code § 552.301(e)(1)(D); 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.

Decision No. 673 (2001) have been met, the system may continue to rely on that ruling as a previous determination for purposes of section 552.301 of the Government Code.⁵ Accordingly, we need not further address the public nature of that information. *See* Open Records Decision No. 673 (2001). To the extent that the information here at issue was not the subject of the previous ruling, we will address the claimed exceptions.

We next consider the system's claim under section 552.104. This exception is applicable to "information that, if released, would give advantage to a competitor or bidder." This exception protects a governmental body's interests in competitive bidding and certain other competitive situations. *See* Open Records Decision No. 593 (1991) (construing statutory predecessor). This office has held that a governmental body may seek protection as a competitor in the marketplace under section 552.104 and avail itself of the "competitive advantage" aspect of this exception if it can satisfy two criteria. First, the governmental body must demonstrate that it has specific marketplace interests. *Id.* at 3. Second, the governmental body must demonstrate a specific threat of actual or potential harm to its interests in a particular competitive situation. *Id.* at 5. Thus, the question of whether the release of particular information will harm a governmental body's legitimate interests as a competitor in a marketplace depends on the sufficiency of the governmental body's demonstration of the prospect of specific harm to its marketplace interests in a particular competitive situation. *Id.* at 10. A general allegation of a remote possibility of harm is not sufficient. *See* Open Records Decision No. 514 at 2 (1988).

The system claims an exception to disclosure under section 552.104 for information relating to partnership reports, portfolio companies and valuations, lists of investors in partnerships, and reports prepared by the system's consultants and staff. You inform us that the system competes as a limited partner with other investors in the private equity and private real estate marketplace. You assert that the system "is a significant investor in the marketplace and competes with other investors, including private pension funds, private endowments and individuals, for access to the top-performing partnerships." You argue that disclosure of the submitted information "would cause specific harm to [the system's] legitimate marketplace interests and could significantly hinder its ability to compete in the marketplace by negatively impacting [the system's] opportunities to invest with top-performing [investment] managers." You contend that the release of information relating to the private equity firms with which the system does business "would severely limit [the system's] opportunity to invest in the private equity marketplace." You also assert that the system has been successful

⁵The four criteria for this type of "previous determination" are 1) the records or information at issue are precisely the same records or information that were previously submitted to this office pursuant to section 552.301(e)(1)(D) of the Government Code; 2) the governmental body which received the request for the records or information is the same governmental body that previously requested and received a ruling from the attorney general; 3) the attorney general's prior ruling concluded that the precise records or information are or are not excepted from disclosure under the Act; and 4) the law, facts, and circumstances on which the prior attorney general ruling was based have not changed since the issuance of the ruling. *See* Open Records Decision No. 673 (2001).

in negotiating favorable terms with partnerships and that the release of the information at issue would cause the system “to have significantly less leverage in future negotiations for favorable terms.” Having considered your arguments, we conclude that you have demonstrated that section 552.104 is applicable to the submitted information. Thus, the system may withhold the submitted responsive information under section 552.104 of the Government Code.⁶

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 Dep’t of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

⁶As our ruling is dispositive, we do not address the other claimed exceptions.

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 Texas Building and Procurement 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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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Assistant Attorney General
Open Records Division

CN/jh

Ref: ID# 187196

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