

The ruling you have requested has been amended as a result of litigation and has been attached to this document.



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 26, 2004

Mr. Dan Junell
Assistant General Counsel
Teacher Retirement System of Texas
1000 Red River Street
Austin, Texas 78701-2698

OR2004-6227

Dear Mr. Junell:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 204915.

The Teacher Retirement System of Texas (the "system") received a request for the information "redacted as non-responsive" to the request for information addressed in Open Records Letter No. 2004-0995 (2004), as well as "the opportunity to review" the transcript of the last board meeting and alternative investments meeting. You indicate that some of the responsive information will be provided to the requestor. You claim that the highlighted portions of the submitted information are excepted from disclosure under section 552.104 of the Government Code.

In addition, because you believe the interests of Pathway Capital Management, L.L.C. ("Pathway"), the Texas Growth Fund ("TGF"), the Employees Retirement System of Texas ("ERS"), the Permanent University Fund ("PUF") and other private entities in which Pathway, TGF, ERS and PUF invest may be implicated (the "portfolio companies"), you notified Pathway, TGF, ERS and PUF 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 section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Act in certain circumstances). You also invited Pathway, TGF, ERS and PUF, on the system's behalf, to provide notice under section

552.305 to the portfolio companies, and we understand that TGF sent twenty-three such notices. Several of the portfolio companies which received notice from TGF submitted comments to this office, as did TGF, ERS and PUF. *Id.*

Initially, we note that an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why requested information relating to that party should be withheld from disclosure. *See Gov't Code § 552.305(d)(2)(B)*. As of the date of this letter, nineteen of the twenty-three portfolio companies notified have not submitted comments to this office in response to the section 552.305 notice; therefore, we have no basis to conclude that these companies have a proprietary interest in the submitted information. *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. 639 at 4 (1996), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990).

The system, TGF and ERS assert section 552.104 of the Government Code for portions of the submitted information.¹ Section 552.104 excepts from required public disclosure "information that, if released, would give advantage to a competitor or bidder." This exception protects a governmental body's interests in connection with competitive bidding and in 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).

You assert that the system has specific marketplace interests in some of the information at issue because the system is constitutionally responsible for the investment of trust assets in excess of \$80 billion. *See Tex. Const. art. XVI, §§ 67(a)(3)* (requiring each statewide benefit system to have board of trustees to administer system and invest funds in accordance with prudent investor standard), (b)(1) (requiring that legislature establish "Teacher Retirement

¹ PUF does not assert a section 552.104 interest in the information at issue. TGF does not object to the release of the names of its portfolio companies, but does object to the release of the remaining highlighted information in the submitted documents. ERS objects to the release of only one of the submitted documents.

System of Texas to provide benefits for persons employed in the public schools, colleges, and universities supported wholly or partly by the state”). You state that the system has a fiduciary duty to the trust beneficiaries to diversify investments. *See* RESTATEMENT (THIRD) OF TRUSTS § 227(b), cmts. e-g (requiring trustees to diversify investments, if prudent, as part of their duty to act as prudent investors). You indicate that the system fulfills its responsibilities, in part, by investing in the private marketplace and assert that the system has an on-going interest in preserving its ability to compete effectively in this marketplace. *See* Gov’t Code § 825.301(a) (authorizing system’s board of trustees to invest in, among other things, “securities,” as that term is defined by section 4 of the Securities Act, Tex. Civ. Stat. art. 581-4).

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, Texans voted to approve a constitutional amendment that authorized certain public pension funds and permanent education funds to make private equity investments through a trust established under Article XVI, Section 70 of the Texas Constitution. In December 1991, 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 in 1998.

Further, TGF explains that it invests in the private equity marketplace on behalf of the system and other public pension funds and permanent education funds.

Similarly, ERS asserts that

ERS is a constitutional trust fund established as mandated by article XVI, Section 67 of the Texas Constitution, and further organized pursuant to Subtitle B, Title 8, Tex. Gov’t Code, as well as 34 Tex. Admin. Code, § 61.1 et seq.

ERS also administers retirement and employment-related benefits for several classes of public servants, including elected officials, appointed public officers, public employees and their dependents. ERS is also the trustee for ERS’ trust funds, and therefore has a duty to protect and invest funds for the benefit of ERS beneficiaries.

Based on these representations, we conclude that the system, TGF and ERS have demonstrated specific marketplace interests and may be considered “competitors” in the private marketplace for purposes of section 552.104. *See* Open Records Decision No. 593 (1991).

The system, TGF and ERS also assert that the release of the highlighted portions of the submitted information would harm their marketplace interests. You state that the system's Board of Trustees has authorized investment in the three trusts to which the information at issue relates: the TGF-1991 Trust and 1995 Trust, as well as the TGF II-1998 Trust. The information at issue consists of historical valuation, transaction, and investment performance data from calendar year 2003 and preceding years. In Open Records Letter No. 2004-0995, this office concluded that the system and TGF had demonstrated that the release of some of the non-highlighted information in the submitted documents would bring about specific harm to the system's and TGF's marketplace interests, and therefore, the system could withhold the information under section 552.104.² However, upon further consideration of the submitted documents and arguments and the purpose of section 552.104, we conclude that neither the system, TGF nor ERS has shown in this instance how the release of the highlighted historical information about the 1991, 1995, and 1998 Trusts would bring about specific harm to their marketplace interests. Therefore, the system may not withhold the highlighted information in the submitted documents pursuant to section 552.104.

ERS also argues that section 552.110 excepts one of the submitted documents from public disclosure. Section 552.110 protects the proprietary interests of private persons by excepting from disclosure two types of information: (1) trade secrets obtained from a person and privileged or confidential by statute or judicial decision and (2) 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. Gov't Code § 552.110. By its terms, section 552.110 only protects the interests of the person from whom the information was obtained. This provision does not protect the interests of the governmental body that receives proprietary information nor does it allow a governmental body to assert section 552.110 for information it creates. Accordingly, we find that ERS has failed to establish the applicability of section 552.110 to the information at issue.

As previously noted, TGF sent notices to twenty-three portfolio companies pursuant to section 552.305. DISA, Inc., Southern Star Concrete, Inc., Timec Company, Inc., and First Texas Holdings Corporation (collectively, the "third parties") responded, each claiming that some of the submitted information is confidential pursuant to section 552.110(b) of the Government Code because release of the information would cause them to suffer competitive harm.³ Section 552.110(b) requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release

² Because the current request does not encompass the non-highlighted information in the submitted documents, this ruling does not address the required public disclosure of this information.

³ We note that DISA, Inc. also cited to sections 552.101, 552.113 and 552.131 of the Government Code, but submitted no arguments to support the applicability of these exceptions to the information at issue. Therefore, we conclude that these sections do not except any of the information at issue from disclosure.

of the information at issue. *See* Open Records Decision No. 661 at 5-6 (1999) (stating that business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm); *see also National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

Based upon our review of the arguments submitted by the third parties, as well as the information at issue, we find that none of the third parties has provided specific factual evidence to support the allegation that release of the information relating to its interests would cause the third party substantial competitive injury. *See* Open Records Decision Nos. 509 at 5 (1988). Accordingly, information relating to the third parties may not be withheld pursuant to section 552.110(b).

Lastly, TGF, ERS, PUF and the system all claim that section 552.136 excepts the bank account, route numbers and other account identifiers within the submitted information. Section 552.136 of the Government Code states that “[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” Gov’t Code § 552.136. Therefore, you must withhold the bank account, route numbers and other account identifiers within the highlighted portions of the submitted information under section 552.136. The remaining highlighted portions of the submitted 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

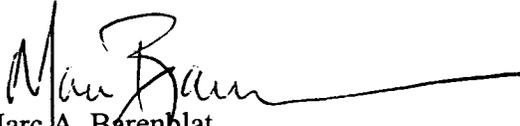
governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877)673-6839. The 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 Dep't of Pub. 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 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,


Marc A. Barenblat
Assistant Attorney General
Open Records Division

MAB/jh

Ref: ID# 204915
Enc. Submitted documents

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All third parties involved

FEB 13 2007

At 9:10A. M.
Amalia Rodriguez-Mendoza, Clerk

CAUSE NO. GN402527

TEXAS GROWTH FUND AND TEXAS	§	IN THE DISTRICT COURT OF
GROWTH FUND II,	§	
Plaintiffs,	§	
and	§	
TEACHER RETIREMENT SYSTEM OF	§	
TEXAS,	§	
Intervenor/Plaintiff,	§	TRAVIS COUNTY, TEXAS
	§	
V.	§	
	§	
TEXAS ATTORNEY GENERAL,	§	
Defendant,	§	
and	§	
FORT WORTH STAR-TELEGRAM,	§	
Intervenor/Defendant.	§	353 RD JUDICIAL DISTRICT

AGREED FINAL JUDGMENT

On this date, the Court heard motion for agreed final judgment of Plaintiffs Texas Growth Fund and Texas Growth Fund II (collectively "TGF"), and Teacher Retirement System of Texas ("TRS"), and Defendant Greg Abbott, Attorney General of Texas. The parties appeared, by and through their respective attorneys, and announced to the Court that all matters of fact and things in controversy between them had been fully and finally compromised and settled. Intervenor Fort Worth Star-Telegram has nonsuited its claims and is no longer a party to this cause. This cause is an action under the Public Information Act (PIA), Tex. Gov't Code ch. 552. The parties represent to the Court that, in compliance with Tex. Gov't Code § 552.325(c), the requestor, Lucius Lomax, was sent reasonable notice of this setting and of the parties' agreement that TRS must withhold some of the information that he requested; that the requestor was also informed of his right to intervene in the suit to contest the withholding of this information; and that the requestor has not informed the parties of his intention to intervene. Neither has the requestor filed a motion to intervene or appeared today. After considering the agreement of the parties and the law, the Court is of the opinion that entry of an agreed final judgment is appropriate, disposing of all claims between these parties.

IT IS THEREFORE ADJUDGED, ORDERED AND DECLARED that:

1. Bate Stamp Nos. 000001-3, 9, 15, 18, 24-25, 29 of the documents that TRS and TGF submitted to the Attorney General, on November 20, 2006, are subject to disclosure under Tex. Gov't Code § 552.0225(b), and TRS shall disclose these documents to the requestor as provided in Paragraph 3 of this Judgment.

2. The specific information that is redacted on Bate Stamp Nos. 000004-8, 10-14, 16-17, 19-23, 26-28 of the documents that TRS and TGF submitted to the Attorney General on November 20, 2006, is excepted from disclosure by Tex. Gov't Code § 552.143(c), and TRS may withhold this redacted information.

3. TRS may redact the specific information identified in Paragraph 2 of this Judgment and shall redact information in the documents described in Paragraphs 1 and 2 of this Judgment that was held excepted from disclosure in Letter Ruling 2004-6227. If it has not already done so, TRS shall disclose to the requestor all of the documents, Bate Stamp Nos. 000001-000029, as redacted.

4. All costs of court are taxed against the parties incurring the same;

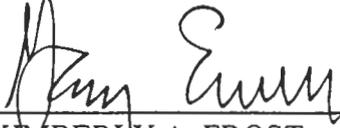
5. All relief not expressly granted is denied; and

6. This Agreed Final Judgment finally disposes of all claims between Plaintiffs and Defendant and is a final judgment.

SIGNED this the 13th day of FEBRUARY, 2006.⁷


PRESIDING JUDGE

APPROVED:



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