



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 2, 2010

Mr. Timothy Wei
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Teacher Retirement System of Texas
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OR2010-07988

Dear Mr. Wei:

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# 381372.

The Teacher Retirement System of Texas ("TRS") received a request for current and expired contracts between TRS and its external managers. You claim that some of the requested information is exempted from disclosure under sections 552.104 and 552.143 of the Government Code. You also believe that the requested information implicates the interests of third parties.¹ You inform us that the interested parties were notified of this request for information and of their right to submit arguments to this office as to why the information

¹TRS informs us that the third parties concerned are Acadian Asset Management, LLC ("Acadian"); Alliance Bernstein ("Alliance"); Artio Global Investors, Inc. ("Artio"); Artisan Partners Limited Partnership ("Artisan"); Baring International Investment Limited ("Baring"); BlackRock Financial Management, Inc. ("BlackRock"); BME Investment Partners, LLC ("BME"); Brandes Investment Partners, L.P. ("Brandes"); Cantillon Capital Management LLC ("Cantillon"); DePrince, Race & Zollo, Inc. ("DRZ"); Dimensional Fund Advisors ("Dimensional"); Eaton Vance Management ("EVM"); Goldman Sachs Asset Management, L.P. ("GSAM"); Grantham, Mayo, Van Otterloo & Co. LLC ("GMO"); Jennison Associates LLC ("Jennison"); J.P. Morgan Investment Management Inc. ("JPMIM"); Knight Vinke Asset Management ("Knight"); Lazard Asset Management, LLC ("Lazard"); Mondrian Investment Partners Limited ("Mondrian"); Morgan Stanley Investment Management Inc. ("MSIM"); Neuberger Berman Fixed Income LLC ("Neuberger"); Omega Advisors, Inc. ("Omega"); Sasco Capital ("Sasco"); Security Capital Research & Management Incorporated ("Security"); Wellington Management Company, LLP ("Wellington"); and Westwood Holdings Group, Inc. ("Westwood").

in question should not be released.² We received correspondence from attorneys for or representatives of Artisan, Barings, BlackRock, Brandes, Cantillon, DRZ, EVM, GSAM, GMO, Jennison, JPMIM, Knight, Mondrian, MSIM, Neuberger, Omega, Security, Wellington, and Westwood.³ We have considered all of the submitted arguments and reviewed the information you submitted.

We first note that an interested third party is allowed ten business days from the date of its receipt of the governmental body's notice under section 552.305 to submit its reasons, if any, as to why information relating to that party should not be released. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this decision, this office has received no correspondence from Acadian, Alliance, Artio, BME, Dimensional, Lazard, or Sasco. Thus, because none of those parties has demonstrated that any of the information at issue is proprietary for the purposes of the Act, TRS may not withhold any of the submitted information on the basis of any interest that Acadian, Alliance, Artio, BME, Dimensional, Lazard, or Sasco may have in the information. *See* § 552.110(a)-(b); Open Records Decision Nos. 552 at 5 (1990), 661 at 5-6 (1999).

TRS acknowledges that some of the submitted information is subject to section 552.0225 of the Government Code. Section 552.0225(b) provides as follows:

(b) The following categories of information held by a governmental body relating to its investments are public information and not excepted from disclosure under [the Act]:

- (1) the name of any fund or investment entity the governmental body is or has invested in;
- (2) the date that a fund or investment entity described by Subdivision (1) was established;
- (3) each date the governmental body invested in a fund or investment entity described by Subdivision (1);

²*See* Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to Gov't Code § 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances).

³We note that BlackRock, EVM, Jennison, and Neuberger have submitted information that the parties seek to have withheld from public disclosure. This decision is applicable only to the information that TRS submitted to this office in requesting this decision. *See* Gov't Code § 552.301(e)(1)(D) (governmental body must submit the specific information it seeks to withhold or representative samples if the information is voluminous).

(4) the amount of money, expressed in dollars, the governmental body has committed to a fund or investment entity;

(5) the amount of money, expressed in dollars, the governmental body is investing or has invested in any fund or investment entity;

(6) the total amount of money, expressed in dollars, the governmental body received from any fund or investment entity in connection with an investment;

(7) the internal rate of return or other standard used by a governmental body in connection with each fund or investment entity it is or has invested in and the date on which the return or other standard was calculated;

(8) the remaining value of any fund or investment entity the governmental body is or has invested in;

(9) the total amount of fees, including expenses, charges, and other compensation, assessed against the governmental body by, or paid by the governmental body to, any fund or investment entity or principal of any fund or investment entity in which the governmental body is or has invested;

(10) the names of the principals responsible for managing any fund or investment entity in which the governmental body is or has invested;

(11) each recusal filed by a member of the governing board in connection with a deliberation or action of the governmental body relating to an investment;

(12) a description of all of the types of businesses a governmental body is or has invested in through a fund or investment entity;

(13) the minutes and audio or video recordings of each open portion of a meeting of the governmental body at which an item described by this subsection was discussed;

(14) the governmental body's percentage ownership interest in a fund or investment entity the governmental body is or has invested in;

(15) any annual ethics disclosure report submitted to the governmental body by a fund or investment entity the governmental body is or has invested in; and

(16) the cash-on-cash return realized by the governmental body for a fund or investment entity the governmental body is or has invested in.

Gov't Code § 552.0225. We agree that the type of information you have highlighted is subject to section 552.0225(b).⁴ Although some of the third parties claim 552.110 for that type of information, we note that the exceptions to disclosure found in the Act do not apply to information that is made public by section 552.0225. *See* Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1989). Therefore, TRS must release the type of information you have highlighted in yellow pursuant to section 552.0225(b) of the Government Code.

We note that the rest of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a)(3) provides for required public disclosure of "information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body," unless the information is expressly confidential under other law. Gov't Code § 552.022(a)(3). Thus, the submitted contracts between TRS and its external managers are subject to section 552.022(a)(3). We note that section 552.104 of the Government Code is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See id.* § 552.007; Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 592 at 8 (1991) (addressing statutory predecessor to Gov't Code § 552.104). Section 552.104 provides, however, that information encompassed by section 552.022 may be withheld under section 552.104(a). *See* Gov't Code § 552.104(b) (information protected by Gov't Code § 552.104 not subject to required public disclosure under Gov't Code § 552.022(a)). Accordingly, we will address section 552.104. We also will consider the claims of TRS and the third parties under sections 552.101, 552.110, and 552.143 of the Government Code, which are confidentiality provisions for the purposes of section 552.022(a)(3). Although Wellington also raises section 552.103 of the Government Code, that exception also is discretionary and may be waived. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive Gov't Code § 552.103). As such, section 552.103 is not other law that makes information confidential for the purposes of section 552.022(a)(3). Accordingly, this decision will not consider whether section 552.103 of the Government Code is applicable to any of the information at issue.

⁴You state that the information you have highlighted in Exhibits 1.1 and 1.2 is a representative sample of the information that is deemed to be public under section 552.0225(b).

Next, we address TRS's claim under section 552.104 of the Government Code. Section 552.104(a) excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). 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 contend that TRS has specific marketplace interests with respect to some of the information at issue. You inform us that TRS is constitutionally responsible for the investment of trust assets worth billions of dollars. *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 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 TRS 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 explain that TRS fulfills its responsibilities by investing in securities and by retaining external managers to invest in securities on TRS's behalf. *See* Gov't Code § 825.301(a)(2) (authorizing TRS to retain external managers). You state that TRS has retained 26 external managers, each of which manages a separate portfolio of TRS assets, pursuant to investment management agreements ("IMAs"). You argue that "TRS thus has ongoing interests in preserving its ability to compete effectively in the market for securities and in the market for external managers" and that TRS "may be considered a competitor in the securities marketplace and in the external manager marketplace[.]" Based on your representations, we find that TRS has demonstrated specific marketplace interests and may be considered to be a "competitor" in the marketplace for the purposes of section 552.104. *See* ORD 593.

You claim section 552.104 for some of the information in the submitted IMAs, including marked provisions of the IMAs (the "Provisions") and the information in the attached investment guideline and fee calculation schedules that is not subject to section 552.0225(b)

(the "Schedules").⁵ You inform us that TRS continues to seek out and retain highly skilled external managers. You state that, in the process of doing so, TRS competes with other institutional investors. You explain that the Provisions and the Schedules reveal the overall monetary compensation terms of each IMA, including the prices that TRS is willing to pay to retain investment managers and the expenses that the retained managers are willing to bear. You contend that disclosure of this information would give competitors for investment managers access to TRS's confidential pricing information and strategies and thereby compromise TRS's ability to negotiate the terms of agreements with prospective managers. You also contend that disclosure of the Provisions and Schedules would reveal the compensation of the external managers concerned and thereby potentially cause prospective investment managers to either increase their fees accordingly or simply decline to do business with TRS. You argue that, if the Provisions and Schedules are released, "TRS's beneficiaries would not enjoy the benefit of TRS's otherwise unimpeded ability to retain the best possible investment managers at the best possible prices," and "TRS's ability to competitively access the securities markets generally would also be harmed." Based on your representations, we conclude that TRS may withhold the Provisions and the Schedules you have marked under section 552.104 of the Government Code.⁶

Turning to the third parties' arguments for the remaining information, we begin with Neuberger's statement that its IMA was intended to be kept confidential.⁷ We note that information is not confidential under the Act simply because the party that submitted the information anticipated or requested that it be kept confidential. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot overrule or repeal provisions of the Act by agreement or contract. *See* Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) ("[T]he obligations of a governmental body under [the Act] cannot be compromised simply by its decision to enter into a contract."), 203 at 1 (1978) (mere expectation of confidentiality by person supplying information did not satisfy requirements of statutory predecessor to Gov't Code § 552.110). Therefore, the remaining information in Neuberger's IMA must be released unless it falls within an exception to disclosure, notwithstanding any expectation or agreement to the contrary.

⁵You state that the Provisions and Schedules you have marked in Exhibits 1.1 and 1.2 are representative samples of the information TRS seeks to withhold under section 552.104.

⁶As we are able to make this determination, we need not address TRS's claim under section 552.143 of the Government Code. Likewise, we need not address the claims asserted for some or all of this information under sections 552.110 and 552.143 of the Government Code by Artisan, Barings, BlackRock, Brandes, Cantillon, EVM, GMO, JPMIM, Jennison, MSIM, Neuberger, Omega, Security, Wellington, and Westwood.

⁷We note that an attorney for GSAM has submitted a letter in which GSAM "agrees with and supports TRS that the provisions of [GSAM's] IMA cited by TRS should be exempt from disclosure[.]" As GSAM claims no exceptions to disclosure, we need not address the rest of its comments.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This exception encompasses common-law privacy, which protects information that is highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and of no legitimate public interest. *See Indus. Found.*, 540 S.W.2d at 685. Common-law privacy encompasses the specific types of information that are held to be intimate or embarrassing in *Industrial Foundation*. *See id.* at 683 (information relating to sexual assault, pregnancy, mental or physical abuse in workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs). This office has determined that other types of information also are private under section 552.101. ~~See generally~~ Open Records Decision No. 659 at 4-5 (1999) (summarizing information attorney general has held to be private). We also have determined that common-law privacy encompasses certain types of personal financial information. Personal financial information that relates only to an individual ordinarily satisfies the first element of the common-law privacy test, but the public has a legitimate interest in the essential facts about a financial transaction between an individual and a governmental body. *See* Open Records Decision Nos. 545 at 4 (1990) (attorney general has found kinds of financial information not excepted from public disclosure by common-law privacy to generally be those regarding receipt of governmental funds or debts owed to governmental entities), 523 at 4 (1989) (noting distinction under common-law privacy between confidential background financial information furnished to public body about individual and basic facts regarding particular financial transaction between individual and public body). We note that common-law privacy protects the interests of individuals, not those of business and governmental entities. *See* Open Records Decision Nos. 620 (1993) (corporation has no right to privacy), 192 (1978) (right to privacy is designed primarily to protect human feelings and sensibilities, rather than property, business, or other pecuniary interests); *see also United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950) (cited in *Rosen v. Matthews Constr. Co.*, 777 S.W.2d 434 (Tex. App.—Houston [14th Dist.] 1989), *rev’d on other grounds*, 796 S.W.2d 692 (Tex. 1990)) (corporation has no right to privacy).

Although Omega contends that its IMA contains information that is “personal and private,” we find that the information at issue is not intimate or embarrassing and a matter of no legitimate public concern. We therefore conclude that TRS may not withhold any of the submitted information under section 552.101 of the Government Code in conjunction with common-law privacy.

Jennison, JPMIM, and Security claim that section 552.104 of the Government Code is applicable to some of the remaining information. This exception protects the competitive interests of governmental bodies, not the proprietary interests of third parties. *See* ORD 592 at 8 (addressing statutory predecessor). In this instance, TRS claims section 552.104 for the Schedules and the Provisions. We have concluded that TRS may withhold those types of information. TRS may not withhold any of the remaining information under section 552.104 of the Government Code on the basis of the third parties’ claims.

Artisan, Barings, BlackRock, Brandes, Cantillon, DRZ, EVM, JPMIM, Jennison, Knight, MSIM, Mondrian, Neuberger, Omega, Security, and Wellington claim section 552.110 of the Government Code. Section 552.110 protects the proprietary interests of third parties with respect to two types of information: “[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision” and “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(a)-(b).

The Supreme Court of Texas has adopted the definition of a “trade secret” from section 757 of the Restatement of Torts, which holds a “trade secret” to be

any formula, pattern, device or compilation of information which is used in one’s business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. *It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business, as, for example, the amount or other terms of a secret bid for a contract or the salary of certain employees* A trade secret is a process or device for continuous use in the operation of the business [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939) (emphasis added); *see Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958). This office will accept a private person’s claim for exception as valid under section 552.110(a) if the person establishes a *prima facie* case for the exception, and no one submits an argument that rebuts the claim as a matter of law.⁸

⁸The Restatement of Torts lists the following six factors as indicia of whether information constitutes a trade secret:

- (1) the extent to which the information is known outside of [the company];
- (2) the extent to which it is known by employees and other 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 [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing the information;
- (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 Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).*

See ORD 552 at 5. We cannot conclude, however, that section 552.110(a) is applicable unless it has been shown that the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim. See Open Records Decision No. 402 (1983).

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 of the information at issue. See ORD 661 at 5-6 (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).⁹

~~We generally note that the remaining information is contained in contracts between TRS and the third parties concerned. Pricing information pertaining to a particular contract with a governmental body is generally not a trade secret under section 552.110(a) because it is "simply information as to single or ephemeral events in the conduct of the business," rather than "a process or device for continuous use in the operation of the business." RESTATEMENT OF TORTS § 757 cmt. b (1939); see *Hyde Corp. v. Huffines*, 314 S.W.2d at 776; Open Records Decision Nos. 319 at 3 (1982), 306 at 3 (1982). Likewise, the pricing aspects of a contract with a governmental entity are generally not excepted from disclosure under section 552.110(b). See ORD 514 (public has interest in knowing prices charged by government contractors); see generally Freedom of Information Act Guide & Privacy Act Overview at 219 (2000) (federal cases applying analogous Freedom of Information Act exemption reason that disclosure of prices charged government is a cost of doing business with government). Moreover, the terms of a contract with a governmental body are generally not excepted from public disclosure. See Gov't Code § 552.022(a)(3) (contract involving receipt or expenditure of public funds expressly made public); ORD 541 at 8 (public has interest in knowing terms of contract with state agency).~~

Brandes, Knight, Neuberger, and Omega claim that section 552.110 is applicable to all of the remaining information in their respective IMAs. Artisan, Barings, BlackRock, Cantillon, EVM, JPMIM, Jennison, MSIM, Security, and Wellington claim section 552.110 for some of the remaining information in their respective IMAs. DRZ and Mondrian generally assert

⁹We note MSIM's contention that section 552.110(b) incorporates the analysis announced in *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). Although this office once applied the *National Parks* test under 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 Am. Insurers*, 994 S.W.2d 766 (Tex. App.—Austin 1999, pet. denied). Section 552.110(b) now expressly states the standard to be applied and requires a specific factual demonstration that the release of the information in question would cause the business enterprise that submitted the information substantial competitive harm. See ORD 661 at 5-6 (discussing enactment of Gov't Code § 552.110(b) by Seventy-sixth Legislature).

that section 552.110 is applicable to information in their respective IMAs.¹⁰ Having considered all of the third parties' arguments, we find that none of the parties has demonstrated that any of the remaining information constitutes a trade secret under section 552.110(a). We also find that none of the third parties has made the specific factual or evidentiary showing required by section 552.110(b) that release of any of the remaining information would cause any of the parties substantial competitive harm. We therefore conclude that TRS may not withhold any of the remaining information under section 552.110 of the Government Code.

BlackRock, Brandes, JPMIM, MSIM, Security, and Wellington also contend that ~~section 552.143 of the Government Code is applicable to some of the remaining information.~~ Section 552.143 provides in part:

(a) All information prepared or provided by a private investment fund and held by a governmental body that is not listed in Section 552.0225(b) is confidential and excepted from [required public disclosure].

(b) Unless the information has been publicly released, pre-investment and post-investment diligence information, including reviews and analyses, prepared or maintained by a governmental body or a private investment fund is confidential and excepted from [required public disclosure], except to the extent it is subject to disclosure under Subsection (c)

Gov't Code § 552.143 (a)-(b). Having considered the third parties' arguments, we find that they have not demonstrated that any of the remaining information falls within the scope of this exception. We therefore conclude that TRS may not withhold any of the remaining information under section 552.143 of the Government Code.

We note that section 552.136 of the Government Code is applicable to some of the remaining information.¹¹ Section 552.136(b) provides that "[n]otwithstanding any other provision of [the Act], 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." *Id.* § 552.136(b); *see id.* § 552.136(a) (defining "access device"). We have marked an account number TRS must withhold under section 552.136.

¹⁰We note that section 552.110 protects the interests of persons that provide information to governmental bodies, not those of governmental bodies themselves. *See generally* ORD 592. In this instance, DRZ and Mondrian rely on TRS's statement that section 552.110 may be applicable. TRS explains, however, that it takes no position under section 552.110 and is relying on the third parties to claim the exception and demonstrate its applicability. *See* Gov't Code § 552.305; ORD 542.

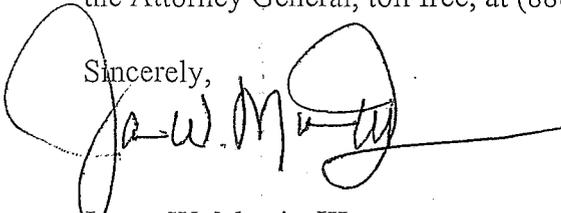
¹¹This office will raise section 552.136 on behalf of a governmental body, as this exception is mandatory and may not be waived. *See* Gov't Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions).

In summary: (1) TRS must release the types of information that are subject to section 552.0225(b) of the Government Code; (2) TRS may withhold the Provisions and the Schedules you have marked under section 552.104 of the Government Code; and (3) TRS must withhold the marked account number under section 552.136 of the Government Code. The rest of the submitted information must be released.

This letter ruling is limited to the particular information 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 information or any other circumstances.

~~This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.~~

Sincerely,



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