



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 8, 2010

Ms. Erin Perales
General Counsel
Houston Municipal Employees Pension System
1111 Bagby, Suite 2450
Houston, Texas 77002

OR2010-10094

Dear Ms. Perales:

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# 385738.

The Houston Municipal Employees Pension System (the "system") received a request for information pertaining to the complete portfolio of the system's pension fund. You claim the requested information is excepted from disclosure under sections 552.104 and 552.110 of the Government Code. You also state, and provide documentation showing, that you have notified several interested third parties of this request and of their opportunity to submit comments to this office as to why the submitted information should not be released.¹ See Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have

¹The interested third parties are: Axiom International Investors, LLC; Brandes Investment Partners, L.P. ("Brandes"); DDJ Capital Management, LLC ("DDJ"); DePrince, Race & Zollo, Inc. ("DePrince"); EARNEST Partners, LLC; INTECH Investment Management, LLC ("INTECH"); Loomis Sayles & Company, L.P. ("Loomis"); Neumeier Investment Council, LLC; Oakbrook Investments, LLC; PanAgora Asset Management; Piedmont Investment Advisors, LLC; Profit Investment Management; Smith, Graham & Co. Investment Advisors, L.P. ("Smith Graham"); and T. Rowe Price.

received comments from Brandes, DDJ, DePrince, INTECH, Loomis, and Smith Graham.² We have considered the submitted arguments and reviewed the submitted information.

Initially, you state that portions of the submitted information are subject to a previous determination issued by this office in Open Records Letter No. 2007-03379 (2007). In that ruling, we concluded that the system may withhold the information we marked under section 552.104 of the Government Code and must release the remaining information to the requestor pursuant to section 552.0225 of the Government Code. You state the facts and circumstances have not changed since the issuance of this prior ruling. Thus, with regard to the requested information that is identical to the information previously requested and ruled on by this office, we conclude the system may continue to rely on our ruling in Open Records Letter No. 2007-03379 as a previous determination and withhold or release the identical information at issue in accordance with that decision. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). However, to the extent the requested information is not encompassed by the previous ruling, we will consider the submitted arguments against disclosure.

Next, we note, and you acknowledge, some of the remaining information is subject to section 552.0225 of the Government Code. Subsection 552.0225(b) provides in relevant part the following:

The following categories of information held by a governmental body relating to its investments are public information and not excepted from disclosure under this chapter:

(1) the name of any fund or investment entity the governmental body is or has invested in;

...

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

Gov't Code § 552.0225(b)(1), (8). Although some of the third parties claim section 552.110 of the Government Code for this type of information, we note the exceptions to disclosure found in the Act do not apply to information that is made public by section 552.0225. *See*

²We note INTECH argues against the disclosure of more information than was submitted for review by the system. This ruling will only address the information the system submitted to this office. *See* Gov't Code § 552.301(e)(1)(D).

Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1989). Therefore, the system must release the types of information we have marked pursuant to subsections 552.0225(b)(1) and (b)(8).

You assert the remaining information you have marked is excepted from disclosure under section 552.104 of the Government Code, which 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. *See id.* First, the governmental body must demonstrate that it has specific marketplace interests. *See 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. *See 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. *See 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 argue that release of the information at issue would harm the interests of the system in a competitive situation. You inform us that the system is "a significant investor in the market place and, through its investment managers, competes with other investors, including private pension funds, for the best rates, commissions, and trading terms." You assert release of the submitted information "could significantly hinder [the system]'s ability to compete in the equity and fixed income marketplaces by negatively impacting the ability of the investment managers to negotiate favorable trades and to get the best price for its investment." Based on these representations and our review, we find the system has demonstrated that it has specific marketplace interests and may be considered a "competitor" for purposes of section 552.104. Further, we find that you have demonstrated that release of the information at issue would cause specific harm to the system's marketplace interests. We therefore conclude that the system may withhold the remaining information under section 552.104 of the Government Code.³

In summary, with regard to the requested information that is identical to the information previously requested and ruled on by this office, we conclude the system may continue to rely on our ruling in Open Records Letter No. 2007-03379 as a previous determination and withhold or release the identical information at issue in accordance with that decision. We have marked the types of information subject to subsections 552.0225(b)(1) and (b)(8) that

³As our ruling is dispositive, we need not address the remaining arguments against disclosure.

the system must release to the requestor. The system may withhold the remaining information under section 552.104 of the Government Code.

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,

Adam Leiber
Assistant Attorney General
Open Records Division

ACL/tp

Ref: ID# 385738

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