



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 1, 2010

Ms. Doreen E. McGookey
General Counsel
Fort Worth Employee's Retirement Fund
3801 Hulen Street, Suite 101
Fort Worth, Texas 76107

OR2010-16492

Dear Ms. McGookey:

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# 398524.

The Fort Worth Employees' Retirement Fund (the "fund") received two requests for answers to questions and information pertaining to the fund's actuarial services. You claim that portions of the submitted information are excepted from disclosure under section 552.104 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Initially, we note the requestors, in part, seek answers to factual questions. The Act does not require a governmental body to answer factual questions, conduct legal research, or create new information in responding to a request. *See* Open Records Decision Nos. 563 at 8 (1990), 555 at 1-2 (1990). However, a governmental body must make a good faith effort to relate a request to information held by the governmental body. *See* Open Records Decision No. 561 at 8 (1990). The submitted information reflects the fund has made a good faith effort to do so.

Next, we note you have not submitted information responsive to the requests for the most recent actuarial audit and the recent three-year experience study. To the extent any documents responsive to these portions of the requests existed on the date the fund received the requests, we assume you have released them. If you have not released any such information to the requestor, you must do so at this time. *See* Gov't Code §§ 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes that

no exceptions apply to requested information, it must release information as soon as possible).

Section 552.104(a) of the Government Code 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 the fund has specific marketplace interests with respect to the information at issue. You inform us that the fund is a retirement fund of approximately 1.6 billion dollars in assets and provides retirement benefits to employees of the City of Fort Worth. You explain the fund is statutorily required to employ an actuary to make valuations of the assets and liabilities of the fund. *See* Gov't Code § 802.101. You state the fund has a duty to obtain the best pricing for its actuarial services. You argue that the fund must compete with all private and public pension plans for access to the top ranked actuaries. Based on your representations, we find that the fund 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 the submitted actuarial fees. You state that "release of the historical actuarial fees by the [f]und would show prospective managers what the [f]und is willing to pay (and what actuaries are willing to bear) and either cause them to increase their price, or . . . not to offer a lower price that they would offer without access to that information." You argue that, if the actuarial fees are released, the fund would not be obtaining the best pricing for actuarial services. You further argue that, if the actuarial fees are released, the fund would not be meeting its fiduciary duty to defray expenses and would suffer a "specific or potential threat of harm[.]" Based on your representations, we conclude that the fund has demonstrated a specific threat of actual or potential harm. Thus, the fund may withhold the information you have marked under section 552.104 of the Government Code. The remaining 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,



Nneka Kanu
Assistant Attorney General
Open Records Division

NK/em

Ref: ID# 398524

Enc. Submitted documents

cc: Requestor
(w/o enclosures)