



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 20, 2010

Ms. Rebecca Merrill
Assistant General Counsel
Teacher Retirement System of Texas
1000 Red River Street
Austin, Texas 78701

OR2010-19125

Dear Ms. Merrill:

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# 404462.

The Teacher Retirement System of Texas ("TRS") received a request for four categories of information related to TRS's investment in Colony Investors VIII, L.P. (the "fund"), which is managed by Colony Capital, LLC ("Colony").¹ You state that some responsive information has been provided to the requestor. You claim that some of the requested information is excepted from disclosure under sections 552.101, 552.104, and 552.143 of the Government Code. You also believe that the requested information implicates the interests of third parties Colony and Townsend Group ("Townsend"). 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 in question should not be released.² We received correspondence from Colony and Townsend. We have considered all of the submitted arguments and reviewed the information you submitted.

You assert that some of the requested information is the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2008-06054 (2008). In that ruling, we concluded TRS must withhold certain information under

¹We note that TRS asked for and received clarification regarding this request. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information).

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).

sections 552.117, 552.130, 552.137, and 552.143(a) and (b) of the Government Code, but must release information subject to section 552.0225(b) of the Government Code. You state that the law, facts, and circumstances on which Open Records Letter No. 2008-06054 was based have not changed. Accordingly, with regard to the requested information that is identical to the information previously requested and ruled upon by this office in the prior ruling, we conclude TRS may continue to rely on Open Records Letter No. 2008-06054 as a previous determination and withhold or release the identical information in accordance with that ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, 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 prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). To the extent the requested information is not encompassed by the previous ruling, we will address the submitted arguments.

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);
- (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 bracketed is subject to section 552.0225(b).³ Although Colony and Townsend 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 bracketed pursuant to section 552.0225(b) of the Government Code.

You assert that the remaining information in Exhibits B-K is excepted under section 552.143 of the Government Code. Section 552.143 provides in part the following:

- (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 the requirements of Section 552.021.
- (b) Unless the information has been publicly released, pre- 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 the requirements of Section 552.021, except to the extent it is subject to disclosure under Subsection (c).

Gov't Code § 552.143 (a), (b). You state that the remaining information in Exhibits B-K consists of information held by TRS that was prepared and provided by private investment funds. You also state portions of the information at issue consist of pre- and post-investment due diligence information about TRS's investments and proposed investment opportunities. You inform us that the information you seek to withhold is not subject to section 552.0225(b). *See id.* § 552.0225(b) (listing categories of information held by governmental body relating to its investments that are public and not excepted from disclosure under the Act). Based on your representations and our review of the information at issue, we agree that TRS must withhold the remaining information in Exhibits B-K under section 552.143 of the Government Code.

Next, we address TRS's claim under section 552.104 of the Government Code for the remaining information in Exhibit A. 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

³You state that the information you have bracketed is a representative sample of the information that is deemed to be public under section 552.0225(b).

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 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, in part, by investing in the private marketplace and assert that TRS has an on-going interest in preserving its ability to compete effectively in this marketplace. *See* Gov't Code § 825.301(a) (authorizing TRS 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). 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 argue that release of the remaining information in Exhibit A "would compromise the negotiating positions of the fund . . . in transacting business with and obtaining favorable transaction terms from prospective purchasers, lessees, or lenders" and would also harm TRS's investment in the fund. You also assert that release of the information at issue "could result in risk-adjusted, premium pricing by prospective private investment funds [which] would generally harm TRS's ability to negotiate favorable terms," or, alternatively, cause TRS to be excluded from investing in those funds. Based on your representations, we find that release of the information at issue would harm TRS in a specific competitive situation. Therefore, TRS may withhold the remaining information in Exhibit A under section 552.104 of the Government Code.

In summary, TRS must release the type of information you have bracketed pursuant to section 552.0225(b) of the Government Code. TRS must withhold the remaining information in Exhibits B-K under section 552.143 of the Government Code. TRS may withhold the remaining information in Exhibit A under section 552.104 of the Government Code.⁴

⁴As we are able to make this determination, we need not address the remaining claims.

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,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/dls

Ref: ID# 404462

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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