

Teacher Retirement System  
of Texas

1000 Red River Street  
Austin, Texas 78701-2698

Feb # 11,429  
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EXECUTIVE SECRETARY  
Bruce Hineman



RQ 10

Charmaine J. Rhodes, Staff Attorney

January 10, 1991

HAND DELIVERED January 10, 1991

The Honorable Dan Morales  
Attorney General of Texas  
Supreme Court Building  
14th & Colorado, 5th Floor  
Austin, Texas 78701

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Opinion Committee

RE: OR90-593

Dear General Morales:

On December 31, 1990, the Teacher Retirement System of Texas (TRS) received a copy of OR90-593 from your office. The decision indicated that your office would be willing to consider additional briefing on two exceptions raised by TRS in its initial request for decision and brief.

TRS appreciates the opportunity for additional briefing and is submitting a supplemental brief to your office with this letter. Further, TRS is resubmitting to your office a copy of the documents with markings to correlate to the specific exceptions TRS is claiming.

Please contact me at 370-0524 if you have questions or need additional information. TRS looks forward to working with you on this and other matters.

Very truly yours,

*Charmaine J. Rhodes*  
Charmaine J. Rhodes

CJR/view

Enclosures (Brief and Documents)

cc: John MacDougall w/Encl. (Brief Only)  
H. William Allen w/Encl. (Brief Only)

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SUPPLEMENTAL BRIEF OF TEACHER RETIREMENT  
SYSTEM OF TEXAS CONCERNING OR90-593

The Teacher Retirement System of Texas (TRS) previously requested a decision from the Attorney General of Texas concerning whether certain records are subject to public disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S. On December 28, 1990, the Attorney General issued OR90-593, ruling that some records are excepted from disclosure under Section 3(a)(10) and (11) of the Act. TRS also had asserted in its request for decision that other records or parts of records are excepted from disclosure under Section 3(a)(4), which excepts information that would give advantage to competitors, and under Section 3(a)(1), which excepts information deemed confidential by law, either Constitutional, statutory, or by judicial decision. TRS maintains that the fiduciary duty created by Constitutional and statutory law, as well as judicial decisions defining the extent of a trustee's fiduciary duty, requires TRS to refrain from disclosing records of the type requested. The release of information would harm the assets of the trust fund in the marketplace and therefore is not required under Section 3(a)(4) or 3(a)(1) of the Act.

The Attorney General has permitted additional briefing on these two exceptions since the points raised by TRS present a case of first impression. This brief is submitted in response to the Attorney General's offer to consider further briefing on these issues. As requested, the documents for which TRS is claiming exceptions to disclosure have been marked and resubmitted with this brief. It is the position of TRS that the portions of the documents marked in yellow are excepted from disclosure under either

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Section 3(a)(1), Section 3(a)(4), or both. The portions not marked either were excepted from disclosure under Section 3(a)(10) or (11) in OR90-593 or consist of information that TRS will make available.

TRS urges the Attorney General to consider the unique position of TRS as a public agency that is subject to many of the laws governing other public agencies but that also has a fiduciary duty to protect the interests of its plan participants. TRS believes that, in most instances, its duties as a state agency are compatible with its fiduciary duties to its members. However, some circumstances require a difficult decision concerning action that would perhaps further a public interest but harm the members' interests. When such circumstances arise, as they have with respect to the request for certain investment records, TRS is required by State law to protect the interests of its beneficiaries first.

TRS has been called upon to examine its responsibilities as fiduciary in deciding whether to pursue protection for the investment records at issue here. Unfortunately, TRS does not have a specific statute, judicial decision, or Attorney General decision available on which to base its decision on whether releasing the requested information would be compatible with its fiduciary duties. Therefore, TRS must rely on general descriptions of a fiduciary's responsibilities and knowledge of how a private fiduciary would respond to such a request for information, as well as its own judgment of how release of the information could affect the investment. After carefully considering its responsibilities and the effect that disclosure of information

could have on an asset of the trust, TRS has decided to request that the marked information be excepted from disclosure.

As noted in its earlier brief, TRS has disclosed much of the basic information about the nature of its investment in TCBY Tower. Therefore, it is clear that TRS is not asserting that its fiduciary duty precludes release of any and all information concerning the investment of trust assets. However, because TRS has determined that disclosure of some of the requested information is likely to cause harm to the trust asset, TRS should be allowed to withhold that information in order to avoid a breach of its fiduciary duty.

#### **I. Fiduciary Duty to Maintain Confidentiality of Documents**

Section 3(a)(1) of the Open Records Act excepts from disclosure information deemed confidential by law, either Constitutional, statutory, or by judicial decision. Both Constitutional and statutory laws of the State of Texas create fiduciary duties for TRS that implicitly require TRS to maintain the confidentiality of certain investment documents.

The Constitution of Texas specifically provides that the assets of TRS are held in trust for the benefit of members and may not be diverted. Subsection (a)(1), Section 67, Article 16 of the Constitution of Texas. The Constitution further provides that a board of trustees must administer the system and invest the funds of the system in the following manner:

Each statewide benefit system must have a board of trustees to administer the system and to invest the funds of the system in such securities as the board may consider prudent investments. In making investments, a board shall exercise the judgment and care under the circumstances then prevailing that persons of ordinary prudence, discretion, and intelligence exercise in the management of their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income therefrom as well as the probable safety of their capital....

Subsection (a)(3), Section 67, Article 16 of the Constitution of Texas.

These constitutional provisions create a trust and impose fiduciary responsibilities on the TRS board of trustees and its employees in investing and managing the funds of the system. The duties of the board as trustees are further defined by TRS statutes, the Texas Trust Code, and common law.

The statutes specifically governing TRS indicate that a trust relationship exists between the board and the members of TRS. Section 825.103(a), Texas Government Code, makes the board the trustee of all assets of the retirement system. In furtherance of their fiduciary duties, trustees and employees of TRS are prohibited from having a direct or indirect interest in the gains from investment made with the system's assets. Section 825.210, Texas Government Code. Similarly, Section 825.304(b) prohibits a trustee or employee from having a personal economic interest in entities in whose name

assets of the retirement system are held. Further, Section 825.506 requires TRS to administer the trust in a manner that the plan will be considered a qualified plan under Section 401(a) of the Internal Revenue Code of 1986 (26 U.S.C. Section 401). Section 401 requires a plan to be administered for the exclusive benefit of the employees and their beneficiaries. Failure to do so will result in loss of the plan's qualified status and the tax benefits to the plan and its participants that result from qualified status. These provisions indicate that as fiduciaries, the trustees and employees of TRS have a duty of loyalty to the beneficiaries, which includes the duty to avoid actions that are based on the interests of persons other than the beneficiary.

The duty of loyalty by the trustee to the beneficiary is described as the duty to administer the trust solely in the interest of the beneficiary. Section 170(1), Restatement of the Law of Trusts 2d (1959) (cited hereinafter as "Restatement"). This duty includes the duty not to disclose to a third person information which he has acquired as trustee where he should know that the effect of such disclosure would be detrimental to the interest of the beneficiary. Comment s, Section 170(1), Restatement. The duty of loyalty also means that in administering the trust, the trustee is not to be guided by the interest of any third person. Comment q, Section 170(1), Restatement.

There is little case law concerning a fiduciary's duty not to disclose information as part of the duty of loyalty, since most cases on breaches of that duty concern self-dealing that overshadows any incidental disclosure of information. However, the position of the Restatement has been noted in at least two cases. In the case of In re Automatic Equipment Manufacturing

Company, 106 F. Supp. 699,706 (D. Neb., 1952), the court noted that an accountant employed by trustees to audit a debtor's records had a fiduciary duty not to disclose information obtained during the audit where he should know that the effect of disclosure would be detrimental to the interests of beneficiaries of the trust estate. In Indian Law Resource Center v. Department of Interior, 477 F. Supp. 145 (D.D.C., 1979), the court held that though the fiduciary duty of the Department of Interior to The Hopi Tribe would not alone exempt tribal documents from disclosure, a showing of harm to the Tribe's or government's interest would exempt documents from disclosure. Similarly, TRS does not assert blanket protection for all documents by its fiduciary duty; instead, TRS requests exemption from disclosure only for the documents whose release could harm its investment.

Texas trust law, though codified, relies heavily on the common law for a description of the duties of a trustee. Section 113.051, Texas Property Code, provides that in administering a trust, the trustee shall perform all of the duties imposed on the trustee by the common law. Section 113.056 provides that in managing trust property, a trustee shall exercise the judgment and care under the current circumstances that persons of ordinary prudence, discretion, and intelligence exercise in the management of their own affairs, considering the probable income from as well as the probable increase in value and the safety of their capital. The statutory descriptions of a trustee's duties are brief, with common law and the judgment of the trustee filling in the large gaps. The statutes largely prohibit obvious kinds of self-dealing. However, other kinds of breaches of duty also exist.

Texas courts have held that even without approaching the concept of dishonesty that may be present when there is self-dealing by a trustee, a trustee could exercise his fiduciary duty in such a negligent or supine manner that his lack of diligence would result in a breach of fiduciary duty. Burnett v. First National Bank of Waco, 567 S.W. 2d 873 (Tex. Civ. App.--Tyler 1978, writ ref. n.r.e.). Thus, when a trustee does literally nothing, he may be exercising his fiduciary duty in such a negligent manner that his lack of diligence will result in a breach of his fiduciary duty. Jewett v Capital National Bank of Austin, 618 S.W. 2d 109 (Tex. Civ. App.--Waco 1981, writ ref. n.r.e.).

These cases, as well as the statutory provision requiring a trustee to exercise care and judgment in administering a trust, indicate that a breach of fiduciary duty is not necessarily based on dishonesty or self-dealing. Negligent administration is also considered a breach of fiduciary duty. Thus, disclosure of information from the files of a trust asset, even if not done to further any self-interest or dishonest purpose, could be considered a breach of duty if persons of ordinary prudence would not disclose such information in the management of their own affairs.

Even in the absence of a specific Texas case holding that disclosure of trust records is a breach of fiduciary duty, Texas common law compels a trustee to consider the impact of disclosure of information on the trust assets. The safety of the trust fund is the first care of law, and on this depends every rule which has been made for the conduct of trustees. Brault v. Bigham, 493 S.W. 2d 576 (Tex. Civ. App.--Waco 1973, writ ref. n.r.e.). A

trustee has the duty to preserve the trust property and to make the trust property productive. See, Sections 176 and 181, Restatement. Therefore, TRS, as trustee of the assets of the system, must determine whether disclosure of certain information would negatively affect the trust property or its safety or productivity. If so, disclosure must be avoided.

In Part III of this brief, TRS discusses the harm that disclosure of information is likely to cause to the TCBY Tower loan as an asset of the trust. The determination of whether disclosure would be a breach of fiduciary duty rests on a finding of harm to the trust assets, as does the determination of whether Section 3(a)(4) is applicable to the marked portions of the documents. Because the applicability of either Section 3(a)(1) or Section 3(a)(4) is based on harm to TRS, this brief discusses the issue of harm in one part.

## **II. Marketplace Interests of TRS**

TRS argued in its request for a decision and in its initial brief that part of the requested information was excepted from disclosure under Section 3(a)(4) of the Act as information which, if released, would give advantage to competitors. In his decision, the Attorney General acknowledged that the relationship of TRS to private enterprise may present a situation in which a governmental entity has interests in the marketplace which have not been hitherto considered in open records decisions. See, page 6 of OR90-593. TRS maintains that both its role as fiduciary and its relationship to private enterprise require it to compete in the marketplace as a private lender would.

This means that TRS must preserve its competitive or negotiating flexibility vis-a-vis the borrower and other potential borrowers or lenders and that TRS must cooperate to protect the borrower's competitive position or business relationship with respect to its tenants, potential tenants, competitors, or other creditors.

In OR90-593, the Attorney General noted that the application of the exception in Section 3(a)(4) of the Act has hitherto been restricted to protecting the interests of governmental bodies in competitive bidding situations but recognized that a broader application may be necessary for an agency such as TRS. The language of the statute excepts from disclosure information which would give advantage to competitors or bidders. For many governmental bodies, competitive bidding situations will present the sole or primary opportunity for competitive harm to the governmental body. For TRS, however, competitive bidding for goods or services needed by the agency is only one of many competitive marketplace transactions entered into by TRS. The wording of Section 3(a)(4) is broad enough to afford protection of information collected with respect to other competitive situations, including information related to investments such as real estate loans.

Several previous open records decisions discussing Section 3(a)(4) suggest that the government's ability to compete in the marketplace as any other consumer or business could compete is the interest that must be protected; though a competitive bidding situation is the most common manifestation of that interest, it is not necessarily the only manifestation. For example, ORD 514 (1988) states that the exception protects the

government's "purchasing interests" by preventing competitors or bidders from gaining unfair advantage over others. The exception requires a showing of specific actual or potential harm in a particular "competitive situation." In ORD 568 (1990), Section 3(a)(4) was described as protecting the interests of a governmental body, generally in a situation involving competitive bidding. The showing required was that of harm to the governmental body's interests in the marketplace, not specifically limited to the marketplace of goods and services obtained by competitive bidding.

Finally, in ORD 541 (1990), Section 3(a)(4) was described as protecting a governmental entity's purchasing interests, not the competitive interests of the successful bidder in the broader marketplace. Even following the termination of bidding, a governmental body could withhold information if it was likely to solicit bids for the same or similar goods or service on a recurring basis in the future. Again, the decision required a showing of harm from a particular competitive situation, not only a general allegation or remote possibility that an unknown competitor will gain an unfair advantage.

These decisions suggest that information may be excepted from disclosure when a governmental entity shows the existence of the following: 1) a particular governmental purchasing interest or other competitive marketplace transaction or interest, 2) the current, on-going, or recurrent nature of the interest, and 3) specific potential harm to the government's interest in the transaction. TRS believes that the situation presented by its loan on TCBY Tower meets the requirements established by previous decisions.

First, there is a governmental interest in a marketplace transaction. The TRS loan was negotiated between TRS and the borrower in the same manner as a private lender would negotiate such a loan, with each party attempting to obtain the most favorable terms while still being able to reach agreement with the other. The borrower was not required to use TRS as the funding source; TRS has no monopoly on loan financing. Similarly, TRS was not required to extend a loan for development of this property. TRS analyzes different investment opportunities and chooses those that are likely to yield the desired return and meet other investment criteria, such as portfolio diversification.

Second, TRS has an on-going marketplace interest at stake. Once the loan was closed, the "transaction" was not over. The loan documents require on-going financial reporting by the borrower to TRS. Further, the loan requires payment to TRS of a percentage of the cash flow rather than simply a flat dollar amount of principal and interest. Thus, TRS has an on-going interest in the performance of the property because its performance determines the amount of the return on the TRS investment. Every event with potential to reduce the cash flow of the property is important to TRS. If release of information has the potential to reduce cash flow, TRS has an interest that will be harmed by the release.

Third, in its role as fiduciary, TRS must closely monitor the performance of its investments, such as the TCBY Tower loan. Monitoring requires information. TRS cannot simply close a loan, release to the public all information in its files on the loan, and consider that the end of its

transaction. It must continue to gather information and make decisions on a frequent, on-going basis, including decisions ranging from the approval of unusual lease provisions to renegotiation of loan provisions or possible foreclosure. In fact, the TCBY Tower loan currently is being renegotiated by the borrower and TRS. This fact alone indicates an on-going marketplace interest, since TRS must be free to negotiate satisfactory terms with the borrower without the undue pressures or influence that disclosure of information to the public and the borrower would have on the negotiations. TRS has a duty to protect the value of an asset and to make trust property productive. This duty creates a role for TRS that at times may be one of cooperation with the borrower and at other times may be one of competition. TRS must be allowed the confidentiality needed to take action when necessary, without prematurely revealing information to the public or the borrower.

The volume, detail, and current nature of the information on the borrower and the property in TRS's files are evidence of the fact that this "transaction" (or, by analogy to the competitive bidding situation, the "purchase") is not over. The term of the loan is for at least ten years, during which time TRS will continue to collect information and make marketplace decisions based on that information.

Fourth, TRS must constantly evaluate new opportunities for investments. In a sense, TRS may be seeking "bids" (i.e., seeking to make loans) for the same kinds of "goods or services" (i.e., on other real estate projects) in the future. Disclosure of all information related to this loan may discourage other potential borrowers from dealing with TRS if they know they cannot

protect their information from public scrutiny. Further, for other real estate loans already in existence, disclosure of information concerning the performance of the TCBY property and steps taken, or not taken, by TRS may affect the negotiating position of TRS in relation to its other borrowers. The point is that TRS has other current investments of a similar nature or may make similar investments in the future. Thus, the concern raised in previous open records decisions about impact of disclosure an agency that could be seeking similar goods or services in the near future should be raised here, too.

Finally, as noted in its initial brief, TRS has a competitive interest in the rental market in Little Rock, Arkansas, because the ability of the property to attract and retain tenants at sufficient rental rates will determine the amount of the return TRS receives on this loan. Thus, there is an on-going competitive environment within which TRS must operate in its management of the loan and its handling of the loan documents or reports.

Because of the nature of real estate loan transactions, TRS must continue to operate in a competitive marketplace, even after the closing of the loan, where the interests of the borrower, present or potential tenants, other rental property, other creditors, other TRS borrowers, and TRS itself clash. TRS urges the Attorney General to apply Section 3(a)(4) to this type of situation. If, in enacting Section 3(a)(4), the legislature was concerned, for example, about a state agency's ability to preserve its competitive position when purchasing \$20,000 in office furniture, surely it intended to preserve the on-going competitive position of an agency that has a \$65 million

investment. The wording of the statute is broad enough to cover the transaction in which TRS is involved, despite the absence of a bidding situation. As discussed in the next part of the brief, because of the multi-faceted competitive situation, potential for harm to TRS does exist if disclosure of certain information is required.

### III. Harm to TRS Interests

Under both the fiduciary duty standards and the Section 3(a)(4) exception for information providing a competitive advantage, TRS must make a showing of harm to the interests of the trust in order for there to be a legally permissible basis for withholding the information. TRS has reviewed the requested information carefully and is requesting protection for those parts of documents that, in the professional opinion of TRS investment staff, could provide competitive advantage to the borrower, the borrower's competing properties, current or potential tenants, the borrower's creditors, other entities to which TRS has made or may make similar loans, or other lenders which compete with TRS for good investment opportunities. Release of the information marked in the documents could have several adverse consequences in the marketplace, and it is likely to affect the productivity and value of the trust asset.

The following discussion indicates how release of the major categories of information marked could affect the system's interest in this and other real estate property securing a TRS loan.

#### A. Current Account Balances

Several of the exhibits contain information on escrow account balances and the letter of credit balance. See, Exhibit D(1), pages 5-6; Exhibit D(2), pages 10-11; and Exhibit E(4), pages 1-2. Although TRS cannot identify a specific borrower report or document that provided the information as presented in the exhibits, the exhibit information is distilled from numerous periodic reports from the borrower to the TRS investment advisor and should be protected for that reason under Section 3(a)(10) of the Act. Additionally, TRS maintains that disclosure of the information would harm TRS in several ways. The information reveals the project's operating conditions and remaining amounts of operating cash for the project. It could be used by competitors of TCBY Tower to project what incentives TCBY Tower is financially able to offer to new tenants and then to make a better lease offer. General information about operating conditions could be used by competitors to approach existing TCBY Tower tenants or win future tenants. Information on what has already been spent on tenant finish could be used by future potential tenants in their negotiations with TCBY Tower. The remaining balance figures are particularly revealing of the borrower's position, though the original balances also provide information that would not normally be available and could provide competitive advantage when combined with information that could be pieced together from other sources. As shown in the documents previously submitted, the Little Rock office rental market is competitive, with several downtown office buildings competing to attract tenants.

TCBY Tower must continue to compete in the marketplace for tenants to fill existing and future vacancies. Revealing information on operating

conditions, tenant finish and leasing commission escrow, project escrow, and the current letter of credit balance gives competing properties and tenants information they would not normally have and could cause the project to lose tenants, fail to secure new tenants, or have a weakened bargaining position when entering into leases. All of the results would affect TRS, since payments to TRS depend on the ability of the project to secure rent payments and, in the case of the participating interest of TRS, to generate a positive cash flow.

B. Letter of Credit Draws

Exhibits E(6) and (7) contain information on letter of credit draws and remaining balances, as well as information on funding modifications under the letter of credit. The same harm previously discussed with respect to the account balances could result from disclosure of the letter of credit information. Further, several of the letters in Exhibit E(6) note that the information presented is based on certified information provided by the borrower; the information should therefore be protected under Section 3(a)(10) of the Act.

The information in Exhibit E(7) presents a detailed picture of what TCBY Tower has spent on behalf of different tenants, other recurring expenses, and cash available. Again, this information puts specific, current financial information into the hands of other competing office buildings and current or potential tenants. The records provide them with information they would not normally have and that they could use as a competitive or negotiating tool.

As noted for other financial reports from the real estate advisor, TRS cannot identify a specific document submitted by the borrower on which the information is based. The reports were not compiled with the need to do so in mind. However, TRS can state that its advisor did not independently gather information on what the borrower spent on hardware, locks, and signs, for example. This type of information is provided by the borrower and is used or relied upon by the advisor in making its reports to TRS.

The information in Exhibit E(6) and (7) reveals the borrower's current financial and operating conditions. A lender such as TRS would not normally reveal such information about the borrower to the public because of the repercussions that disclosure would cause for both the borrower and lender. Tenants, other competing office buildings, and other creditors of the borrower could base business decisions on this type of information if they had access to it. Disclosure would put the borrower and, consequently, TRS at a competitive disadvantage in the leasing marketplace.

#### C. Correspondence

TRS has marked parts of the correspondence in Exhibits E(5) and F as protected from disclosure because of the competitive harm that could result from release. The marked parts of the documents reveal level of concern, strategies for response, and other information about action taken by the Resolution Trust Corporations (RTC) regarding a letter of credit. They reveal information concerning enforcement of the loan provisions by TRS. They also contain financial information that reveals the borrower's financial status. All of this information is of the type that a lender would not reveal to the

public since disclosure could affect the ability of both the lender and borrower to reach agreement on issues. Disclosure could needlessly raise concerns of other creditors and increase financial pressures on the borrower, which could in turn affect the income stream from the borrower to TRS. Tenants or potential tenants could become unduly alarmed about a situation that the borrower and lender could resolve without harm to the tenants. Competitors could tout the RTC-induced situation as reason to rent from them. Especially with the loan currently under renegotiation, the negotiating position of TRS may be damaged by release of correspondence that provides insight into its decision-making process in a similar situation. Further, if TRS is required to disclose such information, the potential for disclosure of similar correspondence for other real estate loans could affect whether and when TRS takes steps such as those indicated in the letters. Again, TRS must operate as a lender and a fiduciary with respect to this transaction. Disclosure of on-going negotiations, claims, and financial details is incompatible with the role that TRS must fulfill in this transaction because disclosure will potentially harm this investment.

TRS must emphasize that the rental market in Little Rock is extremely competitive. Disclosure of the information described in subsections A-C of this part of the brief could deal a devastating blow to TCBY Tower's competitive position. The financial damage to the borrower would ultimately harm TRS. The intent of the Open Records Act is to avoid this kind of damage to both a private business and the governmental entity that would result from disclosure.

D. Appraisals

As permitted under OR90-593, TRS will withhold the opinion portions of the appraisals and the portions based on the borrower's records. Also, TRS has asserted protection for account balance information in the appraisals, as discussed above. With respect to most of the remainder of the two appraisal reports at issue, TRS does not seek to withhold the information. However, pages 13-20 of Exhibit D(2) have been marked, and TRS is requesting that the information be excepted from disclosure as harmful to the interests of TRS.

Page 12 of Exhibit D(2) indicates the opinion of the advisor on what properties in Little Rock, Arkansas, are considered to be comparable rental property. TRS reads OR90-593 as excepting this page from disclosure. The following eight pages contain photographs and other factual information about the properties that are, in the advisor's opinion, comparable rental property. TRS cannot disclose much of the factual information about the properties, including the photographs, without disclosing the opinion of the advisor on which properties are comparable rentals to TCBY Tower. The factual and opinion parts of the document are practically inseparable.

Further, disclosure of this information would be equivalent to providing tenants and competitors with a handbook on shopping for space in Little Rock. TRS, through its advisor, has compiled the data for its own internal use, not for the public's use. TRS has expended its own resources in contracting with the advisor for such information. The information has commercial value to both TRS and the appraiser who compiled this background information. Releasing the information to the public would allow both tenants and

competitors to reap the benefit of a TRS expenditure made to serve the interests of the trust beneficiaries, not the interests of the public. Tenants could use the information to extract concessions from TCBY Tower or to decide to move because of what looks like a better package deal. Competitors also could use the compiled information to attempt to lease their space to current or potential TCBY tenants by using a point by point comparison of features. Further, disclosure would allow other lenders to evaluate their borrowers' properties without expending the same resources that TRS and its advisors have spent in compiling such comparisons.

Release of this type of appraisal information to the public could have a negative effect on the ability of TRS to hire qualified appraisers in the future. If an appraiser cannot be assured of confidentiality for the work product it has assembled, it may be reluctant to provide services to TRS because other appraisers and potential customers will be able to obtain and use the work it has done for TRS. The appraisers hired by TRS may refuse new assignments or charge a premium rate to compensate for the loss of commercial value of its work product due to disclosure.

TRS has over fifty funded real estate projects around the country and regularly receives appraisals from either the investment advisor assigned to the property or from an outside appraisal company. TRS will seek appraisals for TCBY Tower and other properties on a recurring basis. Thus, TRS must be able to attract quality professionals who are familiar with and thoroughly research the market and who then provide a comprehensive report to TRS.

Disclosure of market data will harm the ability of TRS to obtain comprehensive appraisals in the future.

In summary, release of the marked information will harm the building's leasing potential by making available summaries of other properties' features and rental rates as compared to TCBY Tower's; it will also affect the ability of TRS to secure comprehensive appraisals in the future.

#### IV. Summary

TRS is aware that there is no previous decision from the Attorney General or the Texas courts on whether a public agency's fiduciary duty is incompatible with the duty to disclose information in some circumstances. However, other trustees that are also governmental entities have found themselves in similar, if not worse, situations in which the duty to serve the public interest clashes with the duty to serve the beneficiaries' interests. See, for example, Dadisman v. Moore, 384 S.E. 2d 816 (W. Va. 1989); Ahuna v. Department of Hawaiian Home Lands, 640 P. 2d 1161 (Haw. 1982); and County of Skamania v. State, 685 P. 2d 576 (Wash. 1984). The inherent conflict faced by TRS as both a public agency and a trustee is not unique.

It is possible that the Attorney General will find that Section 3(a)(4) protects the information related to TCBY Tower and that it is not necessary to reach the issues raised by TRS under Section 3(a)(1) with respect to fiduciary duties. If so, TRS is content to leave these issues for a court or

legislative body to grapple with at a later time and under different circumstances. However, to the extent that the Attorney General finds it necessary to reach Section 3(a)(1), TRS urges the Attorney General to recognize the fiduciary responsibilities of TRS as a trustee and to allow TRS to exercise the judgment demanded of a fiduciary by withholding potentially harmful information from disclosure.

Respectfully submitted,

*Charmaine J. Rhodes*

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State Bar No. 16812500

#### CERTIFICATE OF SERVICE

On January 10, 1991, copies of the Supplemental Brief of TRS Concerning OR90-593 were mailed to H. William Allen and John MacDougall.

*Charmaine J. Rhodes*  
Charmaine J. Rhodes