



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

December 17, 2015

Ms. Erin Perales
General Counsel
Houston Municipal Employees Pension System
1201 Louisiana, Suite 900
Houston, Texas 77002

OR2015-26536

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# 591121.

The Houston Municipal Employees Pension System (the "system") received a request for (1) board meeting minutes, including any investment committee meeting minutes, from March 1, 2015, through September 28, 2015; (2) any investment-related materials presented at a specified board meeting; and (3) a specified investment report provided by Wilshire Associates. You state the system is providing to the requestor information regarding the first and third categories. You claim the submitted information is excepted from disclosure under sections 552.104, 552.111, and 552.143 of the Government Code. You also state release of this information may implicate the proprietary interests of Cliffwater, L.L.C., DePrince, Race & Zollo, Inc. ("DRZ"), EnCap Investments, L.P., and Thomas White International, Ltd. ("TWI"). Accordingly, you have notified these third parties of the request and of each company's right to submit arguments to this office as to why the submitted information should not be released. *See* Gov't Code § 552.305(d) (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances). We have received comments from

DRZ and TWI. We have considered the submitted arguments and reviewed the submitted information.

We note an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice 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 letter, we have only received comments from DRZ and TWI on why each company's submitted information should not be released. Therefore, we have no basis to conclude any of the remaining third parties have protected proprietary interests in the submitted information. *See id.* § 552.110(a)-(b); Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3. Accordingly, the system may not withhold any portion of the submitted information on the basis of any proprietary interests the remaining third parties may have in it.

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). The "test under section 552.104 is whether knowing another bidder's [or competitor's information] would be an advantage, not whether it would be a decisive advantage." *Boeing Co. v. Paxton*, 466 S.W.3d 831 (Tex. 2015).

You state the information you have marked pertains to a competitive situation. In addition, you state release of this information would cause the system competitive harm and could affect the system's financial interests. After review of the information at issue and consideration of the arguments, we find the system has established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude system may withhold the information you have marked under section 552.104(a) of the Government Code.¹

DRZ and TWI also raise section 552.104 for some of the remaining information. DRZ contends release of its remaining information would give DRZ's competitors an advantage in similar proposals for investment manager services, and release would hinder DRZ's ability to compete in the marketplace by negatively impacting DRZ's ability to negotiate and compete with other providers of investment manager services. TWI contends release of the information it has redacted would give its competitors an advantage because its competitors could replicate TWI's investment strategies and approaches and offer the same product or strategy at a substantially lower cost. Thus, TWI claims release of the information at issue would result in substantial competitive harm to the marketplace position of TWI. Based on

¹As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

the arguments of DRZ and TWI, as well as our review of the information at issue, we find DRZ and TWI have established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude the system may withhold DRZ's remaining information and TWI's information we have indicated under section 552.104(a) of the Government Code.²

Section 552.111 of the Government Code excepts from disclosure “[a]n interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency[.]” Gov’t Code § 552.111. This exception encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). The purpose of section 552.111 is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, orig. proceeding); Open Records Decision No. 538 at 1-2 (1990).

In Open Records Decision No. 615, this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, orig. proceeding). We determined section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. ORD 615 at 5; *see also City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *Arlington Indep. Sch. Dist. v. Texas Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.). A governmental body’s policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body’s policy mission. *See* Open Records Decision No. 631 at 3 (1995). However, a governmental body’s policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. ORD 615 at 5-6; *see also Dallas Morning News*, 22 S.W.3d at 364 (section 552.111 not applicable to personnel-related communications that did not involve policymaking).

Further, section 552.111 does not generally except from disclosure facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *Arlington Indep. Sch. Dist.*, 37 S.W.3d at 157; ORD 615 at 5. But, if factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, the factual information also may be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982).

²As our ruling is dispositive, we need not address the remaining third party arguments against disclosure.

Section 552.111 can also encompass communications between a governmental body and a third party, including a consultant or other party with a privity of interest. *See* Open Records Decision Nos. 631 at 2 (section 552.111 encompasses information created for governmental body by outside consultant acting at governmental body's request and performing task that is within governmental body's authority), 561 at 9 (1990) (section 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process), 462 at 14 (1987) (section 552.111 applies to memoranda prepared by governmental body's consultants). For section 552.111 to apply, the governmental body must identify the third party and explain the nature of its relationship with the governmental body. Section 552.111 is not applicable to a communication between the governmental body and a third party unless the governmental body establishes it has a privity of interest or common deliberative process with the third party. *See* ORD 561 at 9.

You state the information you have marked consists of advice, opinions, and recommendations of a financial consultant retained by the system. You explain this information was used by the system's board members in their policymaking role to deliberate upon the system's private-equity investment strategy. Based on your representations and our review, we find the information at issue consists of advice, opinions, or recommendations related to policymaking matters of the system. Accordingly, the system may withhold the information you have marked under section 552.111 of the Government Code.

Section 552.143 of the Government Code 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.

Gov't Code § 552.143(a). The information you have marked consists of information which you state was provided by a private investment fund and is held by the system. You inform us this information is not subject to section 552.0225(b). *See id.* § 552.0225(b). Based on your representations and our review of the submitted information, we agree the system must withhold the information you have marked under section 552.143(a) of the Government Code.

In summary, the system may withhold the information you have marked, DRZ's information, and TWI's information we have indicated under section 552.104(a) of the Government Code. The system may withhold the information you have marked under section 552.111 of the Government Code. The system must withhold the information you have marked under section 552.143(a) 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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Britni Ramirez
Assistant Attorney General
Open Records Division

BR/bhf

Ref: ID# 591121

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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