



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

April 10, 2018

Mr. Dan Junell
Assistant General Counsel
Teacher Retirement System of Texas
1000 Red River Street
Austin, Texas 78701-2698

OR2018-04093A

Dear Mr. Junell:

This office issued Open Records Letter No. 2018-04093 (2018) on February 21, 2018. Since that date, we have received new information that affects the facts on which this ruling was based. Consequently, this decision is substituted for Open Records Letter No. 2018-04093 and serves as the correct ruling. *See generally* Gov't Code § 552.011 (providing that Office of Attorney General may issue decision to maintain uniformity in application, operation, and interpretation of Public Information Act ("Act")).

You ask whether certain information is subject to required public disclosure under the Act. Your request was assigned ID# 707235 (Ref. No. Wittliff Cutter 18-1).

The Teacher Retirement System of Texas ("TRS") received a request for specified contracts and requests for proposals during a certain time period. You state you released some of the requested information. You state you will withhold certain information pursuant to section 552.136(c) of the Government Code.¹ You also state release of the submitted information may implicate the proprietary interests of State Street Corporation (the "corporation").

¹Section 552.136(c) of the Government Code allows a governmental body to redact the information described in section 552.136(b) without the necessity of seeking a decision from the attorney general. *See* Gov't Code § 552.136(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.136(e). *See id.* § 552.136(d), (e).

Accordingly, you state, and provide documentation showing, you notified the corporation of the request and its right to submit arguments to this office. *See id.* § 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 received comments from the corporation. We have reviewed the submitted information and considered the submitted arguments.

Initially, we note some of the submitted information is subject to section 552.0225 of the Government Code. Section 552.0225(b) provides as follows:

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(b). The corporation argues some of the submitted information is excepted from disclosure under sections 552.104, 552.110, and 552.143 of the Government Code. However, 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 types of information enumerated in section 552.0225(b) of the Government Code.

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). In considering whether a private third party may assert this exception, the supreme court reasoned because section 552.305(a) of the Government Code includes section 552.104 as an example of an exception that involves a third party's property interest, a private third

party may invoke this exception. *Boeing Co. v. Paxton*, 466 S.W.3d 831 (Tex. 2015). 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.” *Id.* at 841. The corporation states it has competitors. In addition, the corporation states its competitors “would be able to use [the information at issue] to create a blueprint for providing the services that [the corporation] currently provides . . . and apply that blueprint to the competitor’s advantage[.]” For many years, this office concluded the terms of a contract and especially the pricing of a winning bidder are public and generally not excepted from disclosure. Gov’t Code § 552.022(a)(3) (contract involving receipt or expenditure of public funds expressly made public); Open Records Decision Nos. 541 at 8 (1990) (public has interest in knowing terms of contract with state agency), 514 (1988) (public has interest in knowing prices charged by government contractors), 494 (1988) (requiring balancing of public interest in disclosure with competitive injury to company). *See generally* Freedom of Information Act Guide & Privacy Act Overview, 219 (2000) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). However, now, pursuant to *Boeing*, section 552.104 is not limited to only ongoing competitive situations, and a third party need only show release of its competitively sensitive information would give an advantage to a competitor even after a contract is executed. *Boeing*, 466 S.W.3d at 831, 839. After review of the information at issue and consideration of the arguments, we find the corporation has established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude, with the exception of the information subject to section 552.0225(b), which must be released, TRS may withhold the information we indicated under section 552.104(a) of the Government Code.²

The corporation raises section 552.143 of the Government Code for some of the remaining information. Section 552.143 of the Government Code provides, in relevant part:

(c) All information regarding a governmental body’s direct purchase, holding, or disposal of restricted securities that is not listed in Section 552.0225(b)(2)-(9), (11), or (13)-(16) is confidential and excepted from the requirements of Section 552.021. This subsection does not apply to a governmental body’s purchase, holding, or disposal of restricted securities for the purpose of reinvestment nor does it apply to a private investment fund’s investment in restricted securities. This subsection applies to information regarding a direct purchase, holding, or disposal of restricted securities by the Texas growth fund, created under Section 70, Article XVI, Texas Constitution, that is not listed in Section 552.0225(b).

²As our ruling is dispositive, we do not address the remaining argument to withhold this information.

Gov't Code § 552.143(c). The corporation explains TRS purchased an equity ownership interest in a private operating company, and the corporation acted as the "custodian and nominee for TRS in" the transaction at issue. The corporation asserts the information at issue pertains to TRS' direct purchase, holding, or disposal of restricted securities. *See id.* § 552.143(d)(3) (defining "restricted securities" for purposes of section 552.143); *see also* 17 C.F.R. § 230.144(a)(3) (defining "restricted securities" as "securities acquired directly or indirectly from the issuer, or from an affiliate of the issuer, in a transaction or chain of transactions not involving public offering"). The corporation also explains the investment at issue was made as part of a private offering and was not made for the purposes of reinvestment. Based on the corporation's arguments and our review, we find, with the exception of information TRS must release pursuant to section 552.0225(b)(2)-(9), (11), or (13)-(16) of the Government Code, TRS must withhold the information at issue under section 552.143(c) of the Government Code.

In summary, with the exception of the information subject to section 552.0225(b) of the Government Code, which must be released, TRS may withhold the information we indicated under section 552.104(a) of the Government Code. With the exception of information TRS must release pursuant to section 552.0225(b)(2)-(9), (11), or (13)-(16) of the Government Code, TRS must withhold the information at issue under section 552.143(c) of the Government Code. TRS must release the remaining information.

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,



Emily Kunst
Assistant Attorney General
Open Records Division

EK/sb

Ref: ID# 707235

Enc. Submitted documents

c: Requestor
(w/o enclosures)

1 Third Party
(w/o enclosures)