

Office of the Attorney General
State of Texas
Informal Letter Ruling No. OR2017-18051
August 9, 2017

Ms. Rachel Feibus
Staff Attorney
Houston Municipal Employees Pension System
1201 Louisiana, Suite 900
Houston, Texas 77002

Dear Ms. Feibus:

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# 670123.

The Houston Municipal Employees Pension System (the "system") received a request for nine categories of information pertaining to a specified board of trustees meeting. You state the system has provided some of the information to the requestor. You state the system has no information responsive to a portion of the request.¹ You claim some of 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 AG Net Lease Realty Fund III ("AG Net"); Platinum Equity Capital Partners IV ("Platinum"); Global Forest Partners; EnCap Energy Capital Fund XI; Vista Foundation Fund II; Cliffwater LLC ("Cliffwater"); Wilshire Associates; Tortoise Capital Advisors; Smith Graham & Co.; Pugh Capital Management; PanAgora Asset Management; OFI Global Asset Management; Neumeier Poma Investment Counsel; Loomis Sayles & Company, L.P.; INTECH; DePrince, Race & Zollo, Inc. ("DePrince"); DDJ Capital Management; Baring Asset Management; and Ariel Investments. Accordingly, you have notified these third parties of the request and of their 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 AG Net, Platinum, Cliffwater, and DePrince. We have considered the submitted arguments and reviewed the submitted information.

Initially, 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 not received comments from any of the remaining third parties explaining the 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.

Next, we note some of the submitted information is subject to [section 552.022 of the Government Code](#). [Section 552.022\(a\)](#) provides, in relevant part:

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108 [.]

[Gov't Code § 552.022\(a\)\(1\)](#). The submitted information contains completed reports that are subject to [section 552.022\(a\)\(1\)](#). The system must release the completed reports pursuant to [section 552.022\(a\)\(1\)](#) unless they are excepted from disclosure under [section 552.108 of the Government Code](#) or are made confidential under the Act or other law. *See id.* You seek to withhold the information subject to [section 552.022\(a\)\(1\)](#) under [section 552.111 of the Government Code](#). However, this exception is discretionary in nature and does not make information confidential under the Act. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 470 at 7 (1987) (statutory predecessor to [section 552.111](#) subject to waiver). Therefore, the system may not withhold the information subject to [section 552.022](#) under [section 552.111 of the Government Code](#). However, information encompassed by [section 552.022](#) may be withheld under [section 552.104](#). *See* [Gov't Code § 552.104\(b\)](#) (information protected by [section 552.104](#) not subject to required public disclosure under [section 552.022\(a\)](#)). Further, [section 552.143 of the Government Code](#) makes information confidential under the Act. Accordingly, we will consider your arguments under [sections 552.104 and 552.143 of the Government Code](#) against disclosure of the information subject to [section 552.022](#). We will also address the system's arguments against disclosure of the information not subject to [section 552.022](#).

[Section 552.104\(a\) of the Government Code](#) excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." *Id.* [§ 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, 841 (Tex. 2015). The system informs us it administers, manages, and operates a pension plan, and its duties include directing investments and overseeing the fund's assets. The system states it contracts with private investment managers to help direct investments for the pension plan. The system argues release of the information at issue would harm its competitive advantage by rendering its investment strategies less effective. Additionally, the system argues release of the information at issue would harm the system's ability to negotiate and obtain favorable terms in future negotiations with private funds. Thus, we conclude the system may withhold the information you marked under [section 552.104\(a\) of the Government Code](#).²

Additionally, a private third party may invoke [section 552.104\(a\)](#). *See id.* Cliffwater, AG Net, and DePrince raise [section 552.104](#) for their information. Cliffwater asserts release of its information at issue would provide a competitive advantage to its competitors. AG Net and DePrince assert release of their information at issue would provide their competitors with a competitive advantage in future proposals and negotiations for investment services. Upon review, we find Cliffwater, AG Net, and DePrince have established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude the system may withhold the information we have marked under [section 552.104\(a\) of the Government Code](#).³

[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 at issue 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 information at issue, we agree the system must withhold the information you marked under [section 552.143\(a\) of the Government Code](#).⁴

In summary, the system may withhold the information you marked and we have marked under [section 552.104\(a\) of the Government Code](#). The system must withhold the information you marked under [section 552.143\(a\) of the Government Code](#). The system 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,

Sidney M. Pounds
Assistant Attorney General
Open Records Division

Footnotes

- ¹ The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ *dism'd*); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990), 452 at 3 (1986), 362 at 2 (1983).
- ² As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.
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