



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 22, 2004

Mr. Dan Junell
Teacher Retirement System of Texas
1000 Red River Street
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OR2004-8095

Dear Mr. Junell:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 209310.

The Teacher Retirement System of Texas (the "system") received a request for:

all minutes and agendas for the board of trustee meetings and meetings of the investment committee between January 1, 2003 and June 30, 2004. This would include subcommittees on investments and investment policy. We would also ask for any attachments, memos, letters, handouts or written items and presentations in connection with agenda items discussed or voted on at these meetings with respect to investments and investment policy decisions, particularly regarding hedge funds and alternative investments.

You state that you will provide the requestor with some of the requested information. You claim that portions of the remaining requested information are excepted from disclosure under sections 552.104, 552.107, 552.111, and 552.117 of the Government Code. Additionally, although you take no position, you raise section 552.110 of the Government Code, claiming that portions of the requested information may contain proprietary information subject to exception under the Public Information Act (the "Act"). Pursuant to section 552.305(d) of the Government Code, you have notified sixty-six interested third parties of the request for information and of their right to submit arguments to us as to why

any portion of the submitted information should not be released.¹ See Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Chapter 552 of Government Code in certain circumstances). We have received arguments from several third parties. We have considered all of the submitted arguments and reviewed the submitted sample of information.²

Initially, we note that Exhibits A, B, D, E, F, G, H7, I, J, K1, and report number 16 in K2 consist of financial information concerning the system's portfolio companies and private investments. There is currently a lawsuit pending against the Office of the Attorney General over the release of similar types of information, *Texas Growth Fund v. Abbott*, Cause No. GN402526, 353rd District Court of Travis County, Texas. You raise section 552.104 of the Government Code for this information.³ Your arguments in the instant request for a decision are similar to the arguments in the pending litigation of the prior ruling. Accordingly, we are closing our file with regard to the financial information concerning the system's portfolio

¹ The interested third parties you notified are: Advent Capital Management, LLC ("ACM"); Angelo, Gordon & Co.; Apex Capital, LLC; AQR Capital Management; The Association for Investment; Avenue Capital Group ("ACG"); Barclays Global Investors ("BGI"); Bear, Stearns & Co., Inc.; Brencourt Advisors, LLC; Callan Associates, Inc.; Carlson Capital, LP; Claiborne Capital Group, LLC; Endeavour Capital Offshore Advisors; Fischer, Francis, Trees and Watts; Forest Investment Management; Gateway Advisors Management, LLC; Halcyon Offshore Management Company, LLC; Hunter Global Investors, LP; Jemmco Capital; JL Advisors, LLC; MIT; Och-Ziff Capital Management Group; PanAgora Asset Management; Perry Capital; Satellite Asset Management, LP ("SAM"); Sirios Capital Management; Standard Pacific Capital, LLC; Tremont Capital Management, Inc. ("Tremont"); Vega Asset Management Ltd; Western Asset Management Company ("WAM"); Zazove Associates, LLC; Apax Partners Holdings, Ltd. ("Apax"); Austin Ventures ("AVF"); Bain Capital, LLC; The Blackstone Group ("Blackstone"); CVC Capital Partners Limited ("CVC"); Candover Partners Limited; The Carlyle Group ("Carlyle"); First Reserve Corporation; Goldman Sachs & Co. ("GSC"); Hellman & Friedman ("Hellman"); Highland Capital Partners ("HCP"); Kelso & Company; Madison Dearborn Partners, Inc. ("MDP"); Nautic Partners, LLC ("Nautic"); Nordic Capital V Limited ("Nordic"); Oak Investment Partners, LP ("OIP"); Onex Partners, LP; Permira Advisors, Ltd. ("Permira"); Polaris Venture Partners ("PVP"); Quad-C Management, Inc. ("Quad-C"); Resolute Fund Partners, LLC; Technology Crossover Ventures ("TCV"); TGF Management Corp. ("TGF"); Thomas Lee Partners; Texas Pacific Group; Whitney & Co., LLC ("Whitney"); Willis Stein & Partners, LLC ("Willis"); Pathway Capital Management, LLC ("Pathway"); State Street PrivateEdge Group; LaSalle Investment Management; Groom Law Group; Ennis, Knupp & Associates; Hester Capital Management, LLC; University of Texas Finance Department; and Gabriel, Roeder, Smith & Company.

² We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

³ We note that although the system does not raise section 552.104 for the information in Exhibit K1, the information in this Exhibit is an exact duplicate of a portion of the information submitted as Exhibit F1 for which you do raise section 552.104.

companies and private investments in Exhibits A, B, D, E, F, G, H7, I, J, K1, and report number 16 in K2 without issuing a decision and will allow the trial court to determine whether the types of information at issue must be released to the public.⁴

Second, we address the information submitted as Exhibit L. Section 552.007 of the Government Code prohibits selective disclosure of information that a governmental body has voluntarily made available to any member of the public. Such information "must be made available to any person." See Gov't Code § 552.007(b). You state that the information submitted as Exhibit L has previously been made available to the public at system Board of Trustees meetings. Thus, since this information has previously been made available to the public by the system, this information must now be provided to the requestor. See also Gov't Code § 552.022(a)(15) (providing for release of information open to public under agency's policies).

Next, we note that an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why requested information relating to that party should be withheld from disclosure. See Gov't Code § 552.305(d)(2)(B). As of the date of this letter, many of the notified third parties have not submitted to this office their reasons explaining why the requested information which relates to them should not be released.⁵ Consequently, these third parties have provided this office with no basis to conclude that their responsive information is excepted from disclosure. See Gov't Code § 552.110(b) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure); Open Records Decision Nos. 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). Thus, we have no basis to conclude that the release of any portion of the submitted information relating to these third parties would implicate their proprietary interests.

We now turn to the arguments made for the remaining information at issue, submitted as Exhibits C, H1, H2, H4, H5, and reports 1 through 15 and 17 through 24 of Exhibit K2. A

⁴ Accordingly, we need not address either the system's remaining arguments or any third-party arguments regarding the information in Exhibits A, B, D, E, F, G, H7, I, J, K1, or report number 16 in K2.

⁵ This office has not received arguments from the following: Angelo, Gordon & Co.; Apex Capital, LLC; AQR Capital Management; The Association for Investment; Bear, Stearns & Co., Inc.; Brencourt Advisors, LLC; Callan Associates, Inc.; Carlson Capital, LP; Claiborne Capital Group, LLC; Endeavour Capital Offshore Advisors; Fischer, Francis, Trees and Watts; Forest Investment Management; Gateway Advisors Management, LLC; Halcyon Offshore Management Company, LLC; Hunter Global Investors, LP; Jemco Capital; JL Advisors, LLC; MIT; Och-Ziff Capital Management Group; PanAgora Asset Management; Perry Capital; Sirios Capital Management; Standard Pacific Capital, LLC; Vega Asset Management Ltd; Zazove Associates, LLC; Bain Capital, LLC; First Reserve Corporation; Kelso & Company; Onex Partners, LP; Texas Pacific Group; State Street PrivateEdge Group; LaSalle Investment Management; Groom Law Group; Ennis, Knupp & Associates; Hester Capital Management, LLC; University of Texas Finance Department; and Gabriel, Roeder, Smith & Company.

number of third parties assert section 552.101 of the Government Code, which excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. However, none of these companies has directed our attention to any law, nor are we aware of any law, under which their information is considered to be confidential for purposes of section 552.101. *See, e.g.*, Open Records Decision Nos. 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality), 611 at 1 (1992) (common-law privacy). Therefore, none of the remaining information is excepted from disclosure under section 552.101 of the Government Code.

Several third parties also assert that their information is excepted from disclosure under section 552.104 of the Government Code. Section 552.104 excepts information from disclosure if a governmental body demonstrates that the release of the information would cause potential specific harm to the governmental body's interests in a particular competitive situation. *See* Open Records Decision Nos. 593 at 2 (1991), 463 (1987), 453 at 3 (1986). However, section 552.104 is not designed to protect the interests of private parties that submit information to a governmental body. *See* Open Records Decision No. 592 at 8-9 (1991). The system has not argued that the release of the remaining information would harm its interests in a particular competitive situation. Therefore, none of the remaining information may be withheld pursuant to section 552.104 of the Government Code.

ACG, ACM, Apax, AVF, BGI, Blackstone, Carlyle, CVC, GSC, HCP, Hellman, MDP, Nautic, Nordic, OIP, Pathway, Permira, PVP, Quad-C, SAM, TCV, Tremont, WAM, Whitney, and Willis assert section 552.110 of the Government Code. This section protects: (1) trade secrets, and (2) commercial or financial information the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. *See* Gov't Code § 552.110(a), (b). Section 552.110(a) protects the property interests of private parties by excepting from disclosure trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *See* Gov't Code § 552.110(a). A "trade secret"

may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives [one] an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business in that it is not simply information as to single or ephemeral events in the conduct of the business, as for example the amount or other terms of a secret bid for a contract or the salary of certain employees. . . . A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as for example, a machine or formula for the production of an article. It may, however, relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

Restatement of Torts § 757 cmt. b (1939); *see also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.); Open Records Decision Nos. 552 at 2 (1990), 255 (1980), 232 (1979), 217 (1978).

There are six factors to be assessed in determining whether information qualifies as a trade secret:

- (1) the extent to which the information is known outside of [the company's] business;
- (2) the extent to which it is known by employees and others involved in [the company's] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and to [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing this information; and
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision Nos. 319 (1982), 306 (1982), 255 (1980), 232 (1979). This office must accept a claim that information subject to the Act is exempted as a trade secret if a *prima facie* case for exemption is made and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990). However, we cannot conclude that section 552.110(a) is applicable unless it has been shown that the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim. Open Records Decision No. 402 (1983).

Section 552.110(b) protects “[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained[.]” Gov’t Code § 552.110(b). This exception to disclosure requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. *Id.*; *see also* Open Records Decision No. 661 at 5-6 (1999).

Based on the submitted arguments and our review of Exhibits C, H1, H2, H4, H5, and reports 1 through 15 and 17 through 24 of Exhibit K2, we find that Pathway and Tremont have sufficiently demonstrated that portions of the information at issue constitute commercial and financial information, the release of which would cause the companies substantial competitive harm. Accordingly, we conclude that the system must withhold the information

that we have marked pursuant to section 552.110(b) of the Government Code.⁶ However, we find that both Pathway and Tremont have failed to make the specific demonstration required by section 552.110 that the release of any of the remaining information at issue constitutes trade secret information or commercial or financial information, the release of which would cause them substantial competitive harm under section 552.110. We therefore conclude that none of the remaining information at issue is excepted from disclosure under section 552.110.

We note that some portions of Exhibits H and K that are not excepted from disclosure are protected by copyright. A governmental body must allow inspection of copyrighted materials unless an exception to disclosure applies to the information. *See* Attorney General Opinion JM-672 (1987). An officer for public information must comply with the copyright law, however, and is not required to furnish copies of records that are copyrighted. *Id.* If a member of the public wishes to make copies of copyrighted materials, he or she must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 at 8-9 (1990).

In summary, we are closing our file with regard to the financial information concerning the system's portfolio companies and private investments in Exhibits A, B, D, E, F, G, H7, I, J, K1, and report number 16 in K2 without issuing a decision and will allow the trial court to determine whether this information must be released to the public. We have marked the information that the system must withhold under section 552.110. The remaining information must be released to the requestor. In releasing information that is protected by copyright, the system must comply with copyright law.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

⁶ Portions of Pathway's information, referred to as the Pathway Reports, contain the commercial and financial information of other third parties, for which these third parties have submitted arguments. As our ruling on Pathway's arguments is dispositive, we need not reach the remaining third-party arguments regarding this information.

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Lauren E. Kleine
Assistant Attorney General
Open Records Division

LEK/jev

Ref: ID# 209310

Enc. Submitted documents

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