



**ATTORNEY GENERAL OF TEXAS**  
**GREG ABBOTT**

January 21, 2005

Mr. Dan Junell  
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OR2005-00631

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# 217149.

The Teacher Retirement System of Texas (the "system") received a request for "... the most recent quarterly report covering the performance of EACH of the private equity/alternative investment funds in which TRS has made a commitment.... I am interested in the following data items on EACH private equity fund to which TRS has committed: Fund Name, Vintage Year, TRS \$ Commitment, Dollars Invested, Dollars Returned, Remaining Value, Internal Rate of Return, Most Recent Performance Information (Quarterly)." You state that you have released some of the responsive information to the requestor. Although you take no position with respect to the remaining information, you claim that some of the requested information may contain proprietary information subject to exception under the Public Information Act. Pursuant to section 552.305(d) of the Government Code, the system notified 58 interested third parties of the system's receipt of the request and of their right to submit arguments to us as to why any portion of the submitted information should not be released.<sup>1</sup> See Gov't

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<sup>1</sup>The interested third-parties that you inform us you notified are: Oak Investment Partners X, LP, Oak Investment Partners XI, LP (collectively, "Oak Investment"), Kelso Investment Associates VII, LP ("Kelso"), The Resolute Fund, LP ("Resolute"), Texas Growth Fund - 1991 Trust, Texas Growth Fund - 1995 Trust, Texas Growth Fund - 1998 Trust (collectively "Texas Growth Fund"), Nautic Partners V, LP ("Nautic"), Advent Convertible Arbitrage (Cayman) Fund, Raphael II, Ltd, Zaxis Institutional Partners, LP, Zaxis Offshore Limited, AQR Global Stock Selection Offshore (USD), Ltd, Avenue International, Ltd, The 12 Capital Fund SPC Ltd - US Large Cap, The 12 Capital Fund SPC Ltd - US Small Cap, Bear Stearns Global Equity Arbitrage Offshore Fund, Ltd, Brencourt Arbitrage International, Ltd, Black Diamond Convertible II, Ltd, Black Diamond

Code §552.305(d); *see also* 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 to disclosure under the Act in certain circumstances). The system has submitted the information at issue to this office. To date, we have only received written comments from Oak Investment, Kelso, Resolute, Texas Growth Fund, and Nautic. We have considered arguments received from these third parties and have reviewed the submitted information.<sup>2</sup>

First, we note that Nautic and Texas Growth Fund do not object to the release of their information that the system deems responsive to the instant request for information. Accordingly, the information related to these parties must be released. Both Kelso and Oak Investment state that they only object to the release of information responsive to the request for “Most Recent Performance Information (Quarterly)” to the extent that the responsive information includes portfolio company information. Kelso also argues that its limited partnership agreement is excepted from disclosure. The submitted information does not consist of portfolio company information or Kelso’s limited partnership agreement. Therefore, because the types of information considered by Kelso and Oak Investment to be protected trade secret or commercial information are not responsive to the instant request, we need not address their arguments.

Resolute argues that all of their information is excepted from disclosure pursuant to sections 552.101, 552.104, and 552.110 of the Government Code. Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Common law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Resolute asserts that the responsive information includes financial information regarding Resolute that would be considered

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Offshore, Ltd, CCPI Holdings, Ltd, FFTW Diversified Alpha Fund, Ltd, Halcyon Offshore Event-Driven Strategies Fund, Hunter Global Investors Offshore Fund, Ltd, JL Partners, LP, OZ Convertible Overseas Fund, Ltd, PanAgora Structured Market Neutral Fund, Ltd, Perry Partners International, Ltd, Satellite Overseas Fund VI, Ltd, Sirios Overseas Fund II, Ltd, Standard Pacific Capital Offshore Fund, Ltd, Zazove Offshore Hedged Convertible Fund, Ltd, Apax Europe V - A, LP, Austin Venture VIII, LP, Bain Capital VII Coinvestment Fund, LP, Bain Capital VIII, LP & Bain Capital Fund VIII Coinvestment, Blackstone Capital Partners IV, LP, Candover 2001 Fund, Carlyle Partners III, LP, CVC European Equity Partners III, LP, First Reserve Fund IX, LP, First Reserve Fund X, LP, GS Vintage Fund, LP, Hellman & Friedman Capital Partners V, LP, Highland Capital Partners VI-B, LP, Madison Dearborn Capital Partners IV, LP, Nordic Capital V, LP, Onex Partners LP, Permira Europe III, Polaris Venture Partners IV, LP, Quad-C Partners VI, LP, Thomas H. Lee V, TPG Partners IV, LP, Whitney V, LP, Willis Stein & Partners III, LP, Crestmont Diversified Corp, OZ Overseas Fund, Ltd, and Red River Limited Partnership.

<sup>2</sup>This ruling only addresses the information submitted by the system as responsive to the instant request for information. *See* Gov’t Code § 552.301(e)(1)(D).

intimate and of no legitimate public interest. However, information regarding a financial transaction between an individual and a governmental body is a matter of legitimate public interest; thus, the doctrine of common law privacy does not apply in this instance. *See* Open Records Decision No. 590 at 3 (1991), 523 at 3-4 (1989). We also note that common law privacy protects the privacy interests of individuals, but not of corporations or other types of business organizations. *See* Open Records Decision Nos. 620 (1993) (corporation has no right to privacy), 192 (1978) (right to privacy is designed primarily to protect human feelings and sensibilities, rather than property, business, or other pecuniary interests); *see also* *U. S. v. Morton Salt Co.*, 338 U.S. 632, 652 (1950); *Rosen v. Matthews Constr. Co.*, 777 S.W.2d 434 (Tex. App.—Houston [14th Dist.] 1989), *rev'd on other grounds*, 796 S.W.2d 692 (Tex. 1990) (corporation has no right to privacy).

Resolute also claims that their information is excepted under section 552.104 of the Government Code. 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). 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). The system has not argued that the release of submitted information would harm its interests in a particular competitive situation. Therefore, Resolute's information may not be withheld pursuant to section 552.104 of the Government Code.

Section 552.110 of the Government Code protects the proprietary interests of private parties by excepting from disclosure two types of information: (1) "[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision," and (2) "commercial 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(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 Public Information Act is excepted 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).

Having reviewed the submitted arguments, we conclude that Resolute has not demonstrated that their information qualifies as trade secret for purposes of section 552.110(a) of the Government Code. We also find that Resolute has not made the specific factual or evidentiary showing required under section 552.110(b) that the release of their information would likely result in substantial competitive harm to them. Accordingly, the system may not withhold any of the information related to Resolute pursuant to section 552.110 of the Government Code.

Additionally, 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 information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this decision, the remaining interested third parties have not submitted to this office any reasons explaining why their information should not be released. Therefore, these parties have provided us with no basis to conclude that they have a protected proprietary interest in any of the submitted information. *See, e.g.*, 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, the remaining submitted information must be released.

In summary, we conclude that all of the submitted information must be released.

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).

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,



Amanda Crawford  
Assistant Attorney General  
Open Records Division

AEC/sdk

Ref: ID# 217149

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