



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

May 28, 2013

Mr. W. Montgomery Meitler  
Assistant Counsel  
Office of Legal Services  
Texas Education Agency  
1701 North Congress Avenue  
Austin, Texas 78701-1494

OR2013-08839

Dear Mr. Meitler:

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# 488443 (TEA PIR No. 19352).

The Texas Education Agency (the "agency") received a request for information related to hedge fund management during specified time periods and certain correspondence. You state you have no information responsive to the request for correspondence.<sup>1</sup> You also state you have released some information. You claim some of the submitted information is excepted from disclosure under section 552.143 of the Government Code. In addition, you state release of some of the submitted information may implicate the proprietary interests of certain third parties. Accordingly, you have notified Blackstone Alternative Asset Management, L.P. ("Blackstone"), GAM USA, Inc. ("GAM"), Grosvenor Capital Management, L.P. ("Grosvenor"), K2 Advisors ("K2"), and Mesirow Financial Advanced Strategies, Inc. ("Mesirow") of the request and of each company's right to submit arguments to this office as to why the requested 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 the circumstances). We have received comments submitted by representatives of Blackstone,

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<sup>1</sup>We note the Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986).

Grosvenor, K2, and Mesirow. 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 arguments from GAM. Thus, GAM has not demonstrated the company has a protected proprietary interest in any of 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 agency may not withhold the submitted information on the basis of any proprietary interest GAM may have in the information.

Next, we note Grosvenor and Mesirow seek to withhold information not submitted to this office by the agency. Because this information was not submitted by the agency, this ruling does not address this information and is limited to the information submitted as responsive by the agency. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested).

Grosvenor states its information is marked “confidential and proprietary” and the agency agreed to keep the information at issue confidential. We note information is not confidential under the Act simply because the party that submits the information anticipates or requests it be kept confidential. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot overrule or repeal provisions of the Act by agreement or contract. *See* Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) (“[T]he obligations of a governmental body under [the Act] cannot be compromised simply by its decision to enter into a contract.”), 203 at 1 (1978) (mere expectation of confidentiality by person supplying information did not satisfy requirements of statutory predecessor to Gov't Code § 552.110). Grosvenor has not identified any law that authorizes the agency to enter into an agreement to keep any of the submitted information confidential. Therefore, the agency may not withhold Grosvenor's information unless it falls within the scope of an exception to disclosure, notwithstanding any expectation or agreement to the contrary.

Section 552.143 of the Government Code provides in relevant 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.

(b) Unless the information has been publicly released, pre-investment and post-investment diligence information, including reviews and analyses, prepared for or maintained by a governmental body or a private investment fund is confidential and excepted from the requirements of Section 552.021, except to the extent it is subject to disclosure under Subsection (c).

(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), (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.

Gov't Code § 552.143(a)-(c). K2 and Mesirow state some of their respective information consists of information prepared and provided by a private investment fund. K2 and Mesirow each inform us the information they seek to withhold is not subject to section 552.0225(b). *See id.* § 552.0225(b) (listing categories of information held by governmental body relating to its investments that are public and not excepted from disclosure under the Act). Based on these representations and our review, we find, with the exception of information the agency must release pursuant to section 552.0225(b) of the Government Code, the agency must withhold Mesirow's submitted information in its entirety and the information indicated by K2 under section 552.143(a) of the Government Code.<sup>2</sup> The agency states the information it has indicated has not been publicly released and consists of pre-investment diligence information prepared by the agency or provided to the agency by a private investment fund, and we understand this information is not subject to disclosure pursuant to subsection 552.143(c) of the Government Code. Based on the agency's representations, we find section 552.143(b) of the Government Code is applicable to the information at issue, and the agency must withhold the information it has indicated on that basis. Blackstone asserts its submitted information contains diligence information prepared by Blackstone that has not been publicly released and is subject to section 552.143(b) of the Government Code. Upon review, we find section 552.143(b) of the Government Code is applicable to some of the information at issue, and the agency must withhold the information we have marked on that basis. However, we find Blackstone has failed to demonstrate any portion of its remaining information consists of pre- or post-investment diligence information prepared or maintained by the agency or a private investment fund for the purposes of subsection 552.143(b). Accordingly, the agency may not withhold any portion of Blackstone's remaining information at issue under section 552.143 of the Government Code.

Blackstone and Grosvenor assert section 552.110 of the Government Code for their respective information. Section 552.110 protects (1) trade secrets, and (2) commercial or

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<sup>2</sup>As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

financial information, the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. *See id.* § 552.110(a)-(b). Section 552.110(a) protects trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *Id.* § 552.110(a). The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts, which holds a trade secret to be:

any formula, pattern, device or compilation of information which is used in one's business, and which gives him 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 . . . . A trade secret is a process or device for continuous use in the operation of the business . . . . [It may] 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 776 (Tex. 1958). In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors.<sup>3</sup> This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for the exception is made and no argument is submitted that rebuts the claim as a matter of law. *See* ORD 552 at 5. 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).

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<sup>3</sup>The Restatement of Torts lists the following six factors as indicia of whether information constitutes a trade secret:

- (1) the extent to which the information is known outside of [the company];
- (2) the extent to which it is known by employees and other 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 [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing the information;
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b; *see* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

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. *See id.*; *see also* ORD 661 at 5.

Upon review, we find Blackstone has failed to establish any portion of its information meets the definition of a trade secret, nor has it demonstrated the necessary factors to establish a trade secret claim. Accordingly, the agency may not withhold any of the information at issue under section 552.110(a) of the Government Code. Upon review, we find Grosvenor has established some of its information, which we have marked, constitutes commercial or financial information, the release of which would cause the company substantial competitive injury. Therefore, the agency must withhold the information we have marked under section 552.110(b) of the Government Code. However, we find Blackstone and Grosvenor have failed to demonstrate release of any of the remaining information would cause either company substantial competitive injury. Accordingly, the agency may not withhold the information at issue under section 552.110(b) of the Government Code.

We note some of the remaining information may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; *see* Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, the person 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.

In summary, with the exception of information the agency must release pursuant to section 552.0225(b) of the Government Code, the agency must withhold Mesirow’s submitted information in its entirety and the information indicated by K2 under section 552.143(a) of the Government Code. The agency must withhold the information it has indicated and the information we have marked under section 552.143(b) of the Government Code. The agency must release the remaining information, but any information subject to copyright may only be released in accordance with copyright law.

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.oag.state.tx.us/open/index\\_orl.php](http://www.oag.state.tx.us/open/index_orl.php), 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 must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Jennifer Burnett  
Assistant Attorney General  
Open Records Division

JB/tch

Ref: ID# 488443

Enc. Submitted documents

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(w/o enclosures)

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