



November 15, 2002

Ms. Belinda R. Perkins
Teacher Retirement System of Texas
1000 Red River Street
Austin, Texas 78701-2698

OR2002-6528

Dear Ms. Perkins:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 172231.

The Teachers Retirement System of Texas (the "system") received a request for copies of the partnership agreements of the following private equity and venture capital limited partnerships: Bain Capital VII Coinvest ("Bain"), Blackstone Capital Partners IV ("Blackstone"), Highland Capital VI ("Highland"), Nautic Partners V ("Nautic"), Polaris Venture Partners IV ("Polaris"), Quad-C Partners VI ("Quad-C"), and Whitney Equity Partners V ("Whitney"). Although you take no position regarding the proprietary nature of the requested information, you have notified the seven named companies of the request and their opportunity to submit comments to this office. *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 Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure in certain circumstances). You indicate that Bain does not object to the release of its information. The remaining third parties assert that information is excepted from disclosure under sections 552.101, 552.104, and 552.110 of the Government Code. We have considered the claimed exceptions and reviewed the submitted information. We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing for submission of public comments).

Highland, Polaris, and Quad-C each argue that section 552.104 of the Government Code should except the requested information from disclosure. This section excepts "information that, if released, would give advantage to a competitor or bidder." The purpose of section 552.104 is to protect a governmental body's interests in competitive bidding situations. *See* Open Records Decision No. 592 (1991). This section protects the interests of governmental bodies, not third parties. Open Records Decision No. 592 (1991). Although these third

parties purport to raise this section in order to protect the interests of governmental entities, section 552.104 is a discretionary exception. Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.*, Open Records Decision No. 592 at 8 (1991) (governmental body may waive predecessor to section 552.104, information relating to competition or bidding), 522 at 4 (1989) (discretionary exceptions in general). Because of the nature and purpose of discretionary exceptions, they may not be raised by a third party. As the system has chosen not to raise this exception, we conclude that none of the requested information may be withheld under section 552.104.

Blackstone, Highland, Nautic, Polaris, Quad-C, and Whitney each assert that its respective partnership agreement is excepted from disclosure pursuant to section 552.110. Section 552.110(b) protects the property interests of private persons by excepting from disclosure 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. This exception requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would result from disclosure. Gov't Code § 552.110(b); *see* Open Records Decision No. 661 (1999); *see also National Parks and Conservation Association v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974); Open Records Decision No. 639 at 4 (1996) (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). Having reviewed the submitted arguments and information, we conclude that each of these third parties has provided evidence that release of its partnership agreement would result in substantial competitive harm. Accordingly, we conclude that, in accordance with section 552.110(b), the system must withhold from disclosure the requested partnership agreements of Blackstone Highland, Nautic, Polaris, Quad-C, and Whitney.

We note that the submitted information concerning Bain includes information indicating whether certain officials and employees of the system have family members. Family member information of a current or former official or employee of a governmental body is excepted from disclosure under section 552.117(1) of the Government Code if the official or employee elected to keep such information confidential prior to the date on which the request for information was received. *See* Gov't Code 552.024; *see also* Open Records Decision Nos. 622 at 5-6 (1994); 455 at 2-3 (1987). However, the governmental body may not withhold this information if the official or employee failed to request confidentiality under section 552.024 or made such a request after the request for information was received. Whether a particular piece of information is public must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Accordingly, if any of the system employees and officials listed in the submitted "TRS Persons" forms elected, prior to the receipt of this request for information, to keep confidential their family member information,

the system must withhold such information. However, the system must release the family member information of any employee or official who did not make a timely election. We have marked the information that the system must withhold if section 552.117 applies.

In summary, the system must withhold the requested partnership agreements pertaining to Blackstone, Highland, Nautic, Polaris, Quad-C, and Whitney under section 552.110(b). We have marked information in the records concerning Bain that refers to the family member status of system officials and employees and that must be withheld under section 552.117 for any official or employee who made a timely election under section 552.024. The remaining 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).

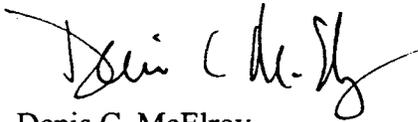
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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 Department of Public 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,



Denis C. McElroy
Assistant Attorney General
Open Records Division

DCM/lmt

Ref: ID# 172231

Enc. Submitted documents

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