



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

December 12, 2002

Ms. Christy W. Wallace
Assistant Secretary
The University of Texas Investment Management Company
221 West Sixth Street, Suite 1700
Austin, Texas 78701

OR2002-7084

Dear Ms. Wallace:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 173648.

The University of Texas Investment Management Company ("UTIMCO") received a request for information regarding the "fund size (both the total commitment and the amounts invested/drawdown), fees and performance" of private equity funds managed by twenty-four named firms. You indicate that the requestor since clarified his request, indicating that he is seeking information regarding "how much UTIMCO pays in management fees (as a percentage of commitments) and how much carried interest each general partner earns (as a percentage of profits). Although you do not assert any exceptions on behalf of UTIMCO, you indicate that the request may implicate the proprietary rights of the third parties whose information was requested. Consequently, you state that you have notified the third parties of the request pursuant to section 552.305 of the Government Code. This office has since received briefing from the following third parties: Atlas Venture Fund VI, L.P. ("AV"), Baker Capital Partners, L.L.C. and Baker Capital Partners II, L.L.C. (collectively referred to as "Baker Capital"), Prism Venture Partners ("Prism"), and CVC European Equity Partners, L.P. ("CVC"). We have considered all of the submitted briefing and reviewed the submitted information.

We begin by addressing Baker Capital's apparent argument that its information is not subject to section 552.022 of the Government Code, and therefore, is not subject to required public disclosure under the Public Information Act (the "Act"). Information in the possession of

a governmental body relating to the transaction of the governmental body's official business is considered public information for purposes of the Act. *See* Gov't Code §§ 552.002, .021; Open Records Decision No. 363 (1983). Such information may only be withheld from the public if the governmental body or third party is able to demonstrate to this office that the information is within one of the exceptions listed under subsection C of the Act. *See* Open Records Decision Nos. 542 at 2-3 (1990), 363 (1983). Furthermore, section 552.022 does not serve as an exhaustive list of public information or as an exception to information by negative implication. Rather, it lists eighteen categories of public information that generally may be withheld only if confidential by law or as otherwise noted in the section. *See* Gov't Code § 552.022 (Section 552.022(a) expressly states that it does not limit "the amount or kind of information that is public information under this chapter.").

Because the submitted information "govern[s] [UTIMCO's] investment of its funds in private investment partnerships," we find that the submitted investment information consists of information maintained by UTIMCO in connection with the transaction of its official business. Therefore, in order for the information to be withheld from the requestor, the information must fall under an exception listed in subsection C of the Act. *See* Gov't Code § 552.301; ORD 542 at 2-3, 363. We will therefore proceed to address the exceptions raised by Baker Capital and the remaining third parties.

Both AV and Baker Capital contend that their information is excepted from disclosure under section 552.104 of the Government Code. The purpose of section 552.104 of the Government Code is to protect a governmental body's interests in competitive bidding situations. Open Records Decision No. 592 (1991). Thus, section 552.104 protects the interests of governmental bodies, not third parties. *Id.* Because UTIMCO does not raise section 552.104, this section is not applicable to the information relating to AV and Baker Capital. *Id.* (Gov't Code § 552.104 may be waived by governmental body).

Similarly, Baker Capital contends that its information is excepted from disclosure under section 552.112 of the Government Code. Section 552.112 excepts from public disclosure "information contained in or relating to examination, operation, or condition reports prepared by or for an agency responsible for the regulation or supervision of financial institutions or securities, or both." Like section 552.104, section 552.112 is designed to protect the interests of a governmental body, not third parties. *See Birnbaum v. Alliance of Am. Insurers*, 994 S.W.2d 766, 776 (Tex. App.--Austin 1999, pet. denied). Because UTIMCO does not raise section 552.112, this section also is not applicable to the Baker Capital's information. *Id.*

Both Baker Capital and AV also contend that their information is excepted from disclosure under section 552.110 of the Government Code. Section 552.110 protects the property interests of private persons by excepting from disclosure two types of information: (1) trade secrets 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. With respect to the trade secret prong of section 552.110, we note that the Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 at 2 (1990). Section 757 provides that a trade secret is:

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). 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. RESTATEMENT OF TORTS § 757 cmt. b (1939).¹ This office has held that if a governmental body takes no position with regard to the application of the trade secret branch of section 552.110 to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5-6 (1990).

¹The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are:

- (1) the extent to which the information is known outside of [the company];
- (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 [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 (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

With respect to the commercial and financial information prong of section 552.110, we note that the 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).

Baker Capital and AV contend that their information is excepted under both prongs of section 552.110. Both contend that information revealing the fees and carried interest percentages they have established with UTIMCO are trade secrets. However, after reviewing Baker Capital's and AV's arguments, we find that neither has adequately demonstrated that their fee and carried interest information consists of "a process or device for continuous use in the operation of the business." Therefore, we find that UTIMCO may not withhold either Baker Capital's or AV's information under the trade secret prong of section 552.110. *See* Open Records Decision Nos. 319 at 3 (1982), 306 at 3 (1982). In addition, Baker Capital and AV contend that release of their fees and carried interest percentages would cause them substantial competitive harm. Specifically, Baker Capital argues that releasing its information could allow competitors "to underbid or outbid Baker Capital in a future procurement endeavor." Similarly, AV contends that release of its information would give an advantage to competitors by allowing them to contact AV's current or future investors and compete with AV for the investment capital. AV also contends that releasing its information would have a chilling effect on future fundraising. Despite Baker Capital's and CV's arguments, we find that the public has a strong interest in UTIMCO's compensation arrangement with both Baker Capital and CV, as reflected by the management fees and the carried interest percentage. *See* Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors); Open Records Decision No. 494 (1988) (requiring balancing of public interest in disclosure with competitive injury to company); *see also* Open Records Decision No. 319 (1982) (pricing proposals may only be withheld under the predecessor to section 552.110 during the bid submission process); Freedom of Information Act Guide & Privacy Act Overview (1995) 151-152 (disclosure of prices charged the government is a cost of doing business with the government). Consequently, we find that UTIMCO may not withhold the information relating to either Baker Capital or CV based on the commercial or financial information prong of section 552.110 of the Government Code.

This office also received correspondence from Prism and CVC. However, neither Prism nor CVC objects to the release of their information. Therefore, UTIMCO must release the information pertaining to Prism and CVC. In addition, as of the date of this ruling, this office has not received any briefing from the remaining interested third parties. Thus, none of the remaining third parties has provided this office with a basis, nor are we aware of any basis, for concluding that their information is proprietary and 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). Consequently, UTIMCO must release the information pertaining to the remaining third parties as well. In summary, UTIMCO may not withhold any of the submitted information.

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); *Tex. 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,



Nathan E. Bowden
Assistant Attorney General
Open Records Division

NEB/sdk

Ref: ID# 173648

Enc: Submitted documents

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