



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

February 28, 2003

Mr. Jesús Toscano, Jr.
Administrative Assistant City Attorney
City of Dallas
1500 Marilla Street
Dallas, Texas 75201

OR2003-1285

Dear Mr. Toscano:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 177190.

The Dallas Police and Fire Pension System (the "system") received a request for four categories of information related to the system's investment in funds operated by Oaktree Capital Management, LLC ("Oaktree"). The requestor subsequently clarified his request to include the system's "investment and/or prospective investment in all funds managed by [Oaktree], including, but not limited to Oaktree's real estate funds." You state that some responsive information will be provided to the requestor. You claim that a portion of the requested information is excepted from disclosure under sections 552.101, 552.103, 552.104, 552.107, 552.110, and 552.305 of the Government Code.¹ You state that some of the

¹As you did not submit to this office written comments within fifteen business days of the system's receipt of the request for information stating the reasons why sections 552.103 and 552.104 would allow the information to be withheld, we find that you have waived these exceptions. *See* Gov't Code §§ 552.301, .302; *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.-Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 522 at 4 (1989) (discretionary exceptions in general), 473 at 2 (1987) (discretionary exceptions under the Public Information Act (the "Act") can be waived).

Furthermore, we note that section 552.305 is not an exception to the disclosure of information under the Act. Rather, section 552.305 permits a governmental body to rely on an interested third party to raise and

requested information may implicate the privacy or property interest of a third party. You indicate, and provide documentation showing, that the system notified Oaktree, an interested third party, of the request for information in order to afford Oaktree an opportunity to supply objections to release of the submitted information. *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 in Act in certain circumstances). This office has received a response from Oaktree objecting to the release of some of its information. We have considered all submitted arguments and reviewed the submitted representative samples of information.² We have also considered the arguments submitted by the requestor. *See* Gov't Code § 552.304 (providing for submission of public comments).

We first address the system's claim that the submitted information in Exhibit C is excepted from public disclosure under section 552.107 of the Government Code as information protected by the attorney-client privilege. Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each

explain the applicability of exceptions in the Act in certain circumstances. *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).

²We 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.

communication at issue has been made. Lastly, the attorney-client privilege applies only to a *confidential* communication, *id.* 503(b)(1), meaning it was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5). Whether a communication meets this definition depends on the *intent* of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein). Upon review, we agree that the documents you seek to withhold under the attorney-client privilege consist of confidential communications made by an attorney for the purpose of facilitating the rendition of professional legal services to the client governmental body. Thus, the system may withhold the submitted information in Exhibit C under section 552.107(1) of the Government Code.

We next address the arguments submitted to this office by Oaktree in relation to the information submitted in Exhibits D-G. Oaktree argues that this information must be withheld from disclosure because its partnership agreements contain a confidentiality agreement restricting the use and release of information relating to its operations and activities. However, information that is subject to disclosure under the Act may not be withheld simply because the party submitting it anticipates or requests confidentiality. *See Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 676-78 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Further, it is well-settled that a governmental body’s promise to keep information confidential is not a basis for withholding that information from the public, unless the governmental body has specific authority to keep the information confidential. *See Open Records Decision Nos.* 514 at 1 (1988), 476 at 1-2 (1987), 444 at 6 (1986). Consequently, the submitted information must fall within an exception to disclosure in order to be withheld.

Oaktree raises section 552.101 of the Government Code, which excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Section 552.101 encompasses information that other law deems to be confidential. *See Open Records Decision Nos.* 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality), 611 at 1 (1992) (common-law privacy). Oaktree has not directed our attention to any law, nor are we aware of any law, under which any of the information that Oaktree seeks to have withheld is deemed to be confidential for purposes of section 552.101. Thus, Oaktree has not demonstrated that section 552.101 is applicable to any of its information.

Oaktree also claims that the submitted information in Exhibits D-G 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).³ 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

³The 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).

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). 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. See Open Records Decision No. 402 (1983).

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).

Oaktree argues that the information at issue is excepted under both prongs of section 552.110. Oaktree contends, generally, that information revealing the terms on which it is willing to do business and the companies in which it has invested, its investment strategies, and the identities of Oaktree's investors and limited partners is trade secret information. However, it appears that this information relates solely to specific partnerships and specific investments. Thus, we find that Oaktree has not adequately demonstrated that such information consists of "a process or device for continuous use in the operation of the business." Therefore, we find that the system may not withhold any of the submitted information in Exhibits D-G under the trade secret prong of section 552.110. See Open Records Decision Nos. 319 at 3 (1982), 306 at 3 (1982).

Additionally, Oaktree contends that release of information revealing the terms on which it is willing to do business and the companies in which it has invested, its investment strategies, and the identities of Oaktree's investors and limited partners would cause Oaktree substantial competitive harm. Specifically, Oaktree argues that releasing its information could allow competitors "to undercut Oaktree's terms," manipulate pricing of investments, and "mimic Oaktree's analyses and investment philosophies when bidding for the same or similar assets." Oaktree further contends that release of its information would disadvantage the company in competition for future investment capital.

After reviewing the information at issue and the arguments submitted by Oaktree, we conclude that Oaktree has demonstrated how the release of most of the information it seeks to withhold would result in substantial competitive injury to Oaktree, and, therefore, these portions are excepted from public disclosure as confidential commercial and financial information. Specifically, we conclude that Oaktree has demonstrated that the following portions of the submitted information come under the protection of section 552.110(b): in Exhibit D, Limited Partnership Agreements, side letters, distribution notices, and drawdown notices; in Exhibit E, quarterly and annual reports, financial statements, performance updates, and OCM Fund presentations and reviews. The system must also withhold Exhibits F and G in their entirety. We find, however, that the public has a strong interest in the system's compensation arrangement with Oaktree, as reflected by the management fees. 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 the system may not withhold the information relating to management fees paid by the system based on the commercial or financial information prong of section 552.110 of the Government Code. The remaining submitted information must be released, except as discussed below.

The submitted information also contains e-mail addresses obtained from members of the public. Section 552.137 of the Government Code makes certain e-mail addresses confidential. Section 552.137 provides:

- (a) An e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.
- (b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

Gov't Code §552.137. You do not inform us that a member of the public has affirmatively consented to the release of any e-mail address contained in the submitted materials. Therefore, to the extent that e-mail addresses of members of the public are not otherwise protected from disclosure under section 552.110, the system must withhold such e-mail addresses under section 552.137. We have marked a representative sample of the type of information that is excepted from disclosure under section 552.137. Please note, however, that section 552.137 does not make confidential a company's website or a public employee's governmental e-mail address.

In summary, the system may withhold the submitted information in Exhibit C under section 552.107(1). The system must withhold from disclosure the above-specified portions of the submitted information pursuant to section 552.110. To the extent that e-mail addresses of members of the public are not otherwise protected from disclosure under section 552.110, the system must withhold such e-mail addresses under section 552.137. The remaining submitted information must be released to the requestor.

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,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/jh

Ref: ID# 177190

Enc. Submitted documents

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