



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 17, 2004

Mr. Dan Junell
Assistant General Counsel
Teacher Retirement System of Texas
1000 Red River
Austin, Texas 78701-2698

OR2004-6981

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# 207410.

The Teacher Retirement System of Texas (the "system") received a request for five categories of information related to the system's alternative assets portfolio. You state that the system has provided the requestor with some of the requested information. The system takes no position with regard to the release of the remaining requested information. However, you have notified twenty-five interested third parties of the request for information pursuant to section 552.305 of the Government Code.¹ *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 section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Public Information Act in certain circumstances). The system has submitted the information at issue to this office. We also received correspondence from CVC, Candover, First Reserve, Nautic, Oak Investment, Onex, Polaris, Quad-C, Resolute Fund, and Whitney. We have considered their arguments

¹The interested third parties you notified are: Apex Partners Holdings, Ltd.; Austin Ventures; Bain Capital, LLC; The Blackstone Group; CVC Capital Partners Limited ("CVC"); Candover Partners Limited ("Candover"); The Carlyle Group; First Reserve Corporation ("First Reserve"); Goldman Sachs & Co.; Highland Capital Partners; The Jordan Company; Kelso & Company; Madison Dearborn Partners, Inc.; Nautic Partners, LLC ("Nautic"); Nordic Capital V Limited; Oak Investment Partners X, L.P. ("Oak Investment"); Onex Partners LP ("Onex"); Permira Advisors, Ltd.; Polaris Venture Partners ("Polaris"); Quad-C Management, Inc. ("Quad-C"); Resolute Fund Partners, LLC ("Resolute Fund"); TGF Management Corp.; Thomas Lee Partners; Whitney & Co., LLC ("Whitney"); and Willis Stein & Partners, LLC.

and reviewed the submitted information.² We have also considered comments submitted by a representative of the requestor. *See* Gov't Code § 552.304 (providing that person may submit comments stating why information should or should not be released).

First, CVC, Nautic, Oak Investment, Onex, and Polaris 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.

Next, Resolute Fund asserts section 552.101 of the Government Code, which excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Resolute Fund has not directed our attention to any law, nor are we aware of any law, under which any of its information is considered to be confidential for purposes of section 552.101. *See, e.g.*, Open Records Decision Nos. 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality), 611 at 1 (1992) (common-law privacy). Therefore, none of the submitted information related to Resolute Fund is excepted from disclosure under section 552.101 of the Government Code.

Resolute Fund also asserts that its information is excepted from disclosure 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 Fund's information may not be withheld pursuant to section 552.104 of the Government Code.

Candover, First Reserve, Quad-C, Resolute Fund, and Whitney assert section 552.110 of the Government Code. This section protects: (1) trade secrets, and (2) commercial or financial information the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. *See* 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

²This 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).

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 ("Act") is exempted 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 briefs, we conclude that Candover, Quad-C, Resolute Fund, and Whitney have not demonstrated that their information qualifies as trade secret for purposes of section 552.110(a) of the Government Code.³ We also find that Candover, First Reserve, Quad-C, Resolute Fund, and Whitney have 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 Candover, Pathway, Quad-C, Resolute Fund, and Whitney pursuant to section 552.110 of the Government Code. As these parties make no additional arguments, their information must be released.

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). Therefore, 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

³First Reserve does not assert section 552.110(a) of the Government Code.

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,



W. Montgomery Meitler
Assistant Attorney General
Open Records Division

WMM/krl

Ref: ID# 207410

Enc: Submitted documents

c: Ms. Yamil Berard
Fort Worth Star-Telegram
P. O. Box 1870
Fort Worth, Texas 76101
(w/o enclosures)

Mr. Thomas J. Williams
Haynes and Boone, LLP
201 Main Street, Suite 2200
Fort Worth, Texas 76102-3126
(w/o enclosures)

Mr. Philip Prescott
CVC Capital Partners Limited
111 Strand
London, England WC2R 0AG
(w/o enclosures)

Mr. Philip Symonds
Candover Partners Limited
20 Old Bailey
London, England EC4M 7LN
(w/o enclosures)

Mr. Thomas Denison
Managing Director
First Reserve Corporation
One Lafayette Place
Greenwich, Connecticut 06830
(w/o enclosures)

Ms. Cynthia L. Balasco
Chief Financial Officer
Nautic Partners, LLC
50 Kennedy Plaza
Providence, Rhode Island 02903
(w/o enclosures)

Ms. Ann Lamont
Oak Investment Partners
One Gorham Island
Westport, Connecticut 06880
(w/o enclosures)

Ms. Andrea E. Daly
General Counsel
Onex Partners LP
161 Bay Street
Toronto, Canada M5J 2S1
(w/o enclosures)

Mr. Kevin F. Littlejohn
Chief Financial Officer
Polaris Venture Partners
1000 Winter Street, Suite 3350
Waltham, Massachusetts 02451-1215
(w/o enclosures)

Mr. Stephen M. Burns
Quad-C Management, Inc.
230 East High Street
Charlottesville, Virginia 22902
(w/o enclosures)

Mr. David W. Zalaznick
Resolute Fund Partners, LLC
767 Fifth Avenue, 48th Floor
New York, New York 10153
(w/o enclosures)

Mr. Kevin J. Curley
General Counsel
Whitney & Co., LLC
177 Broad Street
Stamford, Connecticut 06901
(w/o enclosures)

Mr. Clive Sherling
Apax Partners Holdings, Ltd.
15 Portland Place
London, England W1B 1PT
(w/o enclosures)

Mr. Joe Aragona
Austin Ventures
300 West Sixth Street, Suite 2300
Austin, Texas 78701
(w/o enclosures)

Mr. Bear Albright
Bain Capital, LLC
111 Huntington Avenue
Boston, Massachusetts 02199
(w/o enclosures)

Mr. Kenneth Whitney
The Blackstone Group
345 Park Avenue
New York, New York 10154
(w/o enclosures)

Mr. David Rubenstein
The Carlyle Group
1001 Pennsylvania Avenue, NW
Washington, DC 20004-2505
(w/o enclosures)

Mr. Brad Williams
Goldman Sachs & Co.
32 Old Slip
New York, New York 10005
(w/o enclosures)

Mr. George Matelich
Kelso & Company
320 Park Avenue, 24th Floor
New York, New York 10022
(w/o enclosures)

Mr. David Mosher
Madison Dearborn Partners, Inc.
Three First National Plaza, Suite 3800
Chicago, Illinois 60602
(w/o enclosures)

Mr. Mans Folkesson
Nordic Capital V Limited
Stureplan 4A
Stockholm, Sweden SE-114 35
(w/o enclosures)

Mr. Philip Basset
Permira Advisors, Ltd.
20 Southampton Street
London, England WC2E 7QH
(w/o enclosures)

Mr. John W. Jordan
The Jordan Company
767 Fifth Avenue, 48th Floor
New York, New York 10153
(w/o enclosures)

Mr. Stephen Soileau
TGF Management Corp.
111 Congress Avenue, Suite 2900
Austin, Texas 78701-4098
(w/o enclosures)

Mr. Seth Lawry
Thomas Lee Partners
100 Federal Street, 35th Floor
Boston, Massachusetts 02110
(w/o enclosures)

Mr. Avy Stein
Willis Stein & Partners, LLC
One North Wacher Drive, Suite 4800
Chicago, Illinois 60606
(w/o enclosures)

Ms. Kathy Barry
Highland Capital Partners
92 Hayden Avenue
Lexington, Massachusetts 02421
(w/o enclosures)