



COMMONWEALTH of VIRGINIA

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September 4, 2007

Mr. Robert P. Schultze
Director, Virginia Retirement System
P.O. Box 2500
Richmond, Virginia 23218-2500

Dear Mr. Schultze:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issue Presented

You ask whether certain information provided to the Virginia Retirement System or a local retirement system¹ by a private entity² “relates to” the trade secrets of the private entity rendering such information exempt from disclosure under The Virginia Freedom of Information Act.³

Response

It is my opinion that the information described herein that is provided to the Virginia Retirement System by a private entity “relates to” the trade secrets of the entity. It further is my opinion that such information is exempt from disclosure under The Virginia Freedom of Information Act provided the private entity meets the requirements of § 2.2-3705.7(25).

Background

You relate that the Virginia Retirement System maintains a diversified investment portfolio⁴ and considers a vast amount of information in determining the allocation of assets and investments within asset groups. You relate that private entities possibly could provide investment opportunities across all asset groups, but the majority of these investments are in the real estate and private equity markets. You note that each of these markets is a growing asset class that is crucial to the overall return on the Retirement System’s diversified investment portfolio.

¹ Although this opinion refers to the Virginia Retirement System or the Retirement System, the analysis is intended to apply to any local retirement system governed by §§ 51.1-800 to 51.1-823.

² For example, a limited partnership vehicle that is used for investment purposes would be a private entity.

³ VA. CODE ANN. §§ 2.2-3700 to 2.2-3714 (2005 & Supp. 2007).

⁴ The portfolio includes fixed income investments; domestic, international and private equity investments; real estate; and other investments.

You note that a prior opinion of the Attorney General (the “2003 Opinion”) has described the method by which the Retirement System typically invests in a private equity.⁵ This method generally is applicable across asset classes. Participation in any limited partnership investment is at the discretion of the general partner. You also indicate that these limited partnerships rely on the Retirement System to keep confidential the information regarding the underlying investments and other basic core information regarding their business purposes. You note that disclosure of such information would have an adverse impact on investments acquired, held, or disposed of by a limited partnership. Consequently, there would be an adverse impact on the financial interest of the Retirement System and its beneficiaries. Additionally, you indicate that the threat of disclosure has limited, and may continue to limit, access of the Retirement System to private equity, real estate, and other markets because general partners do not want to risk public disclosure of partnership information.⁶ You advise that such partnership information may include a partnership’s (i) structure and duration of existence, (ii) stable of portfolio companies or other properties, including financial performance; and (iii) strategy or approach in developing companies or other properties for introduction to the market to maximize profit for the entity’s investors. Thus, if such information is made public, it could adversely affect the entity’s ability to maximize its return to investors and ultimately adversely impact the financial interest of the Retirement System.

You advise that a private entity, particularly a general partner of a private equity or other limited partnership, typically desires assurance that information relating to its structure, portfolio, or strategy will be protected from public disclosure. Such assurance often is required as a condition for the Retirement System to participate in the partnership investment. The protected information may include: (1) limited partnership agreements and any amendments thereto; (2) subscription agreements; (3) private placement memoranda; (4) audited financial statements and related quarterly or annual financial reports; (5) investment memoranda; (6) manager portfolio updates; (7) capital call information; (8) distribution information; and (9) Internal Revenue Service Forms K1 or similar forms provided to the Retirement System by the private entity.⁷

⁵See 2003 Op. Va. Att’y Gen. 140. The 2003 Opinion notes that the Retirement System usually invests in a private entity as a limited partner in a limited partnership. *Id.* at 140. “In many instances, the general partner is a management firm that manages a specific fund or funds in which the limited partners invest. While the limited partnership may own interests in several investments, the Retirement System holds only an investment position in the limited partnership and not in the underlying investments of the partnership. The general partner, whether a management fund or otherwise, provides detailed information to the Retirement System regarding the partnership’s underlying investments. This information is provided on a confidential basis so that the Retirement System may monitor current investments and make informed investment decisions. You also relate that the confidentiality of both the initial and the ongoing analyses regarding these underlying investments is critical, because disclosure of such confidential investment information would affect adversely the value of the investment being acquired, held or disposed of by the Retirement System.” *Id.* at 140-41.

⁶You also advise that private equity market limited partnerships require execution of a confidentiality agreement to participate in certain investments. You note that the same requirement applies to limited partnerships in other asset classes.

⁷See VC exPErts, Glossary (follow alphabetical links to terms) (defining partnership agreement, limited partnerships, subscription agreement, private placement memorandum, capital call/draw down, and distribution), available at <http://vcexperts.com/vce/library/encyclopedia/glossary.asp> (last visited July 23, 2007); *Id.*, Encyclopedia (follow link to “Definitions: Financial Statements”) (defining financial statements), available at

You advise that it is your view that the exemption from The Freedom of Information Act discussed in the 2003 Opinion regarding private equity investments⁸ does not encompass all of the documents that private investment entities require to be kept confidential as a condition for the Retirement System to gain access to desirable investment opportunities.

Applicable Law and Discussion

Section 2.2-3704(A) of The Virginia Freedom of Information Act provides that “[e]xcept as otherwise specifically provided by law, all public records shall be open to inspection and copying by any citizens of the Commonwealth during the regular office hours of the custodian of such records.” Section 2.2-3705.7 of the Act establishes exceptions from the mandatory disclosure in § 2.2-3704(A) relating to specific public bodies, including the Virginia Retirement System. Section 2.2-3705.7(25), as amended by the General Assembly and effective March 21, 2007,⁹ provides that:

Records of the Virginia Retirement System acting pursuant to § 51.1-124.30 or of a local retirement system acting pursuant to § 51.1-803 (hereinafter collectively referred to as “the retirement system”), relating to:

a. Internal deliberations of or decisions by the retirement system on the pursuit of particular investment strategies, or the selection or termination of investment managers, prior to the execution of such investment strategies or the selection or termination of such managers, to the extent that disclosure of such records would have an adverse impact on the financial interest of the retirement system; and

b. *Trade secrets, as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.), provided by a private entity to the retirement system, to the extent disclosure of such records would have an adverse impact on the financial interest of the retirement system.*

For the records specified in subdivision b to be excluded from the provisions of this chapter, the entity shall make a written request to the retirement system:

(1) *Invoking such exclusion prior to or upon submission of the data or other materials for which protection from disclosure is sought;*

(2) *Identifying with specificity the data or other materials for which protection is sought; and*

(3) *Stating the reasons why protection is necessary.*

http://vcexperts.com/vce/library/encyclopedia/book_contents.asp?book_number=1 (last visited July 23, 2007); investorwords.com (follow link to search for term) (defining investment memorandum and portfolio manager), available at http://www.investorwords.com/2620/investment_memorandum.html (last visited July 23, 2007); Internal Revenue Service, United States Department of the Treasury, General Instructions [for Schedule K-1], available at <http://www.irs.gov/instructions/i1065sk1/ch01.html>; see also JAMES M. SCHELL, PRIVATE EQUITY FUNDS BUSINESS STRUCTURE & OPERATIONS (2007) (defining various terms in context of limited partnership agreement).

⁸2003 Op. Va. Att’y Gen., *supra* note 5, at 140 (interpreting exemption under § 2.2-3705(47), predecessor to § 2.2-3705.7(12)).

⁹See 2007 Va. Acts. ch. 739, cl. 2 (noting that emergency exists and enacting provisions upon passage), available at <http://leg1.state.va.us/cgi-bin/legp504.exe?071+ful+CHAP0739>.

The retirement system shall determine whether the requested exclusion from disclosure meets the requirements set forth in subdivision b.

Nothing in this subdivision shall be construed to authorize the withholding of the identity or amount of any investment held or the present value and performance of all asset classes and subclasses. [Emphasis added.]

Essentially, § 2.2-3705.7(25)(b) mandates that three conditions¹⁰ be met before the exception from disclosure is applicable. First, the records must “relate to” a trade secret of the private entity. The “relate to” condition typically is met since the described information has a connection or reference to the structure, portfolio, or strategy information comprising the business purpose of the private entity. Therefore, according to the plain and ordinary meaning of “relates to,”¹¹ the information would “relate to” the structure, portfolio, or strategy information of a private entity. Next, such information must be “trade secrets”¹² as defined in the Uniform Trade Secrets Act. Under the third condition, the Retirement System must determine that disclosure of the described information would have an adverse impact on the financial interest of the Retirement System. To the extent the information you describe meets such criteria, § 2.2-3705.7(25) authorizes the Retirement System to exclude such information from the mandatory disclosure requirements of The Freedom of Information Act. Therefore, the focus of the inquiry is whether the structure, portfolio, or strategy information of a private entity is considered a trade secret. According to § 59.1-336 of the Uniform Trade Secrets Act,

“Trade secret” means information, including but not limited to, a formula, pattern, compilation, program, device, method, technique, or process, that:

- 1. Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and*
- 2. Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.* [Emphasis added.]

There is certain basic information that goes to the core of a private entity’s existence, which includes an entity’s stable of portfolio companies or properties, its approach in developing those companies or properties, and the duration of the entity’s existence. Public disclosure of such information could defeat the business purpose of the private entity and adversely affect an entity’s ability to maximize its return to investors. Consequently, such disclosure would have an adverse impact on the financial interest of the Retirement System. Additionally, public disclosure would permit other persons to obtain economic value from the disclosure or use of the entity’s structure, portfolio or strategy information. For example, other parties could sell the information as part of a database or timing information to gain a

¹⁰Section 2.2-3705.7(25)(b) also requires an entity to make a written request to invoke the exemption from disclosure. For purposes of this opinion, I will assume that such written request has been filed with the Virginia Retirement System. I note that the form and sufficiency of any such request is outside the scope of this opinion.

¹¹Absent a statutory definition, the plain and ordinary meaning of the term is controlling. *See Sansom v. Bd. of Supvrs.*, 257 Va. 589, 594-95, 514 S.E.2d 345 349 (1999); *Commonwealth v. Orange-Madison Coop. Farm Serv.*, 220 Va. 655, 658, 261 S.E.2d 532, 533-34 (1980); 1999 Op. Va. Att’y Gen. 31, 31.

¹²*See VA. CODE ANN. § 59.1-336 (2006).*

negotiating advantage in connection with the sale of one or more portfolio companies. Thus, the first prong of the definition of “trade secret” is satisfied.

Most private entities with which the Retirement System invests or desires to make investments take reasonable steps to ensure that their investors are the sole recipients of their structure, portfolio or strategy information. The entities that take steps to protect this information do not make it available to the general public, or even to the investment community generally. Consequently, such entities meet the second prong of the “trade secret” definition.

Finally, in the 2003 Opinion, the Attorney General previously has observed that the trade secret exclusion is consistent with the constitutional and statutory provisions relative to the Retirement System’s investment responsibilities.¹³ Article X, § 11 of the Constitution of Virginia provides that Retirement System funds “shall be deemed separate and independent trust funds, ... and shall be *invested and administered solely in the interests of the members and beneficiaries thereof.*” (Emphasis added.)

Section 51.1-124.30(C) emphasizes the importance of investing Retirement System funds in a manner that is in the best interests of its beneficiaries:

The Board [of Trustees of the Virginia Retirement System] shall discharge its duties with respect to the Retirement System *solely in the interest of the beneficiaries thereof* and shall invest the assets of the Retirement System with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims. *The Board shall also diversify such investments so as to minimize the risk of large losses unless under the circumstances it is clearly prudent not to do so.* [Emphasis added.]

Section 51.1-124.30(C) clearly provides that the Retirement System should diversify its assets as part of its responsibility. The exception from disclosure in § 2.2-3705.7(25) further recognizes the need for the Retirement System to invest in an array of assets that benefit its beneficiaries. In the context of the Retirement System investing in certain private entities, disclosure may have an adverse effect on the investment acquired, held, and disposed of as well as the Retirement System’s overall financial interests. Should the Retirement System be required to disclose information related to the trade secrets of a private entity offering a particular type of investment, the Retirement System may not be invited to participate, which would be detrimental to its financial interests.

Conclusion

Accordingly, it is my opinion that the information described herein that is provided to the Virginia Retirement System by a private entity “relates to” the trade secrets of the entity. It further is my opinion that such information is exempt from disclosure under The Virginia Freedom of Information Act provided the private entity meets the requirements of § 2.2-3705.7(25).

¹³2003 Op. Va. Att’y Gen., *supra* note 5, at 142.

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Thank you for letting me be of service to you.

Sincerely,

A handwritten signature in black ink that reads "Robert F. McDonnell". The signature is written in a cursive style with a large, prominent "R" and "M".

Robert F. McDonnell

1:1107; 1:941/07-068