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September 19, 2016

The Honorable James M. LeMunyon, Chair  
Virginia Freedom of Information Advisory Council  
P.O. Box 220962  
Chantilly, VA 20153-0962

Dear Delegate LeMunyon:

As the study of the Virginia Freedom of Information Act (FOIA) required by HJR 96 from the 2014 Session of the General Assembly draws to a close, the Virginia Retirement System (VRS) would like to take the opportunity to reiterate and expand on the comments submitted to the FOIA Council for its consideration over the last few years. VRS appreciates the opportunity to attend and participate in the many Council, subcommittee, and working group meetings that were held related to the study.

By way of background, it is important to note that when the Subcommittee on Records reviewed the existing VRS exemptions in 2014, the exemptions were determined to be appropriate and no action was deemed necessary to remove or narrow them. As VRS noted during the 2014 review of its existing exemptions, it is critical that we retain our current exemptions to meet our fiduciary duty set forth in the Constitution of Virginia.

VRS' comments center primarily on preserving the existing exemptions for confidential investment information and trade secrets that VRS holds as a result of its investment activities, and the need for continued authority to protect information in the over 677,000 retirement records VRS maintains.

#### Executive Summary: Protecting Existing VRS Exemptions

- VRS manages approximately \$69 billion on behalf of more than 677,000 members, retirees, and beneficiaries, making it the 22<sup>nd</sup> largest public or private pension plan in the United States and 44<sup>th</sup> largest public or private pension plan in the world.
- VRS needs to retain both its records exemptions found in § 2.2-3705.7(12) and (25), as well as its meeting exemptions found in § 2.2-3711(A)(20) and (39). To the extent the VRS Board or one of its committees needs to be briefed on information protected under § 2.2-3705.7(12) and (25), the meeting exemptions are necessary to ensure the protection of this confidential information.
- Protecting confidential information and trade secrets is paramount to investing with premier funds, particularly private equity funds, real assets, credit strategies and hedge funds.

- Top managers have a history of denying investment opportunities to investors that present a risk of disclosing confidential information.
- Public managers generally provide more in depth information to entities that are able to protect confidential and proprietary information, thereby allowing VRS staff to better analyze and monitor its investment managers.

Commercial data aggregators collect information (publicly available and through FOIA requests) on investment strategies and disseminate it to subscribers.

Should VRS lose its current FOIA exemptions, detailed strategy information could be disclosed to the detriment of VRS, which could undermine VRS' favorable investor status with top funds and decrease or even eliminate the allocation available to VRS.

Firms across the investment management industry work hard to develop proprietary insights and processes to achieve a competitive advantage in a crowded marketplace. The sensitivity to losing these competitive advantages due to disclosures under FOIA is present with managers across the VRS portfolio, including public equity, private equity, credit strategies, and real assets.

We can illustrate this manager sensitivity through a private equity example. As of March 31, 2016, VRS had approximately \$5.2 billion invested in its private equity portfolio, equal to about 7.46% of total assets, and it has historically been VRS' most profitable asset class with 10-year returns of 11.2% (net of fees).

- In 2007, VRS was denied further investment opportunities with its best-performing private equity manager (whose internal rate of return (IRR) exceeded 93% as of 3/3/2016).
  - The manager cited potential disclosure risks related to Virginia's FOIA laws.
  - This prompted VRS to pursue stronger investment exemptions.
  - Even with the current FOIA exemptions, VRS has been limited in the amount it has been able to invest in eight of the last ten private equity fund investments due to high investor demand. Losing or weakening the current FOIA exemptions would increase the challenge of putting capital to work.
- The 2007 General Assembly passed legislation that created the current exemptions.
  - § 2.2-3705.7(12) and (25) (records) and § 2.2-3711(A)(20) and (39) (meetings).
  - Since the 2007 legislation, VRS has encountered only one occurrence of significant opposition to the exemptions (i.e., *Forbes* editor requested specific information on private equity holdings).
    - VRS is unaware of any other complaints from the Virginia Press Association or other sources.
    - VRS provides information regarding its private equity program in its annual CAFR available on VRS' public website.
- The VRS Board recognizes the value of private equity investments (as well as public equity, credit strategies, real assets and hedge funds) and has increased the trust fund's exposure to private equity.

- The Joint Legislative Audit and Review Commission (JLARC) and the Auditor of Public Accounts (APA) provide additional layers of scrutiny.
  - JLARC has unlimited access to FOIA-exempt information and considers this information in its semiannual review of VRS investments.
  - APA performs testing, review, and other audit procedures on the VRS investment portfolio.
- Almost all other states provide some sort of FOIA exemption for pension investments.
- Exemptions in a number of other states provide stronger protections than Virginia's FOIA exemptions.
  - VRS has limited its exemptions to only those that have been deemed necessary, particularly in order to participate with top managers.

#### Background of 2007 Virginia Retirement System FOIA Exemptions Related to Investments

The 2007 Virginia General Assembly enacted SB 1369, which amended FOIA to exclude certain VRS investment-related records from mandatory disclosure. SB 1369 also contained a parallel meetings exemption for the closed discussion of sensitive information.

The primary reason VRS sought additional protection for confidential investment information under FOIA was the increase in requests for such information (especially information on VRS alternative investments) from private entities, presumably to be included in databases for sale or subscription. Generally, VRS believed that the then-existing FOIA exemptions did not provide adequate protection and that this lack of protection would affect the ability of VRS to continue to participate in certain desirable investment vehicles. In fact, this was ultimately the case with one of our top-performing managers, which declined to continue to work with VRS as a result of concerns regarding potential disclosure of and lack of sufficient protections for its proprietary information.

At about the same time, many other states began to enact similar changes to their open-record statutes. The changes attempted to strike a balance between transparency in public investments and avoiding damage to private equity managers' ability to compete by forcing them to disclose valuable proprietary information, especially with respect to portfolio companies.

The impetus for these changes was partially related to a California lawsuit, *Coalition of University Employees v. Regents of the University of California*, which required a public agency to release private equity fund information under the state's open-records laws. 2003 WL 22717384 (Cal. Sup. 2003). As a result of this case, a number of prominent private equity firms refused to allow public pension plans to invest in new funds. Further, the private equity firms strongly urged the funds to divest of any then-existing investments.

VRS reviewed its overall exposure to similar document requests under FOIA and realized that certain internal memoranda, often containing confidential and proprietary data and analyses

regarding proposed investments, did not appear to have protection from disclosure under any FOIA exemptions. This realization made protection of these internal memoranda the centerpiece of VRS' 2007 legislative proposal.

Due to disclosure concerns and prior to the effective date of the legislation, VRS was precluded from investing in one of its most successful managers that same year. As of March 2016, this manager has averaged a 93% average annual return since VRS first invested with the firm. Only after VRS acquired an acceptable level of trade secret protection by obtaining the 2007 FOIA records and meeting exemptions did the manager invite VRS to return as an active investor in two recent partnerships. Attached is a copy of a September 4, 2007 Opinion of the Virginia Attorney General interpreting the newly enacted legislation.

#### Continued Need for the Virginia Retirement System Exemptions

The need for the records and meetings exemptions is just as great now as it was in 2007, and perhaps even more so. The exemptions have allowed VRS to continue investing with managers who, absent the records or meetings exemption, would not partner with VRS. Without the ability to provide managers with the assurance that their confidential information and trade secrets will not be disclosed, VRS' participation in these investments would suffer. Therefore, inadequate FOIA protection could have a significant and adverse impact on VRS' ability to effectively implement investment strategies and meet its overall objectives.

Securing allocations to the best managers is extremely competitive. Premier private equity managers often have investor interest that is twice the size of their fund. In eight of the last ten private equity opportunities, VRS was unable to commit its desired level of capital because of high investor demand. Unfortunately for VRS and the Commonwealth, many of these other investors are not public entities covered by FOIA provisions. Thus, absent our current exemptions and being required to disclose confidential and trade secret information, VRS would be prevented from putting together a top-tier sales pitch for high-demand managers.

VRS investment returns would undoubtedly be lower if VRS were excluded from investing with the best managers. Annual investment returns for the top quartile managers have averaged 12.7%, compared to 9.4% for the median managers and 1.6% for the bottom quartile managers (Private iQ database from the Burgiss Group US Private Equity benchmark return information from 1980 through 3/31/2016).

By virtue of its ability to sit on advisory boards and engage in negotiations, VRS is typically provided with additional information to which many investors are not privy. This additional information provides greater insight into a manager's strategy, team, and investment holdings. Likewise, using this information provides VRS with an advantage in underwriting continued investments. Without adequate FOIA protections, the flow of additional information to VRS might shrink or perhaps completely cease.

The aforementioned concerns related to confidential investment information are not limited to private equity and private real assets, although those are the most sensitive of all investments. Hedge fund and public equity managers are also willing to provide VRS with more information if they can be assured that the proprietary information will not be disclosed. The more information VRS investment staff can gather about a specific manager, the better able they are to make a wise investment decision. Likewise, any internal strategic deliberations or communications obtained or created by VRS are sensitive and should not be subject to disclosure. Investment professionals are not as forthcoming or frank in their assessment of a manager or investment in any document that is subject to FOIA disclosure.

In addition, VRS is constantly reassessing its existing investments, so the need for the confidentiality does not end once an investment is executed. The analysis of whether to retain or terminate a particular investment or manager is an ongoing process, and the same reasons that require confidentiality in the initial assessment of a manager or investment continue for the duration of VRS' exposure.

#### FOIA-Protected Information is Subject to Legislative Oversight

JLARC provides an additional layer of scrutiny for VRS investments. The Virginia Retirement System Oversight Act, § 30-78, et seq. of the *Code of Virginia*, tasks JLARC with overseeing and evaluating VRS on a continuing basis. Among JLARC's responsibilities under the Oversight Act is the evaluation of the VRS investment portfolio and investment practices, policies, and performance. See § 30-80(A) of the *Code of Virginia*. JLARC possesses unrestricted access to confidential information that is exempt from FOIA disclosure, which provides assurances that, while not public, there is a mechanism in place for review of this information. The Virginia Auditor of Public Accounts also, should it be deemed necessary, has unlimited access to VRS documents.

#### Similar Exemptions in other States

VRS is not alone in seeking the enactment or strengthening of these types of exemptions. Many other states, including California, Georgia, New York, North Carolina and Texas, provide similar exemptions for their state pension plans to assure private equity, private real assets, and other managers that confidential investment information and trade secrets will not be disclosed.

#### VRS Response to Draft Trade Secrets Statute

One of the proposals made during the study mandated by HJR 96 was to combine all of the proprietary records and trade secrets exemptions currently contained in § 2.2-3705.6 into one generic exemption. While VRS' investment exemptions are not found in § 2.2-3705.6, but instead in § 2.2-3705.7, the exemption in § 2.2-3705.7(25) references trade secrets. VRS has requested that its exemptions related to trade secrets not be included in a generic trade secrets exemption, and it is our understanding that the working group concurred with this request.

Several proposals have been submitted to the FOIA Council related to a generic trade secrets exemption, and the comments below are addressed to these various proposals.

The following information relates to the generic trade secrets statute proposed as part of the study in July of 2015. In concept, VRS is not opposed to a generic trade secrets statute, but has a fiduciary duty to its members and beneficiaries to pursue changes that will protect the investment of retirement trust funds. Article X, § 11 of the Constitution of Virginia provides that “[t]he funds of the retirement system . . . shall be invested and administered solely in the interests of the members and beneficiaries thereof.” When the Subcommittee on Records reviewed the existing VRS exemptions in 2014, the exemptions were determined to be appropriate and no action was deemed necessary to remove or narrow them. As VRS noted during the 2014 review of its existing exemptions, to meet our fiduciary duty set forth in the Constitution, statutes, and regulations, it is critical that we retain our current exemptions. As the generic proposal addresses § 2.2-3705.6, again we anticipate the concurrence by the working group in retaining the protections for our trust in §§ 2.2-3705.7 and 2.2-3711.

There are several issues that VRS would like to highlight in the proposed draft:

1. VRS’ internal investment research and internally developed algorithms and software are not covered under the “Trade Secrets Created by a Public Body” section because that section is limited to academic, medical or scientific research and thus could not be withheld to protect its proprietary value.
2. Trade secrets submitted by VRS’ external managers are not covered under the “Trade Secrets Submitted to a Public Body” section as currently drafted because they do not meet requirement (iii), which requires that a trade secret must be submitted in compliance with a statute, law or regulation of the Commonwealth or the U.S., or as a requirement of a public procurement, public financing or economic development transaction, none of which apply to the trade secrets submitted to VRS by its external investment managers.
3. Proprietary and confidential analysis is key to investment managers’ success. If this information cannot be protected from competitors, managers will lose the economic value of their internal analysis and expertise. The protection of proprietary and confidential internal information is of paramount importance to these managers.
4. Managers will simply not allow VRS to place investments with them if they must be named as a defendant in FOIA enforcement actions and are statutorily liable for unlimited attorneys’ fees in the event of a judicial finding that the records submitted were not property trade secrets. This is particularly true of the top quartile managers, with which VRS partners and seeks to partner.
5. There is strong and active competition among investors for access to top investment managers. If a potential investor (i.e., VRS) is required to impose onerous, costly and burdensome conditions on the manager, the manager is easily able to refuse to allow the entity to invest with the manager. As stated previously, this would impact the fund and in turn our members and beneficiaries to whom we have a fiduciary responsibility.

Proposal Imposing Strict Liability for Legal Fees on Submitting Private Entity

A later submission on the trade secrets issue was discussed by the FOIA Council's Subcommittee on Records on August 18, 2016. While maintaining VRS' existing exemptions in § 2.2-3705.7(12) and (25), the submission, perhaps inadvertently, included VRS in the provisions relating to the imposition of legal costs on the party that submits trade secrets in the event of a court determination that the information submitted is not entitled to that protection. That provision, as submitted, provides in part that "In the event a public body, in response to a request under this Chapter, . . ." and goes on to require that the submitting entity be liable for any award of reasonable costs and attorneys' fees if a court requires that the public body produce material that has been improperly designated as a trade secret by the submitting entity. Because "this Chapter" refers to the entire Virginia Freedom of Information Act (§§ 2.2-3700 through 2.2-3714), it would impose the payment of legal fees as a matter of law on any entity that submits trade secrets to VRS that were later found to have been improperly designated, even though the VRS exemptions are included in a separate section. Because this strict liability standard for a potentially unlimited amount of legal fees would undoubtedly have a chilling effect on managers with whom VRS seeks to invest, VRS requests that any such proposal be amended to exclude VRS.

#### Proposals Related to Personnel Information

Another topic addressed during the HJR 96 study was the exemption for personnel records in § 2.2-3705.1(1). This exemption does not currently make a specific reference to retirement records. However, a 2002 FOIA Council Advisory Opinion, AO-01-02, confirms that records relating to the retirement of identifiable individuals who are public employees are personnel records exempt under § 2.2-3705.1(1). VRS requests that any amendments to the definition of exempt personnel records clearly specify that records relating to the retirement of identifiable individuals who are current or past public employees are included in such exempt personnel records. As an example, VRS maintains information on over 677,000 members, retirees, and beneficiaries related to employment history, beneficiary information, bank information, retirement option elections, disability information, information related to divorce settlements, and optional life insurance elections, among others. In addition, VRS maintains information related to investments in defined contribution plans for a large number of members, retirees, and beneficiaries. Much of this information relates directly to personal investment choices and options for these individuals. At a time when the security of personal data and information is critical in ensuring protection against identity theft, VRS believes that it has a duty to safeguard data and information related to our members, retirees and beneficiaries. Many of VRS' retirees and beneficiaries are older citizens who may be even more vulnerable to fraud, foul play, deception, and fleecing by ill-intended individuals, so the protection of their records is critical. It is, therefore, imperative that the existing protections for this information remain in place.

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Again, VRS appreciates the opportunity to participate in the study and to submit these and previous comments. As you know, VRS has a fiduciary duty to its members and beneficiaries to pursue changes that will protect the investment of retirement trust funds. Article X, § 11 of the

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Constitution of Virginia provides that “[t]he funds of the retirement system . . . shall be invested and administered solely in the interests of the members and beneficiaries thereof.” We firmly believe that retaining current statutory language is consistent with this Constitutional provision. Therefore, we respectfully request that as the Council indicated earlier in its deliberations, it maintain the protections related to confidential investment information and trade secrets currently provided in §§ 2.2-3705.7 and 2.2-3711 of the *Code of Virginia*. In addition, VRS expresses its desire for the Council to confirm in any amendments to the personnel records exemption, as it had done previously in its 2002 FOIA Council Advisory Opinion, AO-01-02, that records relating to the retirement of identifiable individuals who are public employees are personnel records and exempt under § 2.2-3705.1(1).

Should you or the other members of the Council have any questions related to these comments, please do not hesitate to contact me for further clarification.

Sincerely,

A handwritten signature in cursive script that reads "Patricia S. Bishop".

Patricia S. Bishop  
Director

cc: Maria J.K. Everett, Esq.

Executive Director, Virginia Freedom of Information Advisory Council



# COMMONWEALTH of VIRGINIA

Office of the Attorney General

**Robert F. McDonnell**  
Attorney General

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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 system<sup>1</sup> by a private entity<sup>2</sup> “relates to” the trade secrets of the private entity rendering such information exempt from disclosure under The Virginia Freedom of Information Act.<sup>3</sup>

## 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 portfolio<sup>4</sup> 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.

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<sup>1</sup> 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.

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

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

<sup>4</sup> 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.<sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup>

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<sup>5</sup>See 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.

<sup>6</sup>You 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.

<sup>7</sup>See 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 investments<sup>8</sup> 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,<sup>9</sup> 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.*

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[http://vcexperts.com/vce/library/encyclopedia/book\\_contents.asp?book\\_number=1](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](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).

<sup>8</sup>2003 Op. Va. Att’y Gen., *supra* note 5, at 140 (interpreting exemption under § 2.2-3705(47), predecessor to § 2.2-3705.7(12)).

<sup>9</sup>See 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 conditions<sup>10</sup> 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,”<sup>11</sup> the information would “relate to” the structure, portfolio, or strategy information of a private entity. Next, such information must be “trade secrets”<sup>12</sup> 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

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<sup>10</sup>Section 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.

<sup>11</sup>Absent 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.

<sup>12</sup>*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.<sup>13</sup> 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).

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<sup>13</sup>2003 Op. Va. Att’y Gen., *supra* note 5, at 142.

Mr. Robert P. Schultze  
September 4, 2007  
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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 initial 'R'.

Robert F. McDonnell