

Surge in FOIA Requests to State Agencies Seeking Information About PE and Other Alternative Investment Fund Sponsors

We have recently observed a surge in freedom-of-information (“FOIA”) requests made by media outlets to state pension funds and other state-government-affiliated investment entities. Although the requests have so far concentrated on information related to private equity sponsors, they have also sought information about investments with other alternative investment fund sponsors. The requests tend to focus on information about advisers’ treatment of fees and expenses, issues raised as areas of SEC interest in a speech by an SEC official earlier this year. The requests may also ask for information concerning recent SEC examinations of fund managers. Many state-level FOIA laws exempt confidential business information, including private equity or other alternative investment fund information in particular, from disclosure. Nonetheless, record-keepers at state investment entities may reflexively assume that all information requested should be disclosed. But a prompt response, supported by the applicable state law, can help ensure that confidential information that is exempt from FOIA disclosure is in fact not released.

In May, Andrew J. Bowden of the U.S. Securities and Exchange Commission’s Office of Compliance Inspections and Examinations delivered a speech entitled “Spreading Sunshine in Private Equity.” The speech signaled an increasing focus by the SEC on disclosures made by fund sponsors, in particular PE sponsors, to their LPs, including disclosures on topics such as allocation of fees and expenses to funds and portfolio companies, advisory fees paid by portfolio companies, and internal valuation methods. The “Sunshine” speech in turn prompted media outlets to make FOIA requests to state pension funds and other government investment vehicles, seeking information about the funds’ investments in PE and other private funds. Typical requests seek information about the topics covered in the “Sunshine” speech: advisors’ fee structures, the amount of fees and expenses actually paid to individual advisers by the state funds, and fund rates of return. Also, soon after Mr. Bowden’s speech, many states (or their advisers) sent questionnaires to various sponsors seeking Sunshine-related information, including regarding any SEC inquiries related to the “Sunshine” topics. The media are aware of and often explicitly seek copies of these questionnaires and the written responses provided by sponsors.

The question of whether a state pension fund is obligated to release information in response to FOIA requests depends in the first instance on the relevant state’s law. While laws vary by state, most do protect from disclosure information submitted by fund sponsors, either explicitly in statute or case law, or under more general provisions protecting confidential business information. For example:

- **California**
Gov. Code § 6254.26
Protection from public disclosure for a private investment fund’s “[d]ue diligence materials,” “financial statements,” and “investment agreement and all related documents,” while permitting disclosure of more high-level information (including a fund’s overall IRR “since inception”).

- **Florida**

Fla. Stat. § 215.4401

Similar to California in that it exempts disclosure of “[f]inancial statements,” “[m]eeting materials,” and “agreements” of an “alternative investment vehicle,” while permitting disclosure of more high-level information (including a fund’s overall IRR “since inception”).
- **Illinois**

5 ILCS 140/7

No disclosure of “commercial or financial information obtained by a public body, including a public pension fund, from a *private equity fund* ... as a result of either investing or evaluating a potential investment of public funds in a private equity fund.”
- **New Jersey**

N.J.S.A. 47:1A-1

New Jersey case law, *Communications Workers of America v. Rousseau*, 9 A.3d 1064 (N.J. App. Div. 2010), interprets the state’s public records law not to require the disclosure of sensitive information about private equity investments.
- **New York**

Pub. Off. § 87

Exempts the disclosure of records that “would impair present or imminent contract awards” or that “are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise.”

In addition to these state laws, the confidentiality provisions of individual LP agreements, and side-letters with state-affiliated investors, may affect whether a particular document or piece of information is exempt from FOIA disclosure.

It is important for sponsors to be aware of these requests, and to alert the appropriate personnel at the sponsor (including legal, investment, and investor relations staff) who may receive them. Public records laws often provide short periods of time for making objections. It is therefore important to act quickly upon receipt of notice from a state board of a FOIA request. A prompt response, combined with an understanding of the relevant state’s FOIA laws and regulations, will maximize a sponsor’s ability to ensure that information that is exempt from disclosure is in fact kept confidential.

In addition, PE sponsors and other alternative investment managers should be mindful of state FOIA laws when responding in writing to investor inquiries, such as those made by many states earlier this year concerning fee and expense practices and recent SEC examinations. We recommend that managers clearly mark such responses as confidential, and consider applicable state FOIA laws and available exemptions from disclosure at the time such responses are prepared and delivered.

If you have further questions about this topic, or wish to discuss a response to a specific FOIA request notice, please contact the Ropes & Gray attorneys with whom you regularly work.