

THOMAS P. DiNAPOLI
STATE COMPTROLLER



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STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

August 30, 2017

Shanna Cleveland
Senior Counsel
Free Speech for People
1340 Centre Street #209
Newton, MA 02459
Via email: scleveland@freespeechforpeople.org

Re: FOIL Request #17-353

Dear Ms. Cleveland:

This is in reply to your June 26, 2017 request, pursuant to the Freedom of Information Law (FOIL, Public Officers Law [POL], Article 6), for records pertaining to investments of the New York State Common Retirement Fund (CRF) in CIM Fund III. Specifically, you requested (1) any communications from CIM Fund III and/or its parent to the CRF from January 1, 2017 to June 26, 2017 requesting payment of any fees relating to the investment; and (2) any documents reflecting payment of fees from the CRF to CIM Fund III or to its parent for this same time period.

Consistent with its commitment to transparency and openness in the operations of the CRF, this Office provides extensive disclosure of its holdings, earnings and expenses. Data regarding funds in which the CRF invests are provided, in the aggregate, in the Comptroller's Comprehensive Annual Financial Report (CAFR) published annually. Such data are available on the Comptroller's web site at www.osc.state.ny.us under "Pension Fund" and then "Comprehensive Annual Financial Report", and then under the specific asset class list. With regard to item number 2 of your request, the 2017 CAFR, covering the Fund's fiscal year of April 1 through March 31, is not yet published, but is due out in September 2017. The 2016 CAFR reports annual data regarding management fees paid in relation to the CRF's investment in CIM Fund III on page 206, under Real Estate Management Fees. Annual aggregate data on management fee payments to CIM Group, LP for real estate may be found on page 112 of the 2016 CAFR.

FOIL provides that an agency shall make all records available for public inspection and copying, except to the extent that records or portions thereof fall within one or more of the grounds for denial set forth in that statute (POL §87). There is no requirement, however, that an agency prepare any record or compile data that it does not ordinarily prepare or compile (FOIL §89[3]); *Wood v Ellison*, 196 AD2d 933, 602 NYS2d 237; *Matter of Kryston v Board of Education*, 77 AD2d 896, 430 NYS2d 688; see also Comm on Open Gov't FOIL-AO-7349). Based on the foregoing, this Office's obligation under FOIL is limited to retrieving specifically identified records for inspection and copying.

In this regard, with respect to item 1 of your request, the CRF does not publish quarterly management or performance fees; therefore, such records are not available. If such records were compiled, it is our determination that they could be withheld along with communications between CIM funds or their parent and the CRF pursuant to exceptions to FOIL discussed below.

Records you request, other than those published in the CAFR, may be withheld because they constitute material described in POL §87(2)(d), which authorizes the denial of access to records or portions thereof 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.” Case law defines “trade secret” as any formula, pattern, process or compilation of information that is not published or divulged and which gives an advantage over competitors who do not have access to such data (Sunset Energy Fleet v NYS Dept of Environmental Conservation, 285 AD2d 865, [3rd Dept 2001]).

The CRF holds all of the assets of the New York State and Local Retirement System and invests those assets. As such, the CRF is a major institutional investor which competes with other institutional investors, public and private¹. The records you request involve proprietary data on private equity real estate investments, which is not publicly available in the marketplace and which would, if disclosed, be harmful to the competitive position of each fund and the CRF in the marketplace. The CRF’s and each fund’s bargaining position with respect to certain terms and conditions and financial information would be substantially weakened if other investors have knowledge of this information. This office has determined that these records contain proprietary information and trade secrets and, accordingly, will be withheld.

Based on the foregoing, it has been recognized that competition in business turns on the relative costs and opportunities faced by members of the same industry, and that there is a potential windfall, not contemplated as part of FOIL’s principal aim of promoting openness in government, for competitors to whom valuable information is released under FOIL (Encore College Bookstores, Inc. v Auxiliary Service Corp. of State University of New York at Farmingdale, 212 AD2d 418[1st Dept 1995], lv granted, 85 NY2d 811 [1995], affd as mod 87 NY2d 410 [1995]). The Court of Appeals has declined to compel release of trade secret records where FOIL disclosure is the sole means by which competitors can obtain the requested information.

Accordingly, this portion of your request is denied. In the event that you do not agree with this determination, please be advised that you have the right, within thirty days of the receipt of this letter, to appeal, in writing, to Records Appeals Officer, Office of the State Comptroller, 110 State Street, 14th Floor, Albany, New York 12236.

Sincerely,



Jane Hall
Records Access Officer

JH/HN

¹ It is irrelevant that the CRF is a public pension fund and not a private business. Case law holds that when a governmental entity performs functions essentially commercial in nature in competition with private, profit making entities, it may withhold records pursuant to POL §87(2)(d) (Syracuse & Oswego Motor Lines, Inc. v Frank, Sup. Ct. Onondaga Cty., Oct. 15, 1985, Comm on Open Gov’t FOIL-AO-10225).