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Question Submitted by: The Honorable Mike Reynolds, State Representative, District 91

2012 OK AG 1

Decided: 01/12/2012

Oklahoma Attorney General Opinions

Cite as: 2012 OK AG 1, __ __

¶10 This office has received your request for an official Attorney General Opinion in which you ask, in effect, the following questions:

- 1. What information of the Oklahoma Capital Investment Board ("Board") is confidential and not subject to disclosure under the Oklahoma Capital Formation Act and the Open Records Act?**
- 2. Would the answer in question 1 be different if the information was acquired by an intermediary that is wholly owned by the Oklahoma Capital Investment Board?**

The Oklahoma Capital Formation Act

¶11 The precursor to the Oklahoma Capital Formation Act was passed by the Oklahoma Legislature in 1987. 1987 Okla. Sess. Laws ch. 222, §§ 40 - 48. The Oklahoma Capital Investment Act created the Oklahoma Capital Investment Board and was part of the Oklahoma Development Finance Authority. See *id.* This measure was repealed and recreated as The Oklahoma Capital Formation Act ("Act") during the 1991 legislative session. See 1991 Okla. Sess. Laws ch 188, §§ 1 - 12, 15 - 16. The Act created a new Oklahoma Capital Investment Board whose statutory mission "shall be to mobilize equity and near-equity capital for investment ***in such a manner that will result in a significant potential to create jobs and diversify and stabilize the economy of the State of Oklahoma.***" 74 O.S.2011, § 5085.3 (emphasis added). ^{1, 2} The Board is a public trust of the State of Oklahoma, and consists of five directors appointed by the Governor with the advice and consent of the Senate. *Id.* §§ 5085.2(B); 5085.6(A).

¶12 The State of Oklahoma has issued and transferred to the Board One Hundred Million Dollars (\$100,000,000) in tax credits that "may be used to reduce the tax liability of a person, firm or corporation" for state income taxes (see 68 O.S.2011, § 2355) or insurance premium taxes (see 36 O.S.2011, § 624). 74 O.S. 2011, § 5085.7(A). Statutory limitations restrict the fiscal years the tax credits can be exercised (1990 through 2015) and the maximum amount of credits that can be claimed and used in any fiscal year (\$20,000,000). *Id.* § 5085.7(A), (B). An analysis of this program against potential constitutional restrictions was made by this office in 1988. See A.G. Opin. 88-20. The Attorney General opined that the use of tax credits for economic development purposes does not violate the provisions of Article X, Section 15 of the Oklahoma Constitution³ and held the delegation of authority of the Board to allocate credits was lawful. *Id.* at 55. However, the Opinion did not discuss the mechanics of the allocation process by the Board.

¶3 According to its web page, the Oklahoma Capital Investment Board provides two programs for providing equity and near-equity capital for investment.⁴ The first is the Venture Investing Program, 74 O.S.2011, § 5085.8(A), where "the Board supports investments in private, professionally managed venture capital firms that have **committed to serving entrepreneurs within the state** and that have a history of producing solid returns for their investors."⁵ The second program is the Oklahoma Capital Access Program, 74 O.S.2011, § 5085.8(B), where "the Board provides credit insurance to banks and other lending institutions."⁶ We do not opine on the merits of these programs and apply the Oklahoma Supreme Court's analysis in *Liddell v. Heavner*:

The Constitution is the bulwark to which all statutes must yield. In determining the validity of a legislative enactment, effect must be given to the intent of the Constitution's framers and the people adopting it without regard to our own view of a provision's propriety, wisdom, desirability, necessity, or practicality as a working proposition.

Id., 180 P.3d 1191, 1199-1200 (Okla. 2008) (footnotes omitted).

The Open Records Act

¶4 We continue our analysis with the legislatively declared public policy and purpose behind the Open Records Act, 51 O.S.2011, §§ 24A.1 - 24A.29. The Legislature has recognized the people's right to know and be informed, stating:

As the Oklahoma Constitution recognizes and guarantees, all political power is inherent in the people. Thus, ***it is the public policy of the State of Oklahoma that the people are vested with the inherent right to know and be fully informed about their government.*** The Oklahoma Open Records Act ***shall not create, directly or indirectly, any rights of privacy*** or any remedies for violation of any rights of privacy; ***nor shall the Oklahoma Open Records Act, except as specifically set forth in the Oklahoma Open Records Act, establish any procedures for protecting any person from release of information contained in public records. The purpose of this act is to ensure and facilitate the public's right of access to and review of government records so they may efficiently and intelligently exercise their inherent political power. The privacy interests of individuals are adequately protected in the specific exceptions*** to the Oklahoma Open Records Act or in the statutes which authorize, create or require the records. ***Except where specific state or federal statutes create a confidential privilege, persons who submit information to public bodies have no right to keep this information from public access nor reasonable expectation that this information will be kept from public access***; provided, the person, agency or political subdivision shall at all times bear the burden of establishing such records are protected by such a confidential privilege. Except as may be required by other statutes, public bodies do not need to follow any procedures for providing access to public records except those specifically required by the Oklahoma Open Records Act.

51 O.S.2011, § 24A.2 (emphasis added). A "record" is defined as

[A]ll documents, including, but not limited to, any book, paper, photograph, microfilm, data files created by or used with computer software, computer tape, disk, record, sound recording, film recording, video record or other material regardless of physical form or characteristic, created by, received by, under the authority of, or coming into the custody, control or possession of public officials, public bodies, or their representatives in connection with the transaction of public business, the expenditure of public funds or the administering of public property.

Id. § 24A.3(1). Oklahoma jurisprudence holds that questions of doubt as to disclosure of public records are to be resolved in favor of disclosure. *Merrill v. Okla. Tax Comm'n*, 831 P.2d 634, 640 (Okla. 1992); *Tulsa Tribune Co. v. Okla. Horse Racing Comm'n*, 735 P.2d 548, 555 (Okla. 1987). However, "The Oklahoma Open Records Act . . . does not apply to records specifically required by law to be kept confidential . . ." *Id.* § 24A.5(1). Our analysis now turns to a specific confidentiality statute of the Oklahoma Capital Formation Act.

Confidential Information of the Oklahoma Capital Investment Board

¶5 The Oklahoma Capital Formation Act provides for confidentiality in a specific, narrow manner:

Any information **submitted to or compiled by** the Oklahoma Capital Investment Board with respect to the **marketing plans, financial statements, trade secrets, research concepts, methods or products, or any other proprietary information of persons, firms, associations, partnerships, agencies, corporations or other entities** shall be confidential, except to the extent that the person or entity that **provided such information** or that is the **subject of such information** consents to disclosure. Executive sessions may be held to discuss such materials if deemed necessary by the Directors.

74 O.S.2011, § 5085.6(C)⁷ (emphasis added). This statutory language is similar to other Oklahoma confidentiality provisions.⁸ The terms "marketing plans," "financial statements," "trade secrets," "research concepts," and "methods or products," are not defined and Oklahoma Jurisprudence holds that:

[S]tatutes are to be construed by reading their provisions with the ordinary and common definitions of the words used, and we must assume the law-making authority intended for them to have the same meaning as that attributed to them in ordinary and usual parlance.

Income Tax Protest v. State ex rel. Okla. Tax Comm'n, 751 P.2d 1070, 1073 (Okla. 1988). Applying this authority, the phrase "any other proprietary information of" in 74 O.S.2011, § 5085.6(C) would be dependent on confidentiality of the information from another source, i.e., federal law, other Oklahoma statutes or case law.

¶6 In answering your question we are guided by well-established court precedent. The object of statutory interpretation is to discern legislative intent. *Neer v. State ex rel. Okla. Tax Comm'n*, 982 P.2d 1071, 1078 (Okla. 1999). The confidentiality in the statute goes to "[a]ny information **submitted to or compiled by** the Oklahoma Capital Investment Board with respect to the marketing plans, financial statements, trade secrets, research concepts, methods or products, or any other proprietary information of persons, firms, associations, partnerships, agencies, corporations or other entities." 74 O.S.2011, § 5085.6(C). It is the information of entities **other than the Board** that is confidential. For example, the marketing plans, financial statements, trade secrets, research concepts, methods or products, or other proprietary information of a company given to the Board is confidential absent consent to disclosure. Additionally information compiled by the Board regarding the marketing plans, financial statements, trade secrets, research concepts, methods or products, or other proprietary information of a company given to the Board is confidential absent consent to disclosure. However, information **of the Board** for investments in the Venture Investment Program or credit insurance under the Oklahoma Capital Access Program would not be confidential under 74 O.S.2011, § 5085.6(C). Information such as the name of the entity receiving assistance, the amount of investment or credit insurance the Board has at risk in a venture, and the returns from investments or credit insurance is open and subject to disclosure under the Oklahoma Open Records Act.

Confidential Information of an Intermediary

of the Oklahoma Capital Investment Board

¶7 You also ask if the same confidentiality analysis would apply to a wholly owned intermediary of the Oklahoma Capital Investment Board. The Board has used an intermediary to make investments under the Venture Investing Program and to provide credit insurance under the Oklahoma Capital Access Program.⁹ Our analysis above applies regardless of the structure. Marketing plans, financial statements, trade secrets, research concepts, methods or products, or other proprietary information of a company given to the intermediary is confidential absent consent to disclosure. 74 O.S.2011, § 5085.6(C). Information compiled by the intermediary regarding the marketing plans, financial statements, trade secrets, research concepts, methods or products, or other proprietary information of a company is confidential absent consent to disclosure. *Id.*

¶8 An entity may be a public body under the Open Records Act in two ways: either the entity is a subordinate entity that exercises decision-making authority on behalf of the parent company pursuant to *Sanders v. Benton*, 579 P.2d 815, 819-20 (Okla. 1978), or the entity falls within the definition of public body in the Open Records Act as it is supported in whole or in part by public funds, entrusted with the expenditure of public funds, or administering public property. 51 O.S.2011, § 24A.3(2). The intermediary meets at least two of the statutory definitions of a public body, as discussed below.

A. Entrusted with the Expenditure of Public Funds

¶9 Using the transferrable tax credits from the Oklahoma Legislature now totaling One Hundred Million Dollars (74 O.S.2011, § 5085.7(A)), the intermediary is entrusted with the expenditure of public funds as it makes investments in the Venture Investment Program and provides credit insurance under the Oklahoma Capital Access Program.¹⁰ Records of the intermediary not confidential under 74 O.S.2011, § 5085.6(C) would be subject to disclosure. 51 O.S.2011, § 24A.5(1).

B. Administering or Operating Public Property

¶10 Also, the intermediary is a public body as it administers the investments and loan guarantees resulting from the public funding to the Board in the form of transferrable tax credits. The statutory mission of the Act is "to mobilize equity and near-equity capital for investment in such a manner that will result in a significant potential to create jobs and diversify and stabilize the economy of the State of Oklahoma." 74 O.S.2011, § 5085.3. Because the intermediary is "administering or operating public property," it is a public body under the Open Records Act and records not confidential under 74 O.S.2011, § 5085.6(C) would be subject to disclosure. 51 O.S.2011, § 24A.5(1).

¶11 It is, therefore, the official Opinion of the Attorney General that:

1. Under the Open Records Act, it is the "public policy of the State of Oklahoma that the people are vested with the inherent right to know and be fully informed about their government." 51 O.S.2011, § 24A.2. Additionally, the purpose of the Act is "to ensure and facilitate the public's right of access to and review of government records so they may efficiently and intelligently exercise their inherent political power." *Id.* Questions of doubt as to disclosure of public records are to be resolved in favor of disclosure. *Merrill v. Okla. Tax Comm'n*, 831 P.2d 634, 640 (Okla. 1992); see *Tulsa Tribune Co. v. Okla. Horse Racing Comm'n*, 735 P.2d 548, 555 (Okla. 1987). However, "The Oklahoma Open Records Act . . . does not apply to records specifically required by law to be kept confidential . . ." 51 O.S.2011, § 24A.5(1).

2. The Oklahoma Capital Formation Board must keep confidential "[a]ny information submitted to or compiled by the Oklahoma Capital Investment Board with respect to the marketing plans, financial statements, trade secrets, research concepts, methods or products, or any other proprietary information of persons, firms, associations, partnerships, agencies, corporations or other entities . . . , except to the extent that the person or entity that provided such information or that is the subject of such information consents to disclosure." 74 O.S.2011, § 5085.6(C) (emphasis added). The confidentiality goes to entities other than the Board. Information compiled by the Board regarding the marketing plans, financial statements, trade secrets, research concepts, methods or products, or other proprietary information of a company given to the Board is confidential absent consent to disclosure. Absent a specific exemption under the Oklahoma Open Records Act, other records, such as information of the name of the entity receiving assistance, the amount of investment or credit insurance the Board has at risk in a venture and the returns from investments or credit insurance are open and subject to disclosure. 51 O.S.2011, § 24A.5(1); see 51 O.S.2011, §§ 24A.1 - 24A.29.

3. A wholly owned intermediary of the Oklahoma Capital Investment Board used to make investments or provide credit insurance would be subject to the same standards as the Board with regards to disclosure of information. "Any information submitted to or compiled" by the intermediary "with respect to the marketing plans, financial statements, trade secrets, research concepts, methods or products, or any other proprietary information of persons, firms, associations, partnerships, agencies, corporations or other entities" is confidential "except to the extent that the person or entity that provided such information or that is the subject of such information consents to disclosure." 74 O.S.2011, § 5085.6(C). The intermediary is a "public body" under the Oklahoma Open Records Act because it is "entrusted with the expenditure of public funds" and is "administering or operating public property." 51 O.S. 2011, § 24A.3(2). Absent a specific exemption under the Oklahoma Open Records Act, other records, such as information of the name of the entity receiving assistance, the amount of investment or credit insurance the Board has at risk in a venture and the returns from investments or credit insurance are open and subject to disclosure. 51 O.S.2011, § 24A.5(1); see 51 O.S.2011, §§ 24A.1 - 24A.29.

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FOOTNOTES

¹ The Act defines "equity capital" as "capital invested in common or preferred stock, royalty rights, limited partnership interests, and any other securities or rights that evidence ownership in private businesses[.]" 74 O.S.2011, § 5085.5(3).

² The Act defines "near-equity capital" as "capital invested in unsecured, undersecured, subordinated or convertible loans or debt securities[.]" *Id.* § 5085.5(5).

³ Article X, Section 15(A) of the Oklahoma Constitution provides in pertinent part:

[T]he credit of the State shall not be given, pledged, or loaned to any individual, company, corporation, or association, municipality, or political subdivision of the State, nor shall the State become an owner or stockholder in, nor make donation by gift, subscription to stock, by tax, or otherwise, to any company, association, or corporation.

Id.

⁴ See <http://www.ocib.org>.

⁵ <http://www.ocib.org> (follow "Fund of Funds" *Programs for VC Firms, The Venture Investment Program*) (emphasis added).

⁶ <http://www.ocib.org> (follow "Other Efforts" *Programs for Oklahoma Small Business Owners, The Capital Access Program*).

⁷ This language was not included in the original act (see 1987 Okla. Sess. Laws ch. 222, § 44), but was enacted in the Third Extraordinary Session of the 1988 Oklahoma Legislature. See 1988 Okla. Sess. Laws ch. 2, § 4(C).

⁸ See 2 O.S.2011, § 5-3.4 (Oklahoma Agriculture Enhancement and Diversification Act); 51 O.S.2011, § 24A.10(C) (Oklahoma Open Records Act - Exception for the Oklahoma Department of the Commerce, the Oklahoma Department of Career and Technology Education, the technology center school districts, and the Oklahoma Film and Music Office); 62 O.S.2011, § 52 (EDGE Fund Policy Board); 62 O.S.2011, § 855 (Local Development Act); 63 O.S.2011, § 3207 (University Hospitals Authority Act); 63 O.S.2011, § 3275 (Oklahoma State University Medical Authority Act); 74 O.S.2011, § 854 (Oklahoma Industrial Finance Authority Act); 74 O.S.2011, § 2231 (Oklahoma Tourism, Parks and Recreation Enhancement Act); 74 O.S.2011, § 5060.7 (Oklahoma Science and Technology Research and Development Act); 74 O.S.2011, §§ 5062.6, 5062.6a (Oklahoma Development Finance Authority Act).

⁹ In 2006, the Oklahoma State Auditor and Inspector issued a Oklahoma Capital Investment Board Performance Audit [hereinafter Audit] for the Oklahoma Capital Investment Board from July 1, 1993 through June 30, 2005. In that audit the State Auditor stated:

[T]here was some question as to whether the OCIB [Oklahoma Capital Investment Board] could directly invest in private companies as Article 10, Section 15 of the Constitution prohibits the State from directly investing in a private entity. Because of this, the OCIB elected to use an intermediary as part of its structure and entered into a contractual relationship with the OCFC [Oklahoma Capital Formation Corporation] in 1992. . . . The investment is made in the name of the OCFC rather than the OCIB even though the OCIB is guaranteeing the funds used to purchase the investment.

Id. at 9.

¹⁰ In the Audit, the State Auditor stated: "Using the tax credits as a guarantee, OCIB secures a line of credit (LOC) with a local lender. Draws made against the LOC are then used by a third party, the Oklahoma Capital Formation Corporation (OCFC), to make investments in venture capital (VC) funds." *Id.* at 9.

Citationizer[®] Summary of Documents Citing This Document

Cite Name Level

None Found.

Citationizer: Table of Authority

Cite Name Level

Oklahoma Supreme Court Cases

Cite	Name	Level
<u>1988 OK 23, 751 P.2d 1070, 59 OBJ 660,</u>	<u>Income Tax Protest of Ashland Exploration, Inc., Matter of</u>	Cited
<u>1992 OK 53, 831 P.2d 634, 63 OBJ 1291,</u>	<u>Merrill v. Oklahoma Tax Com'n</u>	Discussed
<u>2008 OK 6, 180 P.3d 1191,</u>	<u>LIDDELL v. HEAVNER</u>	Cited
<u>1978 OK 53, 579 P.2d 815,</u>	<u>SANDERS v. BENTON</u>	Cited
<u>1999 OK 41, 982 P.2d 1071, 70 OBJ 1551,</u>	<u>Neer v. State ex rel. Oklahoma Tax Commission</u>	Cited
<u>1986 OK 24, 735 P.2d 548, 57 OBJ 1323,</u>	<u>Tulsa Tribune Co. v. Oklahoma Horse Racing Com'n</u>	Discussed

Title 2. Agriculture

Cite	Name	Level
<u>2 O.S. 5-3.4,</u>	<u>Administration of the Oklahoma Agriculture Enhancement and Diversification Program</u>	Discussed

Title 36. Insurance

Cite	Name	Level
<u>36 O.S. 624,</u>	<u>Report to Chief Officer of Premiums, Membership, Application, and Fees - Payment of Fees and Taxes - Penalty</u>	Cited

Title 51. Officers

Cite	Name	Level
<u>51 O.S. 24A.10,</u>	<u>Disclosure of Information Voluntarily Supplied</u>	Cited
<u>51 O.S. 24A.3,</u>	<u>Definitions</u>	Discussed
<u>51 O.S. 24A.1,</u>	<u>Short Title</u>	Discussed at Length
<u>51 O.S. 24A.2,</u>	<u>Political Power - Public Policy and Purpose of Act</u>	Discussed
<u>51 O.S. 24A.5,</u>	<u>Open and Confidential Records</u>	Discussed at Length

Title 62. Public Finance

Cite	Name	Level
<u>62 O.S. 855,</u>	<u>Project Plan and Ordinance or Resolution - Review Committees</u>	Cited
<u>62 O.S. 52,</u>	<u>Repealed</u>	Cited

Title 63. Public Health and Safety

Cite	Name	Level
<u>63 O.S. 3207,</u>	<u>Creation of University Hospitals Authority - Members</u>	Cited
<u>63 O.S. 3275,</u>	<u>Oklahoma State University Medical Authority</u>	Cited

Title 68. Revenue and Taxation

Cite	Name	Level

68 O.S. 2355, Tax Imposed - Classes of Taxpayers Cited

Title 74. State Government

Cite	Name	Level
<u>74 O.S. 854,</u>	<u>Oklahoma Industrial Finance Authority - Membership - Public Meetings - Executive Sessions</u>	Cited
<u>74 O.S. 5060.7,</u>	<u>Officers - Meetings of Board of Directors</u>	Cited
<u>74 O.S. 5085.3,</u>	<u>Oklahoma Capital Investment Board - Mission</u>	Discussed
<u>74 O.S. 5085.5,</u>	<u>Definitions</u>	Cited
<u>74 O.S. 5085.6,</u>	<u>Oklahoma Capital Investment Board - Directors - Chairman - Meetings - Conflict of Interest</u>	Discussed at Length
<u>74 O.S. 5085.7,</u>	<u>Issuance of Tax Credits</u>	Discussed
<u>74 O.S. 5085.8,</u>	<u>Investments</u>	Discussed
<u>74 O.S. 5062.6,</u>	<u>Governing Board of Oklahoma Development Finance Authority</u>	Cited
<u>74 O.S. 2231,</u>	<u>Authority to Keep Confidential Information</u>	Cited