



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

May 29, 1997

Mr. William H. Baker
General Counsel
Teacher Retirement System of Texas
1000 Red River Street
Austin, Texas 78701-2698

OR97-1232

Dear Mr. Baker:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 105243.

The Teacher Retirement System of Texas (the "system") received a request for "records, correspondence, memos, or agendas" pertaining to the system's ownership of tobacco company stocks traded on U.S. or foreign stock exchanges. You advise that the system has provided some of the requested documents. However, you contend that the remainder of the requested information is excepted from public disclosure by sections 552.101, 552.103, 552.107, 552.110, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted documents.

Initially, we note that some of the requested information may have been filed with a court. Documents filed with a court are generally considered public and must be released. *See Star Telegram, Inc. v. Walker*, 834 S.W.2d 54, 57 (Tex. 1992). If the system holds records from which the requested information can be obtained, it must provide that information to the requestor unless it is otherwise excepted from disclosure.

Because you assert that section 552.101 protects all of the records you submitted to this office, we will discuss it first. Section 552.101 excepts from required public disclosure information that is considered confidential by law, either constitutional, statutory, or by judicial decision. You argue that because section 552.101 encompasses information made confidential by other law, disclosure of the requested information would "envelop certain other exceptions," such as 552.107 and 552.110. Because you have not specifically indicated how section 552.101 applies to except the requested information from disclosure, we will not consider it. *See Gov't Code § 552.301(b)*.

You claim that section 552.103(a) excepts from public disclosure the information in Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 10, 11, 12, 13, 14, and 15. Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the state or a political subdivision is or may be a party. The system has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4. The system must meet both prongs of this test for information to be excepted under section 552.103(a). Section 552.103(a) is applicable only where litigation involves or is expected to involve the governmental body claiming the exception. Open Records Decision No. 132 (1976). Here, although you have shown that there is pending litigation involving the State of Texas against certain tobacco companies, you have not shown that litigation specifically involving the system is pending or reasonably anticipated. Therefore, the system may not withhold the requested information under section 552.103(a).

In addition, you assert that section 552.107 protects from disclosure most of the documents in Exhibits 1, 2, 3, 4, and 17. Section 552.107(1) excepts information that an attorney cannot disclose because of a duty to his client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107 excepts from public disclosure only "privileged information," that is, information that reflects either confidential communications from the client to the attorney or the attorney's legal advice or opinions; it does not apply to all client information held by a governmental body's attorney. Open Records Decision No. 574 (1990) at 5. When communications from attorney to client do not reveal the client's communications to the attorney, section 552.107 protects them only to the extent that such communications reveal the attorney's legal opinion or advice. *Id.* at 3. In addition, basically factual communications from attorney to client, or between attorneys representing the client, are not protected. *Id.* We find that some of the information in Exhibits 1, 2, 3, 4, and 17 contains the advice or opinion of legal counsel or the client's confidential communications and, therefore, may be withheld under section 552.107. We have marked the types of information in these documents which may be withheld.

You also claim that section 552.110 protects from required disclosure certain documents in Exhibits 6, 7, 10, and 14.¹ Because the property and privacy rights of third

¹We also note your concern that the system cannot provide information which it acquired through equipment and software providers that require confidentiality by contractual agreements. Information is not confidential under the Open Records Act simply because the party submitting the information anticipates or requests that it be kept confidential. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976), *cert. denied* 430 U.S. 931 (1977). In other words, a governmental body cannot, through a contract, overrule or repeal provisions of the Open Records Act. Attorney General Opinion JM-672 (1987). Consequently, unless the requested records fall within one of the act's exceptions to disclosure, they must be released, notwithstanding any agreement between the system and the providers specifying otherwise.

parties may be implicated by the release of some of the requested information, this office notified the following companies of the request for information: Dean Witter Reynolds, Inc., Merrill Lynch & Co., Wellington Management Company, L.L.P., Oppenheimer & Co., Stockval, and Sanford C. Bernstein & Co., Inc. See Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Open Records Act in certain circumstances). Of the five companies, only Wellington Management Company, L.L.P. ("Wellington") responded, claiming that the documents at issue are excepted from public disclosure by sections 552.103, 552.110, and 552.111 of the Government Code.

Section 552.110 protects the property interests of private persons by excepting from disclosure two types of information: (1) trade secrets, and (2) commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision. In this instance neither the system nor Wellington has demonstrated that the requested information constitutes information protected by section 552.110. Open Records Decision Nos. 639 (1996) at 4 (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure), 552 (1990) at 5 (party must establish a prima facie case that information is trade secret). As the other five companies did not respond to our notice, we have no basis to conclude that these five companies' information contained in the submitted records is excepted from disclosure by section 552.110. See *id.* Therefore, the system may not withhold the information in Exhibits 6, 7, 10, and 14 under section 552.110.

Finally, you claim that section 552.111 excepts from disclosure Exhibits 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, and 16. Section 552.111 excepts "an interagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. An agency's policymaking functions, however, do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. Open Records Decision No. 615 (1993) at 5-6. In addition, section 552.111 does not except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Id.* at 4-5. While some of the information in the documents at issue pertain to the policy functions of the system, some of the information contained in the documents is purely factual. We have marked the types of information in these documents that may be withheld from required public disclosure under section 552.111. The remaining information in Exhibits 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, and 16 must be released.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,



Vickie Prehoditch
Assistant Attorney General
Open Records Division

VDP/alg

Ref.: ID# 105243

Enclosures: Marked/submitted documents

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(w/o enclosures)

All third party companies
(w/o enclosures)