



July 26, 1999

Ms. Paula A. Jones  
Director of Legal Services  
Employees Retirement System of Texas  
P.O. Box 13207  
Austin, Texas 78711-3207

OR99-2095

Dear Ms. Jones:

You ask whether certain information is subject to required public disclosure under the Public Information Act, chapter 552 of the Government Code. Your request was assigned ID# 125970.

The Employment Retirement System of Texas (the “system”) received a request for “access to all correspondence between and all other public documents that may be filed with the Texas Employment Retirement System” concerning various individuals, organizations, and their agents. You acknowledge that some of the requested information is “clearly subject to disclosure.” You contend that the remaining information is excepted from disclosure pursuant to sections 552.024, 552.101, 552.107, 552.111, and 552.117 of the Government Code. We have considered the exceptions you claim and have reviewed a representative sample of the documents at issue.<sup>1</sup>

Initially, we note that section 552.301 of the Government Code requires a governmental body seeking an open records decision to submit that request to the attorney general within ten business days after the governmental body’s receipt of the request for information. When a request for an open records decision is not made within the time period prescribed by section 552.301, the requested information is presumed to be public. *See Gov’t Code* § 552.302. The system received the request for information on April 15, 1999, but did not

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<sup>1</sup>We assume that the “representative sample” of records submitted to this office is truly representative of the requested records as a whole. *See Open Records Decision* Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

request a decision from this office until April 30, 1999, more than ten business days after it received the request for information.<sup>2</sup> You explain that the system attempted, without success, to contact the requestor by telephone in order to clarify his request. On April 22, 1999, the system sent a letter to the requestor seeking clarification of his request. This letter asks the requestor to clarify whether his request is intended to encompass appeal letters sent to the system and also forwarded to the Governor. We agree that it is unclear whether the request was intended to encompass this type of information. Under the circumstances presented here, we conclude that the ten business day deadline was tolled on April 22, 1999 when the system sent the requestor the letter asking that he clarify his request and identifying the types of information available. *See* Open Records Decision Nos. 563 (1990), 561 (1990), 333 (1982). Therefore, the requested information is not presumed to be public.

Exhibit C consists of a letter and an attachment. You contend that the attachment is excepted from disclosure under sections 552.107 and 552.111 of the Government Code. Section 552.111 excepts from disclosure “an interagency or intraagency 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 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. ORD 615 at 5-6. Additionally, section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. ORD 615 at 4-5. The attachment in exhibit C contains factual information that is not protected by section 552.111.<sup>3</sup> The remainder of the attachment, which we have marked, sets forth the position of the system on a policymaking issue. The system may withhold this marked portion of the attachment from disclosure under section 552.111.<sup>4</sup>

Exhibit D consists of five pages of retirement and insurance information about a particular state employee. Exhibit E is a representative sample of insurance complaints sent to the system. You contend that exhibits D and E are excepted from disclosure under section

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<sup>2</sup>Our records indicate that the system hand-delivered its request for a decision to this office on April 30, 1999.

<sup>3</sup>We note that section 552.107(1) also does not except purely factual information from disclosure. Open Records Decision Nos. 574 (1990), 559 (1990), 462 (1987).

<sup>4</sup>Because we conclude that section 552.111 excepts the opinion portions of the attachment from disclosure, we do not address your section 552.107 claim.

552.101 of the Government Code in conjunction with section 815.503 of the Government Code. Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Section 815.503 provides:

Records of members and beneficiaries under retirement plans administered by the [Employees Retirement System of Texas] that are in the custody of the system are considered to be personnel records and are required to be treated as confidential information under Section 552.101.

In *Calvert v. Employees Retirement System of Texas*, 648 S.W.2d 418 (Tex. App. - Austin 1983, writ ref'd n.r.e.), the court considered whether the statutory predecessor to section 815.503 excepted from required disclosure the names and addresses of retired appellate judges. The court held as follows:

Appellant reasons, on the other hand, that art. 6228k §7 and art. 6228a §9C placed retirement records in the category of personnel records, which are dealt with in exception 3(a)(2) of art. 6252-17a, and therefore are confidential only if ‘disclosure would constitute a clearly unwarranted invasion of personal privacy.’ This Court has concluded that appellant’s argument is correct.

The language of §9C provides that the records in the custody of the System ‘are to be considered in the manner of personnel records and such records are hereby deemed confidential information’ under the Open Records Act. Similarly, §7 provides that records in the custody of the System ‘are personnel records and are deemed to be confidential information’ under the Open Records Act. Had the legislature intended to insure that retirement records or files be entirely confidential, it could have easily achieved that result by omitting all reference to personnel records or files. Instead, both §§7 and 9C direct that such retirement records be regarded as personnel files. The specific direction in §§7 and 9C most surely points to the application of §3(a)(2).

*Calvert*, 648 S.W.2d at 420-21. This excerpt establishes that it was the reference to “personnel records” in the relevant statutes that convinced the court that these statutes should be construed in light of section 3(a)(2), the statutory predecessor to section 552.102 of the Government Code. See Open Records Decision No. 471 (1987). We must therefore conclude that *Calvert* compels the view that section 815.503 protects records of system members only if release of the records would cause a “clearly unwarranted invasion of personal privacy” within section 552.102 of the Public Information Act. *Id.*

In *Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546 (Tex. App. - Austin 1983, writ ref'd n.r.e.), the court held that section 552.102 protects personnel records only if their release would cause an invasion of privacy under the standards used to apply section 552.101. Under section 552.101, as construed in *Industrial Foundation of the South v. Texas Industrial Accident Board*, 540 S.W.2d 668, 685 (Tex. 1976), information is protected on common-law privacy grounds only if (1) it is highly intimate or embarrassing such that a reasonable person would object to its release, and (2) it is of no legitimate concern to the public. We conclude that the documents in exhibit D are protected by the common-law right to privacy.<sup>5</sup> See Open Records Decision No. 600 (1992). Therefore, the system must withhold exhibit D from disclosure. We conclude that exhibit E is not protected by the common-law right to privacy and must be released.

Finally, you contend that some of the information in the submitted documents is excepted from disclosure under sections 552.024 and 552.117 of the Government Code. Section 552.117 excepts from disclosure the home addresses, home telephone numbers, social security numbers, and family member information of officials or employees of a governmental body who elect under section 552.024 to protect such information. Section 552.024 provides that an employee of a governmental body may deny public access to such information "in the custody of the governmental body." Here, the system is not the employing governmental body of the individuals referenced in the submitted documents. Thus, the system may not withhold information on behalf of these individuals under sections 552.024 and 552.117.

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 upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Sincerely,



Karen E. Hattaway  
Assistant Attorney General  
Open Records Division

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<sup>5</sup>Because we conclude that the documents in exhibit D are protected by the common-law right to privacy, we do not address your additional arguments against disclosure of these documents.

Ref: ID# 125970

Encl. Submitted documents

cc: Mr. Brad McCord  
2002-A Guadalupe, #314  
Austin, Texas 78705  
(w/o enclosures)