



May 1, 2002

Ms. Paula A. Jones  
General Counsel  
Employees Retirement System of Texas  
P.O. Box 13207  
Austin, Texas 78711-3207

OR2002-2270

Dear Ms. Jones:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID#162138.

The Employees Retirement System of Texas (the "ERS") received a request for the following information:

1. Records of meetings, phone calls, e-mails, or other correspondence with executives, representatives, or agents of Enron or Enron subsidiaries, partnerships, or trusts including but not limited to: Osprey Trust, Marlin Trust, LJM1, LJM2, LJM3, Raptor, Chewco, or Jedi concerning investment possibilities.
2. Other memoranda, letters, or documents sent by or received from your agency pertaining to Enron-related investments.
3. Records of Enron-related investments made by ERS, including types, amounts, and dates of transactions.

You inform us that ERS does not possess any information responsive to the first part of the request. In this regard, we note that the Public Information Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.--San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986). You next inform us that 38 pages of information responsive to the second and third parts of the request have been made available to the requestor, but claim that some of the requested

information responsive to the second and third parts of the request is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.110, and 552.111 of the Government Code. In addition, you notified two private law firms of the request for information and invited those firms to submit arguments to this office for withholding certain information.<sup>1</sup> We received briefing from Entwistle & Cappucci, L.L.P. ("Entwistle & Cappucci"). We have considered the arguments submitted by all parties and have reviewed the submitted information.

Among other arguments, you contend that the information in submitted Appendix A is excepted from disclosure under section 552.107. 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(1) 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 at 5 (1990). Upon review of the information contained in Appendix A, as well as the submitted comments and representations, we conclude that this information is excepted from disclosure in its entirety under section 552.107(1). In light of this conclusion, we need not address the remaining arguments for Appendix A.

With regard to the information in Appendix B, you make no arguments for withholding this information. However, Entwistle & Cappucci argue that a portion of Appendix B is protected from disclosure as attorney work product under section 552.101 of the Government Code in conjunction with Rule 192.5 of the Texas Rules of Civil Procedure. However, our office has previously determined that "information [which] may be privileged in the civil discovery context . . . may not be withheld under section 552.101 of the Government Code." Open Records Decision Nos. 647 at 2 (1996), 575 at 2 (1990) (stating explicitly that discovery privileges are not covered under the predecessor to section 552.101).

This office has also determined that a *governmental body* may withhold attorney work product from disclosure under section 552.111 of the Government Code. *See* ORD 647; *see also* Gov't Code § 552.111. Section 552.111, however, is a discretionary exception to disclosure that protects the interests of a governmental body, not those of a third party.<sup>2</sup>

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<sup>1</sup>*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 Public Information Act in certain circumstances).

<sup>2</sup>Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.,* Open Records Decision Nos. 663 (1999) (governmental body may waive sections 552.103 and 552.111), 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 522 at 4 (1989) (discretionary exceptions in general). Discretionary exceptions therefore do not constitute "other law" that makes information confidential.

Rather than assert a discretionary exception, a governmental body may choose to release the information. Gov't Code § 552.007. Here, ERS did not assert section 552.111 for Appendix B. We therefore have no basis for concluding that any portion of Appendix B may be withheld under section 552.111. Because Entwistle & Cappucci's sole argument relates to the possible applicability of a discretionary exception, which ERS chose not to assert, we conclude that the information in Appendix B is subject to release in its entirety.

To summarize, ERS may withhold the information submitted as Appendix A in its entirety under section 552.107(1). The information submitted as Appendix B must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Michael A. Pearle  
Assistant Attorney General  
Open Records Division

MAP/seg

Ref: ID# 162138

Enc. Submitted documents

c: Mr. Nate Blakeslee  
Texas Observer  
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Austin, Texas 78701  
(w/o enclosures)