



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

May 6, 2003

Ms. Belinda R. Perkins
Assistant General Counsel
Teacher Retirement System of Texas
1000 Red River Street
Austin, Texas 78701-2698

OR2003-3053

Dear Ms. Perkins:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 180623.

The Teacher Retirement System of Texas (the "system") received a request for eight categories of information as follows:

- 1) documents sufficient to identify the dates, quantities, and prices of all purchases and sales of securities in Enron Corporation ("Enron") by or on behalf of the "Enron Investments" for a specified period of time;
- 2) documents sufficient to identify the gains and/or losses to the system as a result of the "Enron Investments";
- 3) documents sufficient to identify the internal and/or external portfolio manager responsible for the "Enron Investments";
- 4) documents analyzing or discussing the system's "Enron Investments";
- 5) documents analyzing the performance of the internal or external portfolio managers responsible for the "Enron Investments" for a specified period of time;
- 6) documents reflecting research regarding Enron as to any internal portfolio managers responsible for "Enron Investments";

- 7) documents raising, discussing, or analyzing the possibility of bringing or participating in any lawsuit with respect to the "Enron Investments"; and
- 8) documents discussing or analyzing the proposed Enron-Dynegey merger.

You state that you have made some responsive information available to the requestor. You claim, however, that the remaining requested information, or portions thereof, is excepted from disclosure pursuant to sections 552.102, 552.103, 552.107, 552.111, 552.117, and 552.137 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted information, which includes representative sample documents.¹

Initially, we note that the system previously requested a decision from us regarding the information submitted to us as Exhibit B. We ruled on that information in Open Records Letter No. 2002-6326 (2002) and concluded that the system may withhold the information pursuant to section 552.103 of the Government Code. You inform us that the law, facts, and circumstances on which that ruling was based have not changed since the issuance of the ruling. Accordingly, we conclude that the system may rely on Open Records Letter No. 2002-6326 (2002) as a previous determination regarding the public availability of the information submitted to us as Exhibit B.² *See* Gov't Code § 552.301(f); *see also* Open Records Decision No. 673 (2001) (regarding previous determinations).

Next, we note that portions of the remaining submitted information are subject to section 552.022 of the Government Code. Section 552.022 makes certain information public, unless it is expressly confidential under other law. *See* Gov't Code § 552.022(a). One category of public information under section 552.022 is "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]" *Id.* § 552.022(a)(1). Another category subject to section 552.022 is "final opinions, including concurring and dissenting opinions, and orders issued in the adjudication of cases[.]" *Id.* § 552.022(a)(12). A third category subject to section 552.022 is "information that is also contained in a public court record[.]" *Id.* § 552.022(a)(17). We have marked portions of the submitted information in Exhibits C and E which are subject to section 552.022. Although the system claims that these marked documents are excepted from disclosure pursuant to sections 552.103, 552.107, and 552.111 of the Government Code, we note that these exceptions are discretionary exceptions under the Public

¹ 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.

² Consequently, we need not address your remaining claimed exceptions to disclosure regarding Exhibit B.

Information Act and, as such, do not constitute "other law" that makes information confidential.³ Accordingly, we conclude that the system may not withhold any portion of these documents pursuant to sections 552.103, 552.107, or 552.111 of the Government Code. However, we note that the Texas Supreme Court recently held that "[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are 'other law' within the meaning of section 552.022." See *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Thus, we will determine whether any portion of the documents that we have marked in Exhibit C as subject to section 552.022 is confidential under rule 192.5 of the Texas Rules of Civil Procedure. See Open Records Decision No. 677 at 9 (2002) (appropriate law for claim of attorney work product privilege for section 552.022 information is Texas Rule of Civil Procedure 192.5). Further, since the system also claims that the documents that we have marked in Exhibit E as subject to section 552.022, or portions thereof, are excepted from disclosure pursuant to sections 552.102, 552.117, and 552.137 of the Government Code, we will address those claims.

An attorney's work product is confidential under rule 192.5. Work product is defined as:

- (1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or
- (2) a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents.

TEX. R. CIV. P. 192.5(a). Core work product is defined as the work product of an attorney or an attorney's representative developed in anticipation of litigation or for trial that contains the attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories. See Tex. R. Civ. P. 192.5(a), (b)(1). Accordingly, in order to withhold attorney work product from disclosure under rule 192.5, a governmental body must demonstrate that the material, communication, or mental impression was created for trial or in anticipation of litigation. See *id.* In order to show that the information at issue was

³ 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. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 551 (1990) (statutory predecessor to section 552.103 serves only to protect governmental body's position in litigation and does not itself make information confidential), 473 (1987) (governmental body may waive section 552.111), 522 at 4 (1989) (discretionary exceptions in general); see also *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103). Discretionary exceptions, therefore, do not constitute "other law" that makes information confidential.

created in anticipation of litigation, a governmental body must demonstrate that (1) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue, and (2) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation. See *National Tank v. Brotherton*, 851 S.W.2d 193, 207 (Tex. 1993). A "substantial chance" of litigation does not mean a statistical probability, but rather "that litigation is more than merely an abstract possibility or unwarranted fear." *Id.* at 204. Information that meets the work product test is confidential under rule 192.5 provided the information does not fall within the purview of the exceptions to the privilege enumerated in rule 192.5(c). See *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ). In *Curry v. Walker*, 873 S.W.2d 379 (Tex. 1994), the Texas Supreme Court held that a request for a district attorney's "entire file" was "too broad" and, citing *National Union Fire Insurance Co. v. Valdez*, 863 S.W.2d 458 (Tex. 1993), held that "the decision as to what to include in [the file] necessarily reveals the attorney's thought processes concerning the prosecution or defense of the case." 873 S.W.2d at 380.

Based on our review of your representations and the documents that we have marked in Exhibit C as subject to section 552.022, we conclude that all three documents constitute attorney work product. Consequently, the system must withhold the marked documents in Exhibit C that are subject to section 552.022 pursuant to Rule 192.5 of the Texas Rules of Civil Procedure. See *Curry v. Walker*, 873 S.W.2d 379 (Tex. 1994) (finding that release of any portion of attorney's litigation file would necessarily reveal governmental body's thought process concerning case).

You claim that the documents that we have marked in Exhibit E as subject to section 552.022 are excepted from disclosure pursuant to section 552.102 of the Government Code. Section 552.102 excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). Section 552.102(a) is generally applicable to information relating to a public official or employee. See Open Records Decision No. 327 at 2 (1982) (anything relating to employee's employment and its terms constitutes information relevant to person's employment relationship and is part of employee's personnel file). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected from disclosure under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation* for information claimed to be protected from disclosure under the common-law right to privacy as incorporated by section 552.101 of the Government Code. See *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), *cert. denied*, 430

U.S. 931 (1977). Accordingly, we address the system's section 552.102 claim under section 552.101.⁴

Information is protected from disclosure under the common-law right to privacy when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *See id.* After carefully reviewing the information at issue in Exhibit E, we find that no portion of this information is protected from disclosure under the common-law right to privacy. *See Open Records Decision Nos. 470 (1987) (public employee's job performance does not generally constitute his private affairs), 455 (1987) (public employee's job performances or abilities generally not protected by privacy), 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees), 423 at 2 (1984) (statutory predecessor applicable when information would reveal intimate details of highly personal nature), 405 at 2 (1983) (manner in which employee performed his job cannot be said to be of minimal public interest), 400 at 5 (1983) (statutory predecessor protected information only if its release would lead to clearly unwarranted invasion of privacy).* Accordingly, we conclude that the system may not withhold any portion of this information under section 552.101 of the Government Code in conjunction with the common-law right to privacy.

You also claim that portions of this information are excepted from disclosure pursuant to section 552.117 of the Government Code. Section 552.117(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who timely request that this information be kept confidential under section 552.024 of the Government Code. *See Gov't Code § 552.117(1).* However, information that is responsive to a request may not be withheld from disclosure under section 552.117(1) if the employee did not request confidentiality for this information in accordance with section 552.024 or if the request for confidentiality under section 552.024 for the information was not made until after the request for information at issue was received by the governmental body. Whether a particular piece of information is public must be determined at the time the request for it is made. *See Open Records Decision No. 530 at 5 (1989).*

You have submitted information to us that reflects that three of the employees who are the subjects of the information that is encompassed by section 552.022 in Exhibit E requested confidentiality for their home addresses and telephone numbers, social security numbers, and family member information prior to the system's receipt of this request for information. Accordingly, we conclude that the system must withhold the social security numbers that we have marked within Exhibit E pursuant to section 552.117(1) of the Government Code.

⁴ Section 552.101 of the Government Code excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. *See Gov't Code § 552.101.* Section 552.101 encompasses information that is protected from disclosure by the common-law right to privacy.

However, it does not appear that the fourth employee who is the subject of the information that is encompassed by section 552.022 in Exhibit E elected confidentiality for his social security number prior to the system's receipt of this request for information. Accordingly, we conclude that the system may not withhold this social security number pursuant to section 552.117(1) of the Government Code.

Nevertheless, we note that this employee's social security number may be confidential under section 552.101 of the Government Code in conjunction with federal law. Section 552.101 also encompasses information that is protected from disclosure by other statutes. The 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), make confidential social security numbers and related records that are obtained or maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See* Open Records Decision No. 622 (1994). The system has cited no law, nor are we aware of any law, enacted on or after October 1, 1990, that authorizes it to obtain or maintain social security numbers. Therefore, we have no basis for concluding that this number is confidential under section 405(c)(2)(C)(viii)(I) of title 42 of the United States Code. We caution the system, however, that section 552.352 of the Government Code imposes criminal penalties for the release of confidential information. Prior to releasing this social security number, the system should ensure that it was not obtained and is not maintained by the system pursuant to any provision of law enacted on or after October 1, 1990.

You also claim that portions of the information in Exhibit E which are subject to section 552.022, as well as portions of the information in Exhibit A, are excepted from disclosure pursuant to section 552.137 of the Government Code. Section 552.137 provides in relevant part:

- (a) An e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.
- (b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

Gov't Code § 552.137. Section 552.137 requires the system to withhold e-mail addresses of members of the public that are provided for the purpose of communicating electronically with the system, unless the members of the public with whom they are associated have affirmatively consented to their release. Section 552.137 does not apply to a government employee's work e-mail address or a business's general e-mail address or web address. Accordingly, we conclude that the system must withhold e-mail addresses of members of the public pursuant to section 552.137, unless the members of the public with whom they are associated have affirmatively consented to their release. We find no portion of the

documents in Exhibit E that are subject to section 552.022 to be excepted from disclosure under section 552.137. However, we have marked a representative sample of the types of e-mail addresses in Exhibit A that are subject to section 552.137 of the Government Code. The system must release to the requestor the remaining portions of the documents in Exhibit E that are subject to section 552.022 of the Government Code that have not already been addressed.

We note that portions of Exhibit A are copyrighted. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. *See* Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception to disclosure applies to the information. *See id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making such copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990). Accordingly, we conclude that the system must release to the requestor the remaining portions of Exhibit A not previously addressed in compliance with applicable copyright law.

You claim that the remaining submitted information in Exhibits C, D, and E is excepted from disclosure pursuant to section 552.103 of the Government Code. Section 552.103 provides in pertinent part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103 (a),(c). The system maintains 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 on the date that the governmental body receives the request for information, and (2) the information at issue is related to that litigation. *See University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *see also 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 at 4 (1990). The system must meet both prongs of this test for information to be excepted under 552.103(a).

You have submitted a Notice of Appearance filed by the Office of the Attorney General on behalf of several entities, including the system, in Civil Action No. H-01-CV-3624 (Consolidated), *Mark Newby v. Enron Corporation, et. al.*, in the United States District Court, Houston Division. You state that although the system is not currently a party to the suit, there are system interests that may result in the system becoming a party to the suit. On this basis, and upon review of the remaining submitted information, we conclude you have established that litigation regarding the system was reasonably anticipated on the date that the system received this request for information. Accordingly, we conclude that the system may withhold the remaining submitted information in Exhibits C and E, as well as the entirety of Exhibit D, pursuant to section 552.103 of the Government Code.⁵

Generally, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. See Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. See Attorney General Opinion MW-575 (1982); see also Open Records Decision No. 350 (1982).

In summary, the system may rely on Open Records Letter No. 2002-6326 (2002) as a previous determination regarding the public availability of the information submitted to us as Exhibit B. The system must withhold the marked documents in Exhibit C that are subject to section 552.022 of the Government Code pursuant to Rule 192.5 of the Texas Rules of Civil Procedure. The system must withhold the social security numbers that we have marked within the documents in Exhibit E that are subject to section 552.022 pursuant to section 552.117(1) of the Government Code. The social security number of another system employee that is contained within the documents in Exhibit E which are subject to section 552.022 may be confidential under federal law. The system must release to the requestor the remaining portions of the documents in Exhibit E that are subject to section 552.022. The system must withhold e-mail addresses in Exhibit A, a representative sample of which we have marked, pursuant to section 552.137 of the Government Code, unless the members of the public with whom they are associated have affirmatively consented to their release. The system must release to the requestor the remaining portions of Exhibit A in compliance with applicable copyright law. The system may withhold the remaining submitted information

⁵As we are able to make this determination, we need not address your remaining claimed exceptions to disclosure regarding Exhibits C and D.

in Exhibits C and E, as well as the entirety of Exhibit D, pursuant to section 552.103 of the Government Code.

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 Dep't of Pub. 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,



Ronald J. Bounds
Assistant Attorney General
Open Records Division

RJB/lmt

Ref: ID# 180623

Enc. Marked documents

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