

The ruling you have requested has been amended as a result of litigation and has been attached to this document.



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 25, 2003

Ms. Erin Perales
General Counsel
Houston Municipal Employees Pension System
1111 Bagby, Suite 2450
Houston, Texas 77002-2555

OR2003-5957

Dear Ms. Perales:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 186430.

The Houston Municipal Employees Pension System (the "system") received a request for (1) all written travel, gift, and ethics policies of the system; (2) all expense reports submitted by the executive director and members of the pension board since January, 2001; (3) all receipts for meals since January, 2001; (4) documents detailing travel, food, entertainment, or lodging provided to the executive director or members of the board; (5) documents detailing the current pension of the mayor, members of the city council, and all current department heads of the City of Houston; (6) documents detailing all incentive, Christmas, or mid-year bonuses paid to any member of the system's staff since January, 2001; (7) documents identifying all current system pension investments; (8) minutes of all system committee and/or board meetings since January 1, 2001; (9) all cell phone records of the executive director and members of the pension board since January 1, 2001; and (10) all e-mails generated or received by the executive director and chairman of the system fund since January 1, 2001.¹ You inform us that the system will release some or all of the information that is responsive to parts 1, 2, 3, 4, 7, 8, and 10 of this request for information.

¹Based on the communications that we have received from the system, the requestor, and his attorney, it appears that the request for information has been amended to exclude certain types of information. To the extent that the submitted documents contain information that is no longer responsive to the request, this decision is not applicable to such information, which need not be released.

You state that the system has no records that are responsive to part 5 of the request.² You assert that some of the remaining requested information is not subject to chapter 552 of the Government Code. You also claim that the remaining information is excepted from disclosure under sections 552.101, 552.102, 552.104, 552.106, 552.109, 552.111, 552.117, 552.136, and 552.137 of the Act. You also believe that this request for information implicates the proprietary interests of private parties to which some of the requested information pertains. You notified 11 private parties of this request for information and of their right to submit arguments to this office as to why information relating to the private parties should not be released.³ We received arguments from Brockway Moran & Partners (“Brockway”), Oaktree Capital Management (“Oaktree”), and Wilshire Associates Incorporated (“Wilshire”). We also received correspondence from the requestor and his attorney.⁴ We have considered all of the submitted arguments and have reviewed the submitted information.⁵

We first note that an interested third party is allowed ten business days from the date of its receipt of the governmental body’s notice under section 552.305 to submit its reasons, if any, as to why information relating to that party should not be released. *See* Gov’t Code § 552.305(d)(2)(B). As of the date of this decision, this office has received no correspondence from Barclays Global Investors; CDK Realty Advisors; Crestline Investors, Inc.; Legg Mason Capital Management; State Street; Synergy Investment Advisers; TT International; or Taplin, Canida & Habacht. Thus, none of these parties has demonstrated that any of the submitted information is proprietary for purposes of section 552.110 of the Government Code. *See, e.g.*, Gov’t Code § 552.110(a)-(b); Open Records Decision Nos. 552 at 5 (1990), 661 at 5-6 (1999).

²We note that the Act does not require a governmental body to answer factual questions, conduct legal research, or create new information in responding to a request for information. *See* Open Records Decision Nos. 563 at 8 (1990), 555 at 1-2 (1990). Likewise, the Act does not require a governmental body to take affirmative steps to create or obtain information that is not in its possession, so long as no other individual or entity holds that information on behalf of the governmental body that receives the request. *See* Gov’t Code § 552.002(a); Open Records Decision Nos. 534 at 2-3 (1989), 518 at 3 (1989). A governmental body must make a good-faith effort, however, to relate a request to any responsive information that is within the governmental body’s possession or control. *See* Open Records Decision Nos. 87 at 2-3 (1975), 561 at 8-9 (1990).

³*See* Gov’t Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to Gov’t Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under Gov’t Code ch. 552 in certain circumstances).

⁴*See* Gov’t Code § 552.304 (any person may submit written comments stating why information at issue in request for attorney general decision should or should not be released).

⁵This letter ruling assumes that the submitted representative samples of information are truly representative of the requested information as a whole. This ruling neither reaches nor authorizes the system to withhold any information that is substantially different from the submitted information. *See* Gov’t Code § 552.301(e)(1)(D); Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

Likewise, Oaktree does not assert that any of the submitted information must be withheld from disclosure under section 552.110. However, Oaktree has informed this office that the request for the submitted information that relates to Oaktree has been withdrawn. We have received no confirmation of Oaktree's representation from either the system or the requestor. Thus, it is not clear to this office whether the submitted information that relates to Oaktree is still at issue. Nevertheless, if the request for the information relating to Oaktree has in fact been withdrawn, then this decision is not applicable to the submitted information that relates to Oaktree, and the system need not release that information.

Next, we address the system's contention that submitted communications of its chairman and executive director of the system are not subject to the Public Information Act (the "Act"), chapter 552 of the Government Code. The Act applies to "public information." *See* Gov't Code § 552.021. Section 552.002 of the Act defines "public information" as consisting of

information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

- (1) by a governmental body; or
- (2) for a governmental body and the governmental body owns the information or has a right of access to it.

Gov't Code § 552.002(a). Thus, virtually all information that is in a governmental body's physical possession constitutes public information that is subject to the Act. *Id.* § 552.022(a)(1); *see also* Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). Likewise, the Act is applicable to information that a governmental body does not physically possess, if the information is collected, assembled, or maintained for a governmental body, and the governmental body owns the information or has a right of access to it. Gov't Code § 552.002(a)(2); *see also* Open Records Decision No. 462 at 4 (1987) (Act applies to information collected or maintained by consultant if information relates to governmental body's official duties or business, consultant acts as agent of governmental body in collecting information, and governmental body has or is entitled to access to information). However, the Act does not require a governmental body to release information if the governmental body that receives the request has neither possession of the information nor a right of access to it. *See* Open Records Decision Nos. 534 at 2-3 (1989), 518 at 2-3 (1989).

You assert that three submitted e-mail communications "do not relate to the official business of [the system], nor are they maintained by a public official or employee in the performance of official duties." Based on your representations and our review of the information at issue, we agree that the three e-mail communications do not constitute or contain "public information" for purposes of section 552.002 and are therefore not subject to disclosure

under the Act.⁶ See Open Records Decision Nos. 635 at 3-8 (1995) (appointment calendar purchased by state employee, who also maintained calendar herself and apparently had sole access to it, not subject to Act), 77 (1975) (personal notes made by individual faculty members for personal use as memory aids not subject to Act); compare Open Records Decision Nos. 626 at 1-2 (1994) (handwritten notes taken during oral interview by Texas Department of Public Safety promotion board members subject to Act), 450 (1986) (notes of appraisers taken in course of teacher appraisals subject to Act), 120 (1976) (faculty members' written evaluations of doctoral student's qualifying exam subject to Act).

Next, we address your arguments with regard to the rest of the submitted information. We begin with your claim that much of the remaining information is not subject to the Act. You inform us that the system is a governmental defined pension plan governed by article 6243h of Vernon's Texas Civil Statutes. Article 6243h is applicable to municipal pension systems in cities of 1,500,000 or more. You assert that section 26 of article 6243h exempts information held by the system from the scope of the Act. Section 26 is titled "Confidential Information" and provides in part:

(a) Records that are in the custody of the pension system concerning an individual member, deferred participant, retiree, eligible survivor, beneficiary, or alternate payee are not public information under Chapter 552, Government Code, and may not be disclosed in a form identifiable to a specific individual unless:

(1) the information is disclosed to:

(A) the individual or the individual's attorney, guardian, executor, administrator, or conservator, or another person who the executive director determines is acting in the interest of the individual or the individual's estate;

(B) a spouse or former spouse of the individual and the executive director determines that the information is relevant to the spouse's or former spouse's interest in a member's accounts or benefits or other amounts payable by the pension system;

(C) a governmental official or employee and the executive director determines that disclosure of the information requested is reasonably necessary to the performance of the duties of the official or employee; or

⁶As we are able to make this determination, we need not address your claim that one of the e-mail communications is excepted from disclosure under section 552.109 of the Act.

(D) a person authorized by the individual in writing to receive the information; or

(2) the information is disclosed under a subpoena and the executive director determines that the individual will have a reasonable opportunity to contest the subpoena.

(b) This section does not prevent the disclosure of the status or identity of an individual as a member, former member, deferred participant, retiree, deceased participant, eligible survivor, beneficiary, or alternate payee of the pension system.

V.T.C.S. art. 6243h, § 26(a)-(b). You assert that “[s]ection 26 broadly states that records concerning specific categories of participants are not public information under the [Act].” (Emphasis in original.) You contend that “information relating to participants is [therefore] not ‘public information’ under Section 552.002 [of the Act] and is not available to the public under the Act.”

We disagree. We find that section 26(a) does not remove any information to which it is applicable from the scope of the Act. Although section 26(a) prohibits public release of information “in a form identifiable to a specific individual,” it does not prohibit the release of information that has been de-identified and specifically provides for disclosure of the fact that a particular individual is a participant in the system. We therefore conclude that section 26(a) does not broadly remove information that relates to participants in the system from the scope of the Act, and thus such information may not be withheld from the public unless it is demonstrated to fall within one of the Act’s exceptions to disclosure.

You also claim that much of the submitted information is confidential under section 552.101 of the Act in conjunction with section 26(a) of article 6243h, V.T.C.S. Section 552.101 exempts from required public disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” This exception encompasses information that other statutes make confidential. You argue that section 26 of article 6243h makes the following information confidential: (1) personal credit card and preferred client account numbers of officials of the system; (2) the home addresses, home telephone and fax numbers, personnel cellular telephone numbers, personal e-mail addresses, and family member information of officials of the system; (3) information relating to “performance pay” of employees of the system; and (4) information contained in minutes of meetings, schedules of minutes, and e-mail messages that relates to members, deferred participants, retirees, eligible survivors, beneficiaries, and alternate payees.

Having considered your arguments, we conclude that only the submitted information that relates to and identifies individuals as participants in the system is confidential under section 26(a). We have marked that information. You do not inform us that the marked

information may be disclosed to this requestor under section 26(a)(1). Therefore, the system must withhold the marked information under section 552.101 of the Act as information made confidential by law. Otherwise, you have not demonstrated that section 26(a) is applicable to any of the remaining information that you submitted. Therefore, you may not withhold any of that information under section 552.101 of the Act in conjunction with section 26(a) of article 6243h, V.T.C.S. *See also* Open Records Decision Nos. 658 at 4 (1998) (statutory confidentiality provision must be express, and confidentiality requirement will not be implied from statutory structure), 649 at 3 (1996) (language of confidentiality provision controls scope of its protection), 478 at 2 (1987) (statutory confidentiality requires express language making certain information confidential or stating that information shall not be released to public).

The system also raises section 552.101 in conjunction with the common-law right to privacy. Common-law privacy protects private facts about individuals. Information must be withheld from the public under section 552.101 in conjunction with common-law privacy when the information is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, *and* (2) of no legitimate public interest. *See Industrial Found. v. Texas Ind. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Common-law privacy encompasses the specific types of information that the Texas Supreme Court held to be intimate or embarrassing in *Industrial Foundation*. *See* 540 S.W.2d at 683 (information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs). This office has since concluded that other types of information also are private under section 552.101. *See* Open Records Decision No. 659 at 4-5 (1999) (summarizing information attorney general has determined to be private), 470 at 4 (1987) (illness from severe emotional job-related stress), 455 at 9 (1987) (prescription drugs, illnesses, operations, and physical handicaps), 343 at 1-2 (1982) (references in emergency medical records to drug overdose, acute alcohol intoxication, obstetrical/gynecological illness, convulsions/seizures, or emotional/mental distress).

Common-law privacy protects certain types of personal financial information from public disclosure. In prior decisions, this office has determined that financial information relating only to an individual ordinarily satisfies the first element of the common-law privacy test, but the public has a legitimate interest in the essential facts about a financial transaction between an individual and a governmental body. *See, e.g.*, Open Records Decision Nos. 545 at 4 (1990), 523 at 4 (1989), 373 at 4 (1983). Thus, a public employee's allocation of part of the employee's salary to a voluntary investment program offered by the employer is a personal investment decision, and information about that decision is protected by common-law privacy. *See, e.g.*, Open Records Decision Nos. 600 at 9-12 (1992) (TexFlex benefits), 545 at 3-5 (1990) (deferred compensation plan). Likewise, an employee's designation of a retirement beneficiary is excepted from disclosure under the common-law right to privacy. *See* Open Records Decision No. 600 at 9 (1992). However, where a

transaction is funded in part by the state, it involves the employee in a transaction with the state, and the basic facts about that transaction are not protected by common-law privacy. *Id.* at 9.

The system also raises section 552.102 of the Government Code. Section 552.102(a) excepts from public disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]” This exception is applicable to information that relates to public officials and employees. *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). The test of privacy under section 552.102(a) is the same as the test of common-law privacy under section 552.101 of the Government Code. *See Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.—Austin 1983, writ ref'd n.r.e.) (addressing statutory predecessor). Therefore, we will address your privacy claims under sections 552.101 and 552.102 together.

You contend that information relating to participants in the pension system and the programs in which they are enrolled is protected by common-law privacy. We have previously concluded, however, that the system must withhold the information that identifies these individuals under section 552.101 in conjunction with section 26(a) of article 6243h, V.T.C.S. Because the de-identified information does not otherwise implicate the private interests of the individuals to whom it pertains, we conclude that none of the remaining information that relates to participants in pension system programs is protected by common-law privacy under sections 552.101 or 552.102. Likewise, you have not demonstrated, and it is not otherwise clear to this office, that any of the remaining documents contain any information that is private under sections 552.101 or 552.102. *See Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d at 549-51 (statutory predecessor to Gov't Code § 552.102(a) protects information that reveals “intimate details of a highly personal nature”); Open Records Decision Nos. 470 at 4 (1987) (public employee's job performance does not generally constitute that individual's private affairs), 444 at 3 (1986) (public has obvious interest in information concerning qualifications and performance of governmental employees), 423 at 2 (1984) (statutory predecessor to Gov't Code § 552.102 applicable when information would reveal intimate details of highly personal nature), 400 at 5 (1983) (statutory predecessor to Gov't Code § 552.102 is “very narrow” and protects information only if release would lead to clearly unwarranted invasion of privacy).

Next, we address the system's claims under sections 552.106 and 552.111 of the Act. Section 552.106 excepts from disclosure “[a] draft or working paper involved in the preparation of proposed legislation” and “[a]n internal bill analysis or working paper prepared by the governor's office for the purpose of evaluating proposed legislation.” *See* Gov't Code § 552.106(a)-(b). Sections 552.106 and 552.111 are similar in that both of these exceptions protect advice, opinion, and recommendation on policy matters, in order to encourage frank discussion during the policymaking process. *See* Open Records Decision

No. 460 at 3 (1987). However, section 552.106 applies specifically to the legislative process and thus is narrower than section 552.111. *Id.* The purpose of section 552.106 is to encourage frank discussion on policy matters between the subordinates or advisors of a legislative body and the members of the legislative body, and therefore it does not except purely factual information from disclosure. *Id.* at 2. Furthermore, section 552.106 ordinarily applies only to persons with a responsibility to prepare information and proposals for a legislative body. *Id.* at 1.

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.” This exception encompasses the deliberative process privilege. The purpose of section 552.111 is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, no writ); Open Records Decision No. 538 at 1-2 (1990). In Open Records Decision No. 615 (1993), this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined that section 552.111 excepts only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See* Open Records Decision No. 615 at 5. A governmental body’s policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *Id.*; *see also City of Garland v. The Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body’s policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body’s policy mission. *See* Open Records Decision No. 631 at 3 (1995). Further, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *See* Open Records Decision No. 615 at 5. But if factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, the factual information also may be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982).

We also have concluded that a preliminary draft of a document that is intended for public release in its final form necessarily represents the drafter’s advice, opinion, and recommendation with regard to the form and content of the final document, so as to be excepted from disclosure under section 552.111. *See* Open Records Decision No. 559 at 2 (1990) (applying statutory predecessor). Section 552.111 protects factual information in the draft that also will be included in the final version of the document. *See id.* at 2-3. Thus, section 552.111 encompasses the entire contents, including comments, underlining, deletions, and proofreading marks, of a preliminary draft of a policymaking document that will be released to the public in its final form. *See id.* at 2.

You assert that the submitted information includes communications that contain advice, recommendations, and opinions relating to policy matters and thus are protected by section 552.111. You also seek to withhold most of this same information under section 552.106. You state that the information for which you claim an exception under section 552.106 consists of draft proposals and recommendations for legislation. You state that this information relates to proposed legislation affecting programs administered by the system and reflects the system's policy judgments and recommendations regarding the proposed legislation at issue. Having considered your arguments, we conclude that the system has demonstrated that some of the information at issue is excepted from disclosure under section 552.111. *See also* Open Records Decision Nos. 631 at 2 (1995) (Gov't Code § 552.111 encompasses information created for governmental body by outside consultant acting at governmental body's request and performing task that is within governmental body's authority) 462 at 14 (1987) (statutory predecessor applies to memoranda prepared by governmental body's consultants). We have marked the information that the system may withhold under section 552.111. We note that some of the remaining information that you seek to withhold under sections 552.111 or 552.106 consists of communications with outside parties. You do not inform us that these outside parties have a responsibility to prepare information and proposals for a legislative body. *See* Open Records Decision No. 460 at 1 (1987) (addressing statutory predecessor to Gov't Code § 552.106). Likewise, you do not inform us that these parties share a privity of interest or common deliberative process with the system. *See* Open Records Decision No. 561 at 9 (1990) (addressing statutory predecessor to Gov't Code § 552.111). We conclude that you have not shown that section 552.106 or section 552.111 is applicable to any of the remaining information that the system seeks to withhold under these exceptions. Therefore, none of that information is excepted from disclosure under sections 552.106 or 552.111.

The system also contends that section 552.117 is applicable to some of the submitted information. Section 552.117(a)(2) excepts from public disclosure the home address, home telephone number, and social security number of a peace officer, as defined by article 2.12 of the Code of Criminal Procedure, as well as information that reveals whether the peace officer has family members, regardless of whether the peace officer complies with sections 552.024 or 552.1175. You state that the submitted cell phone records contain the home telephone or cell phone number of a peace officer. We agree that the system must withhold a peace officer's home telephone or cell phone number under section 552.117(a)(2). *See also* Open Records Decision No. 670 at 6 (2001) (all governmental bodies covered by Act may withhold home telephone and personal cell phone numbers of peace officers without necessity of requesting decision under Gov't Code § 552.301 as to whether Gov't Code § 552.117(a)(2) applies).

Section 552.117(a)(1) excepts from disclosure the home address and telephone number, social security number, and family member information of a current or former official or employee of a governmental body who requests that this information be kept confidential under section 552.024. Whether a particular item of information is protected by section

552.117(a)(1) must be determined at the time that the request for the information is received by the governmental body. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the system may only withhold information under section 552.117(a)(1) on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date on which the system received this request for information. The system may not withhold information under section 552.117(a)(1) on behalf of a current or former official or employee who did not make a timely election under section 552.024 to keep the information confidential. We have marked the types of information that the system must withhold under section 552.117(a)(1) if the information relates to a current or former official or employee of the system who timely and specifically elected under section 552.024 to keep that information confidential.

The system also raises sections 552.136 and 552.137. Section 552.136 provides as follows:

(a) In this section, “access device” means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

(1) obtain money, goods, services, or another thing of value; or

(2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.

Gov’t Code § 552.136. We have marked the type of information that the system must withhold under section 552.136.

Section 552.137 makes certain e-mail addresses confidential. This exception provides as follows:

(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 is applicable only to a personal e-mail address. This exception is not applicable to an institutional e-mail address, an Internet website address, or an e-mail address that a governmental body maintains for one of its officials or employees. We have marked the types of e-mail addresses that are confidential under section 552.137. You do not inform us that the individuals to whom the marked e-mail addresses belong have affirmatively consented to their public disclosure. Therefore, the system must withhold the marked e-mail addresses under section 552.136.

Next, we consider the system's claim under section 552.104.⁷ This exception is applicable to "information that, if released, would give advantage to a competitor or bidder." This exception protects a governmental body's interests in competitive bidding and certain other competitive situations. *See* Open Records Decision No. 593 (1991) (construing statutory predecessor). This office has held that a governmental body may seek protection as a competitor in the marketplace under section 552.104 and avail itself of the "competitive advantage" aspect of this exception if it can satisfy two criteria. First, the governmental body must demonstrate that it has specific marketplace interests. *Id.* at 3. Second, the governmental body must demonstrate a specific threat of actual or potential harm to its interests in a particular competitive situation. *Id.* at 5. Thus, the question of whether the release of particular information will harm a governmental body's legitimate interests as a competitor in a marketplace depends on the sufficiency of the governmental body's demonstration of the prospect of specific harm to its marketplace interests in a particular competitive situation. *Id.* at 10. A general allegation of a remote possibility of harm is not sufficient. *See* Open Records Decision No. 514 at 2 (1988).

The system claims an exception to disclosure under section 552.104 for information relating to investment managers with which the system does business. You inform us that the system competes as a limited partner with other investors in the private equity and private real estate marketplace. You assert that the system "is a significant investor in the marketplace and competes with other investors, including private pension funds, private endowments and individuals, for access to the top-performing partnerships." You argue that disclosure of information relating to the system's investment managers "would likely cause specific harm to [the system's] legitimate marketplace interests and could significantly hinder its ability to compete in the marketplace by negatively impacting [the system's] opportunities to invest with top-performing [investment] managers." You contend that the release of information relating to investment managers with which the system does business "would cause competitive harm to the system because private equity and private real estate funds would be less willing to seek or retain [the system] as an investor." You also assert that the system has been successful in negotiating favorable terms with partnerships and that the release of

⁷Brockway also has submitted arguments under section 552.104. We note, however, that this exception protects the interests of governmental bodies, not those of private parties. *See* Open Records Decision No. 592 at 8 (1991) (addressing statutory predecessor). Therefore, Brockway may not rely on section 552.104.

information relating to the system's investments would cause the system to have significantly less leverage in future negotiations for favorable terms. Having considered your arguments, we find that you have demonstrated that the system has specific marketplace interests and that the prospective release of the information at issue poses a specific threat of harm to the system's interests in a particular competitive situation. We therefore conclude that the system may withhold the submitted information that relates to its investments under section 552.104. We have marked that information accordingly.⁸

In summary, except for the three e-mail communications that do not constitute public information under section 552.002, the submitted information is subject to the Act. The system must withhold the marked information that identifies participants in the system under section 552.101 of the Act in conjunction with section 26 of article 6243h of Vernon's Texas Civil Statutes. The system may withhold the marked information that is excepted from disclosure under section 552.111. A peace officer's home telephone and personal cellular phone number must be withheld under section 552.117(a)(2). The system also must withhold the home address and telephone number, social security number, and family member information of a current or former official or employee of the system under section 552.117(a)(1) if the individual to whom the information pertains timely and specifically elected under section 552.024 to keep it confidential. The system also must withhold the marked information that is confidential under section 552.136 and the marked e-mail addresses that are confidential under section 552.137. The information that relates to the system's investment managers is excepted from disclosure under section 552.104. The system must release the rest of the submitted information.

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).

⁸As we are able to make this determination under section 552.104, we need not address the claims of the system, Brockway, or Wilshire under section 552.110.

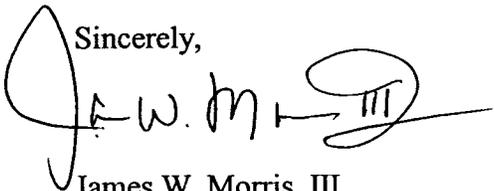
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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,

A handwritten signature in black ink, appearing to read "J.W. Morris III". The signature is written in a cursive style with a large initial "J" and a long horizontal flourish extending to the right.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/sdk

Ref: ID# 186430

Enc: Submitted documents

c: Mr. Wayne Dolcefino
KTRK-TV
3310 Bissonnet
Houston, Texas 77005
(w/o enclosures)

Mr. Charles L. Babcock
Jackson Walker L.L.P.
100 Congress Avenue, Suite 1100
Austin, Texas 78701
(w/o enclosures)

Mr. B. Jay Anderson
Brockway Moran & Partners, Inc.
225 NE Mizner Boulevard, 7th Floor
Boca Raton, Florida 33432
(w/o enclosures)

Mr. Alan L. Manning
Wilshire Associates Incorporated
1299 Ocean Avenue, Suite 700
Santa Monica, California 90401-1085
(w/o enclosures)

Mr. Robert L. Dell Angelo
Munger, Tolles & Olson LLP
355 South Grand Avenue, 35th Floor
Los Angeles, California 90071-1560
(w/o enclosures)

Mr. Charles Mcauley
TT International
5 Martin Lane, 2nd Floor
London, England EC4R0DP
(w/o enclosures)

Mr. Will Britten
Barclays Global Investors
45 Fremont Street
San Francisco, California 94105
(w/o enclosures)

Mr. Alan Habacht
Taplin, Canida & Habacht
1001 Brickell Bay Drive, Suite 2100
Miami, Florida 33131
(w/o enclosures)

Mr. Asim Azfar
State Street California, Inc.
1001 Marina Village Parkway, 3rd Floor
Alameda, California 94501
(w/o enclosures)

Ms. Theresa D. Mozzocci
Crestline Investors, Inc.
201 West Main Street, Suite 1900
Fort Worth, Texas 76102
(w/o enclosures)

Mr. Kyle Legg
Legg Mason Capital Management
100 Light Street
Baltimore, Maryland 21202
(w/o enclosures)

Mr. Kenneth Cooley
CDK Realty Advisors
2301 North Akard Street, Suite 100
Dallas, Texas 75201
(w/o enclosures)

Mr. Donald Lamuth
Synergy Investment Advisers
800 Third Avenue, 38th Floor
New York, New York 10022
(w/o enclosures)



**In The
Court of Appeals
Sixth Appellate District of Texas at Texarkana**

No. 06-05-00055-CV

HOUSTON MUNICIPAL EMPLOYEES
PENSION SYSTEM, Appellant

V.

GREG ABBOTT, ATTORNEY GENERAL OF TEXAS, Appellee

On Appeal from the 353rd Judicial District Court
Travis County, Texas
Trial Court No. GN303629

Before Morriss, C.J., Ross and Carter, JJ.
Opinion by Justice Carter

OPINION

Houston Municipal Employees Pension System (HMEPS) appeals from the denial of its request for a declaratory judgment. HMEPS had asked Greg Abbott, the Attorney General of Texas, for direction concerning the scope of its necessary response to information sought by the news media. HMEPS disagreed with parts of the Attorney

General's conclusions, and sought judicial direction. The trial court agreed with the Attorney General's conclusion that HMEPS was required to produce certain documents. This appeal ensued.

A television station asked HMEPS to provide it with information about income, salaries, benefits, and bonuses provided to the executive director and members of the Pension Board. HMEPS provided part of the information, but decided that some of the records could not be released because of the confidentiality provisions of the Pension Statute. At that point in the proceedings, there were a number of different records sought. Since then, the scope has been narrowed to two categories of records, as set out below.

HMEPS sought an open records decision from the Attorney General's Office. The Attorney General declared that Section 26 of the Pension Statute did not remove information relating to the pension fund participants from the scope of the Public Information Act (PIA) and informed HMEPS that it was required to release a number of items, some redacted, some complete, and that some items could be withheld under the exceptions of the PIA. HMEPS followed the Attorney General's directives, for all but two categories of documents that remain in dispute.

HMEPS then sought a declaratory judgment. The trial court declared that it had to produce unredacted copies of the two types of items that remain at issue.

HMEPS appeals, arguing that it should not have to produce: (1) records showing pay and bonuses of HMEPS employees who are also HMEPS participants; and (2) schedules disclosing pension payments to individual HMEPS participants, participants' requests for disability benefits, participants' payments to HMEPS for increased benefits, and participants' requests to change or commence participation in different programs or groups offered by the fund.

Underlying Concepts: Review of Statutory Pronouncements

When interpreting statutes, we try to give effect to legislative intent. Legislative intent remains the polestar of statutory construction. However, it is cardinal law in Texas that a court construes a statute, first, by looking to the plain and common meaning of the statute's words. If the meaning of the statutory language is unambiguous, we adopt, with few exceptions, the interpretation supported by the plain meaning of the provision's words and terms. Further, if a statute is unambiguous, rules of construction or other extrinsic aids cannot be used to create ambiguity. *Fitzgerald v. Advanced Spine Fixation Sys., Inc.*, 996 S.W.2d 864, 865 (Tex. 1999); *accord In re Entergy Corp.*, 142 S.W.3d 316 (Tex. 2004).

Are the Records Subject to Disclosure Under the Public Information Act?

The position of HMEPS is quite straightforward. It argues that the trial court's ruling, essentially adopting the Attorney General's argument, was incorrect and that TEX. REV. CIV. STAT. ANN. art. 6243h, Section 26(a), specifies that the records are NOT public information, and thus, the PIA does not apply. The Pension Statute provides that:

(a) **Records that are in the custody of the pension system** concerning an individual member, deferred participant, retiree, eligible survivor, beneficiary, or alternate payee **are not public information under Chapter 552 Government Code, *and*** may not be disclosed in a form identifiable to a specific individual unless: [a list of exceptions, none of which are applicable on their face to this case].

(Emphasis added.) HMEPS contends that these are such records, in the custody of the pension system, concerning individual members, and thus—by the explicit and clear language of the statute—the records are not public information.

HMEPS is correct. The Attorney General presents four reasons why these records must be released: (1) it is contrary to the plain language and core principles of the PIA, (2) there is an internal inconsistency in the Pension Statute, (3) it would create an exception that would allow HMEPS to administratively operate outside of any public scrutiny, and (4) the records are public information because they could be disclosed if identifying information is redacted. We will address these issues:

(1) Contrary to the plain language and core principles of the PIA.

It is true, as the Attorney General argues, that the PIA should be liberally construed and that the manner and degree to which public funds are expended is of public interest. Based on that premise, the Attorney General argues that it is proper to distinguish records from HMEPS that pertain to staff as public employees and records solely as pension system members. The Attorney General suggests that finding such a distinction allows "the pension system statute and the PIA to be read in harmony." That may be a valid suggestion for the Legislature to consider, but the statute that we must interpret makes no such distinction in the records in the custody of HMEPS.

(2) Internal inconsistency in the Pension Statute.

The Attorney General also argues that the records should be released because another portion of the Pension Statute (Section 26(b)) specifically allows disclosure of the fact that a particular person is a participant in the system.

The Attorney General argues that Section 26(a) and (b) can only be harmonized by construing 26(a) "narrowly"—it prohibits the public release of pension information only when such release would identify a pension individual and pension system information. Identifying a person as a participant is not equivalent to providing details about that person's participation. The records, which could (but might not) contain such details are the specific type of documents that are not subject to the PIA. The Pension Statute does not differentiate between various types of records held by the pension system—or suggest that some are subject to the PIA while some are not—or that some might be shifted to be under the aegis of the PIA if some particular type of information was redacted from the record. Again, the statute states that records in custody of the system concerning individual members are not public information under Chapter 552 of the Texas Government Code. *See* TEX. GOV'T CODE ANN. §§ 552.001–.353 (Vernon 2004 & Supp. 2005). That pronouncement has a degree of clarity uncommon to many legislative enactments.

(3) It would create an exception that would allow HMEPS to administratively operate outside of any public scrutiny.

We recognize that the reason behind the Attorney General's reasoning is this: part of the information sought was salary and bonus records, which are—*when public information*—discoverable under the PIA. That argument, nonetheless, runs contrary both to the language of the Pension Statute and the internal pronouncement of the PIA itself. *See* TEX. GOV'T CODE ANN. § 552.101 (Information is excepted from the requirements of the Act if it is confidential by law—either constitutional, statutory, or by judicial decision.).

(4) May the records be released if identifying information has been redacted?

The Attorney General further argues that the schedules are public information because one section of Section 26(a) allows the release of some records if identifying information has been redacted.

To reach that conclusion, the Attorney General theorized that, if the information was "de-identified" to remove the names, the information was within the scope of the Act, and subject to disclosure. The Attorney General suggests that the records are not excluded unless they provide information about individual members AND also are not redactable to hide the identity of the individual.

That position ignores the clear language of the Pension Statute. The "and" phrase on which the Attorney

General relies does not either necessarily or by any reasonable implication require that combination of factors *before* the records are "not public information." The statute contains two separate confidentiality clauses, designed to protect records in two different situations: (1) the records are not public information (thus not required to be produced under the PIA), and (2) the records may not be disclosed in a form identifying the individual (except in certain, specified circumstances).

The Pension Statute specifically states that records in the custody of the pension system about its members are not subject to the PIA. We have no authority or inclination to rewrite a clear statutory pronouncement.

Are the HMEPS Schedules Subject to Disclosure Under the Open Meetings Act?

The Attorney General also suggests that the documents should be available because the Open Meetings Act requires disclosure of the minutes of an open meeting. *See* TEX. GOV'T CODE ANN. § 551.022. This argument, and its statutory support, was not presented to the trial court, and is thus not properly before us for review. *See* TEX. R. APP. P. 33.1. Although the trial court did mention the Act while making its oral ruling, the ruling was not based on that Act, and it does not appear in the trial court's judgment.

As pointed out by appellant, however, even if that theory of recovery was before this Court, that Act requires "minutes" to be released to the public. Minutes are required to (1) state the subject of deliberation, and (2) indicate the result of the vote or decision. TEX. GOV'T CODE ANN. § 551.021(b). The Attorney General argues that, because during the meetings the schedules addressing pension payments and requests for benefits were considered during the Board's deliberations, and because those schedules have been filed along with the minutes, they are equivalent to being part of the minutes. The Attorney General has directed us to no authority requiring that result, and we are aware of none.

We reverse and render judgment in favor of the Houston Municipal Employees Pension System.

Jack Carter
Justice

Date Submitted: April 18, 2006
Date Decided: May 9, 2006