



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 1, 2004

Mr. Dan Junell
Assistant General Counsel
Teacher Retirement System of Texas
1000 Red River Street
Austin, Texas 78701-2698

OR2004-1484

Dear Mr. Junell:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 197051.

The Teacher Retirement System of Texas (the "system") received a request for information pertaining to "discussions or proposals about the [system] and the use of insurance arbitrage, also known as insurance securitization, for the benefit of active and/or retired members or other state agencies, not-for-profit organizations or private entities making use of such arrangements on behalf of [the system] and its members." You state that the system has made some of the requested information available to the requestor. You claim, however, that the remaining requested information, or portions thereof, is excepted from disclosure pursuant to sections 552.101, 552.107, 552.111, and 552.137 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted information.¹

Initially, we address your claim with respect to the information that the system submitted to us for review as Exhibits B and C under section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. In asserting section 552.101 for this particular information, you essentially argue that the information should be deemed confidential because the fiduciary duty of members of the system's Board

¹ We note your assertion that portions of the submitted information are not responsive to this request for information. Accordingly, this ruling does not address this particular information and it need not be released to the requestor in response to this ruling.

of Trustees under the Restatement (Third) of Trusts, as well as other law, requires that the system's trusts be administered solely for the benefit of the trust beneficiaries and that the release of the information at issue has the potential to harm the trust and, therefore, its beneficiaries. We note, however, that statutory confidentiality requires express language making certain information confidential or stating that the information shall not be released to the public. *See* Open Records Decision No. 478 at 2 (1987). None of the provisions of law cited with respect to your section 552.101 assertion contain language that makes any of the information at issue expressly confidential, nor do any of the provisions state that the information shall not be released to the public. As we are aware of no provision that makes any portion of the information at issue expressly confidential, we conclude that the system may not withhold any portion of Exhibits B and C under section 552.101 of the Government Code.

You claim that portions of Exhibit B are excepted from disclosure pursuant to section 552.107 of the Government Code. Section 552.107(1) protects information that is encompassed by the attorney-client privilege. *See* Gov't Code § 552.107(1). When asserting the attorney-client privilege, a governmental body maintains the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. *See* Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *See id.* at 7. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. *See* TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *See In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element.

Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. *See* TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a confidential communication, *see id.* 503(b)(1), meaning it was "not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." *See id.* 503(a)(5). Whether a communication meets this definition depends on the intent of the parties involved at the time the information was communicated. *See Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality

of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

Based on our review of your arguments and Exhibit B, we agree that all of the information in this exhibit that is at issue reflects confidential communications exchanged between privileged parties in furtherance of the rendition of legal services to a client. Accordingly, we conclude that the system may withhold the entirety of the information at issue in Exhibit B pursuant to section 552.107(1) of the Government Code.²

You also claim that portions of Exhibit C are excepted from disclosure pursuant to section 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." Gov't Code § 552.111. 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. *See City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *see also Arlington Indep. Sch. Dist. v. Texas Attorney Gen.*, 37 S.W.3d 152 (Tex. App.- Austin, 2001, no pet.). The purpose of section 552.111 is "to protect from public disclosure advice and opinions on policy matters and to encourage frank and open discussion within the agency in connection with its decision-making processes." *Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.- San Antonio 1982, writ ref'd n.r.e.).

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. *See Open Records Decision No. 615 at 5-6 (1993)*. Additionally, section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *See Arlington Indep. Sch. Dist.*, 37 S.W.3d at 160; *see also Open Records Decision No. 615 at 4-5*. However, 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)*. Further, a preliminary draft of a policymaking document that has been released or is intended for release in final form is excepted from disclosure in its entirety under section 552.111 because such a draft necessarily represents the advice,

² Because we base our ruling regarding this particular information on section 552.107(1) of the Government Code, we need not address your section 552.111 claim with regard to this same information.

recommendations, or opinions of the drafter as to the form and content of the final document. *See* Open Records Decision No. 559 at 2 (1990).

You indicate that the information at issue in Exhibit C constitutes intraagency and interagency communications which contain the advice, opinions, and recommendations of system staff concerning the subject matter of the present request for information. Further, you state that this information includes drafts of documents which were subsequently released in final form. Based on our review of your representations and the information at issue in Exhibit C, we find that portions of this information constitute intraagency and interagency communications consisting of advice, recommendations, and opinions reflecting the policymaking processes of the system. Accordingly, we conclude that the system may withhold portions of the information at issue in Exhibit C, which we have marked, pursuant to section 552.111. However, we also find that the remaining portions of the information at issue in Exhibit C do not constitute such intraagency or interagency communications. Accordingly, we also conclude that the system may not withhold any other portion of the information at issue in Exhibit C under section 552.111 of the Government Code.

You claim that portions of the information that you submitted to us for review as Exhibit A, as well as a portion of Exhibit C, may be excepted from disclosure pursuant to section 552.137 of the Government Code. Section 552.137 provides:

(a) Except as otherwise provided by this section, 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.

(c) Subsection (a) does not apply to an e-mail address:

(1) provided to a governmental body by a person who has a contractual relationship with the governmental body or by the contractor's agent;

(2) provided to a governmental body by a vendor who seeks to contract with the governmental body or by the vendor's agent;

(3) contained in a response to a request for bids or proposals, contained in a response to similar invitations soliciting offers or information relating to a potential contract, or provided to

a governmental body in the course of negotiating the terms of a contract or potential contract; or

(4) provided to a governmental body on a letterhead, coversheet, printed document, or other document made available to the public.

(d) Subsection (a) does not prevent a governmental body from disclosing an e-mail address for any reason to another governmental body or to a federal agency.

Gov't Code § 552.137. Section 552.137 requires a governmental body to withhold certain e-mail addresses of members of the public that are provided for the purpose of communicating electronically with the governmental body, unless the members of the public with whom the e-mail addresses 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. E-mail addresses that are encompassed by subsection 552.137(c) are also not excepted from disclosure under section 552.137. We have marked the e-mail addresses in Exhibits A and C that may be excepted from disclosure under section 552.137(a). However, if these marked e-mail addresses are encompassed by subsection 552.137(c), they are not excepted from disclosure under section 552.137(a) and may not be withheld from the requestor on that basis. You state that the system has not received the affirmative consent of any member of the public to release his or her e-mail address. Accordingly, in the event that these marked e-mail addresses are excepted from disclosure pursuant to section 552.137(a) of the Government Code, we conclude that the system must withhold them pursuant to this subsection.

Finally, 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 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).

In summary, the system may withhold the entirety of the information at issue in Exhibit B pursuant to section 552.107(1) of the Government Code. The system may also withhold the portions of the information at issue in Exhibit C, which we have marked, pursuant to section 552.111 of the Government Code. In the event that the e-mail addresses that we have marked in Exhibits A and C are excepted from disclosure pursuant to section 552.137(a) of the Government Code, the system must withhold them pursuant to this subsection. The system must release the remaining submitted information that is at issue to the requestor.

However, in doing so, the system must comply with the applicable copyright law with respect to those portions of Exhibit A that are copyrighted.

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,

A handwritten signature in black ink that reads "Ronald J. Bounds". The signature is written in a cursive style with a large initial "R".

Ronald J. Bounds
Assistant Attorney General
Open Records Division

RJB/lmt

Ref: ID# 197051

Enc. Marked documents

c: Ms. Shannon Buggs
Business Reporter
The Houston Chronicle
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(w/o enclosures)