



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 29, 2006

Ms. Sylvia N. Salazar
Assistant General Counsel
Employees Retirement System of Texas
P. O. Box 13207
Austin, Texas 78711-3207

OR2006-13999

Dear Ms. Salazar:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 264517.

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

1. Investment Operational Review by Callan Associates, Inc.;
2. First Quarter 2006 Performance Report as provided by Callan Associates, Inc.;
3. Second Quarter 2006 Performance Report as provided by Callan Associates, Inc.;
4. Copy of the audio tapes from the Investment Advisory Committee meeting of May 23, 2006;
5. Copy of the audio tapes from the Investment Advisory Committee meeting of June 30, 2006.

You state that you have released the information regarding items 2, 3, 4, and 5. You claim that the submitted information is excepted from disclosure under section 552.111 of the Government Code. We have considered the exception you claim and reviewed the submitted information. We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

Initially, we note that the requestor asserts that the information at issue is a completed report. However, ERS claims that the submitted information is a preliminary report that has not been finalized. We note that a completed report is not excepted from disclosure under section 552.111. *See* Gov't Code § 552.022(a)(1). The question of whether the submitted information is a completed report is a question of fact. This office cannot resolve factual issues in the opinion process. *See* Open Records Decision 592 at 2 (1991), 552 at 4 (1990), 435 at 4 (1986). We therefore must rely on a governmental body's representations with regard to such issues, unless the contrary is clearly shown as a matter of law. *See* Open Records Decision No. 564 (1990). Accordingly, based on the representations of ERS, we conclude that the submitted information does not constitute a completed report subject to section 552.022(a)(1).

We next note that some of the submitted information is subject to section 552.0225 of the Government Code. Subsection 552.0225(b) provides in relevant part the following:

The following categories of information held by a governmental body relating to its investments are public information and not excepted from disclosure under this chapter:

...

(3) each date the governmental body invested in a fund or investment entity described by Subdivision (1);

...

(5) the amount of money, expressed in dollars, the governmental body is investing or has invested in any fund or investment entity;

...

(12) a description of all of the types of businesses a governmental body is or has invested in through a fund or investment entity[.]

Gov't Code § 552.0225(a), (b)(3), (5), (12). The exceptions to disclosure found in the Act do not apply to information that is made public by section 552.0225. *See* Open Records

Decision Nos. 623 at 3 (1994), 525 at 3 (1989). Therefore, the information subject to subsection 552.0225(b), which we have marked, must be released.

Turning to the remaining information, section 552.111 excepts from public 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. The purpose of this exception 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*. If, however, the 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 may also be withheld under section 552.111. *See Open Records Decision No. 313 at 3* (1982).

Section 552.111 applies not only to a governmental body’s internal memoranda, but also to memoranda prepared for a governmental body by its outside consultant. *Open Records Decision Nos. 462 at 14* (1987), *298 at 2* (1981). Information created by an outside consultant for a governmental body may constitute intraagency memoranda that may be withheld under section 552.111 when the outside consultant is acting at the request of the governmental body and performing a task within the authority of the governmental body. *Open Records Decision No. 631 at 4* (1995).

You inform us that Callan Associates, Inc. (“Callan”) “is an outside investment consulting firm providing various investment consulting services for ERS.” You state that the submitted information is a preliminary report prepared by Callan for ERS and that this preliminary report has not been finalized by Callan or formally presented to the ERS Board of Trustees. You assert that “[t]his preliminary report consists of advice, opinions, or

recommendations relative to ERS' policy decisions regarding the operation of the ERS investment program." Based upon your representations and our review of the information, we agree that section 552.111 is applicable to the remaining information. Therefore, we conclude that ERS may withhold the remaining information pursuant to section 552.111 of the Government Code.

In summary, the information subject to subsection 552.0225(b), which we have marked, must be released. ERS may withhold the remaining information pursuant to section 552.111 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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 Office of the Attorney General 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. 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 'José Vela III', with a long horizontal line extending to the right.

José Vela III
Assistant Attorney General
Open Records Division

JV/eb

Ref: ID# 264517

Enc. Submitted documents

c: Mr. Robert V. Smith
812 Indian Run Drive
Pflugerville, Texas 78660
(w/o enclosures)