



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 15, 2007

Ms. Deborah H. Loomis
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919 Congress Avenue Suite 1250
Austin, Texas 78701-3656

OR2007-15093

Dear Ms. Loomis:

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# 294810.

The City of Austin Employees' Retirement System (the "system"), which you represent, received a request for seven categories of information, including communications relating to a named individual and the telephone logs of three employees of the system for a specified time interval. You indicate that some of the requested information either has been or will be released. You claim that other responsive information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.117 of the Government Code.¹ We have considered the exceptions you claim and have reviewed the information you submitted.² We also have considered the comments that we received from the requestor.³

¹You also raise Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5, which have been held to be other law that makes information expressly confidential for the purposes of section 552.022 of the Government Code. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001); *see also* Gov't Code § 552.022(a) (providing that eighteen categories of information are subject to required public disclosure unless the information is expressly confidential under other law or subject to Gov't Code § 552.022(a)(1) and excepted from disclosure under Gov't Code § 552.108). Because section 552.022 is not applicable in this instance, we do not address Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5.

²This 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), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

³*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).

We begin with section 552.103 of the Government Code, as it is the most inclusive exception you claim. This section provides in 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). A governmental body that raises section 552.103 bears the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information at issue. To meet this burden, the governmental body must demonstrate that (1) litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) the information at issue is related to the pending or anticipated litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See Open Records Decision No. 551 at 4 (1990).*

The determination of whether litigation is reasonably anticipated must be made on a case-by-case basis. *See Open Records Decision No. 452 at 4 (1986).* To establish that litigation is reasonably anticipated, a governmental body must provide this office with "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture."⁴ *Id.* In this instance, you explain that the requestor is an attorney for an individual who recently received an unfavorable ruling from the system's board of trustees. You contend that litigation is reasonably anticipated because the system received the request for information two days after the ruling and because the requestor has informed you that her client would be interested in mediating the matter. Having considered your arguments, we

⁴Among other examples, this office has concluded that litigation was reasonably anticipated where the opposing party took the following objective steps toward litigation: (1) filed a complaint with the Equal Employment Opportunity Commission ("EEOC"), *see Open Records Decision No. 336 (1982)*; (2) hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see Open Records Decision No. 346 (1982)*; and (3) threatened to sue on several occasions and hired an attorney, *see Open Records Decision No. 288 (1981)*.

conclude that you have not demonstrated that litigation was reasonably anticipated when the system received this request for information. *See* Open Records Decision Nos. 361 (1983) (fact that request was made by attorney on behalf of rejected applicant not sufficient to invoke statutory predecessor to Gov't Code § 552.103), 331 at 1-2 (1982) (mere chance of litigation not sufficient to trigger statutory predecessor). Therefore, the system may not withhold any of the submitted information under section 552.103 of the Government Code.

You also raise section 552.107(1) of the Government Code, which protects information that comes within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has 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. *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 Tex. 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, *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.” *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).

You have marked the information that the system seeks to withhold under section 552.107(1). You state that the marked information consists of confidential attorney-client communications that were made for the purpose of facilitating the rendition of professional legal services to the system. You also state that the communications in question

remain confidential. Based on your representations and our review of the information at issue, we conclude that the system may withhold the information that you have marked under section 552.107(1) of the Government Code.

Next, we address the other exceptions you claim. Section 552.101 of the Government Code protects “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This exception encompasses information that other statutes make confidential. You raise section 552.101 in conjunction with section 13 of article 6243n of Vernon’s Texas Civil Statutes. You state that the system was established under and is governed by article 6243n, which provides in part:

(a) Information contained in records that are in the custody of the retirement board or the system concerning an individual member, retiree, annuitant, beneficiary, or alternate payee is confidential under this section and may not be disclosed in a form identifiable with a specific individual unless

(1) the information is disclosed to:

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

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

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

(D) the individual’s employer as defined in this Act; or

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

(2) the information is disclosed pursuant to a subpoena and the pension 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, retiree, deceased member or retiree, beneficiary, or alternate payee of the retirement system.

V.T.C.S. art. 6243n, § 13(a)-(b). You also cite to *Houston Municipal Employees Pension System v. Abbott*, 192 S.W.3d 862 (Tex. App.—Texarkana 2006, pet. denied). In that case, the court concluded that section 26 of article 6243h of Vernon's Texas Civil Statutes makes confidential the salary and bonus information of employees of the Houston Municipal Employees Pension System ("HMEPS") who were also members of the HMEPS retirement program. *Id.* at 865; *see also* V.T.C.S. art. 6243h, § 26. You concede that the language of section 26 of article 6243h is not the same as that of section 13 of article 6243n.⁵ You contend, however, that section 13 could also be construed to encompass information relating to employees of the system who also are members of the system, as well as information concerning members of the system who are not employees.

We note that the remaining information is contained in a page from an appointment calendar, e-mails, and telephone message slips. You inform us that some of the remaining information concerns employees of the system who also are members of the system. We find that the information in question, insofar as it is related to employees of the system solely in their employment capacities, is personnel information, not "[i]nformation concerning an individual member, retiree, annuitant, beneficiary, or alternate payee" of the system. V.T.C.S. art. 6243n, § 13(a). We therefore conclude that article 6243n, section 13 does not make confidential any of the remaining information that is related to employees of the system solely in their capacities as employees. *See* 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).

You also state that some of the remaining information concerns members of the system in their capacities as members. You have marked that information. Based on your representations and our review of the information in question, we conclude that the system must withhold the marked information that concerns its members under section 552.101 of the Government Code in conjunction with section 13 of article 6243n of Vernon's Texas Civil Statutes. We have marked additional information that must also be withheld on this basis. We note that the requestor has a right to information concerning her client as a member of the system if the pension director determines that the requestor is acting in her client's interest. *Id.* § 13(a)(1)(A).

⁵Section 26 of article 6243h of Vernon's Texas Civil Statutes provides in part that "[r]ecords that are in the custody of [HMEPS] 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[.]" V.T.C.S. art. 6243h, § 26(a).

Section 552.101 also encompasses common-law privacy, which protects information that is highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and of no legitimate public interest. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). Common-law privacy encompasses the specific types of information that are held to be intimate or embarrassing in *Industrial Foundation*. *See id.* at 683 (information relating to sexual assault, pregnancy, mental or physical abuse in workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs). This office has concluded that other types of information also are private under section 552.101. *See generally* Open Records Decision No. 659 at 4-5 (1999) (summarizing information attorney general has held to be private). We have marked information that the system must withhold under section 552.101 in conjunction with common-law privacy.

Section 552.117(a)(1) of the Government Code 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 of the Government Code. Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former official or employee of a governmental body who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who did not timely request under section 552.024 that the information be kept confidential.

You state that some of the submitted documents contain the home telephone numbers and family member information of employees of the system. You inform us that the employees concerned elected under section 552.024 to keep their home telephone numbers and family member information confidential. We understand you to state that these employees did so prior to the date of the system's receipt of this request for information. Based on your representations and our review of the information in question, we have marked the information that the system must withhold under section 552.117(a)(1) of the Government Code.

We note that section 552.137 of the Government Code is applicable to some of the remaining information at issue.⁶ Section 552.137 states that "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 [the Act]," unless the owner of the e-mail address has affirmatively consented to its public disclosure. Gov't Code

⁶Unlike other exceptions to disclosure under the Act, this office will raise section 552.137 on behalf of a governmental body, as this exception is mandatory and may not be waived. *See* Gov't Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions).

§ 552.137(a)-(b). The types of e-mail addresses listed in section 552.137(c) may not be withheld under this exception. *See id.* § 552.137(c). Likewise, section 552.137 is not applicable to an institutional e-mail address, an Internet website address, or an e-mail address that a governmental entity maintains for one of its officials or employees. The system must withhold the e-mail address that we have marked under section 552.137 of the Government Code unless the owner has affirmatively consented to its disclosure.

In summary: (1) the system may withhold the information that you have marked under section 552.107(1) of the Government Code; (2) the system must withhold the information that you have marked that concerns members of the system, as well as the additional information that we have marked, under section 552.101 of the Government Code in conjunction with section 13 of article 6243n of Vernon's Texas Civil Statutes; (3) the system must withhold the information that we have marked under section 552.101 in conjunction with common-law privacy; (4) the system must withhold the information that we have marked under section 552.117(a)(1) of the Government Code; and (5) the system must withhold the marked e-mail address under section 552.137 of the Government Code unless the owner has affirmatively consented to its disclosure. The rest of the submitted information must be released.

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 "James W. Morris, III", with a long horizontal flourish extending to the right.

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

JWM/ma

Ref: ID# 294810

Enc: Submitted documents

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