



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 10, 2007

Ms. Christi Worth
Assistant General Counsel
Teacher Retirement System of Texas
1000 Red River Street
Austin, Texas 78701-2698

OR2007-16287

Dear Ms. Worth:

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# 296769.

The Teacher Retirement System of Texas (the "system") received a request for information pertaining to the system's new compensation plan, including copies of regular and electronic mail received by specified individuals, internal memoranda and notes written in response to phone calls regarding the plan, and the ingoing and outgoing e-mails of two named individuals for a specified time period.¹ You state that some of the requested information has been released. The system takes no position as to whether a portion of the submitted information is excepted from disclosure, but states its release may implicate the proprietary interests of a third party. The system states that it notified McLagan Partners ("McLagan") of the request for information and of its right to submit arguments to this office as to why the requested information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). You assert that portions of the remaining submitted information are not subject to the Act. In the alternative, you claim that the remaining submitted information is excepted from disclosure under sections 552.101,

¹You inform us that the requestor has narrowed and clarified the scope of his original request. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of narrowing or clarifying request for information).

552.107, 552.111, 552.117, 552.137, and 552.147 of the Government Code.² We have considered all of the submitted arguments and reviewed the submitted information³.

Initially, we address your argument that portions of the submitted information are not subject to the Act. The Act applies only to public information. *See* Gov't Code §§ 552.021, .221. Section 552.002(a) of the Act defines "public information" as information "collected, assembled, or maintained under a law or ordinance or in connection with 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." *Id.* § 552.002(a). You argue that, pursuant to section 825.507 of the Government Code, records pertaining to system employees who are also participants in the system's retirement program are not public information for the purposes of section 552.002. Section 825.507(a) of the Government Code provides in relevant part:

(a) Records of a participant that are in the custody of the retirement system or of an administrator, carrier, attorney, consultant, or governmental agency acting in cooperation with or on behalf of the retirement system are confidential and not subject to public disclosure in a form that would identify an individual and are exempt from the public access provisions of Chapter 552, except as otherwise provided by this section. Because the records described by this subsection are exempt from the public access provisions of Chapter 552, the retirement system is not required to accept or comply with a request for a record or information about a record or to seek an opinion from the attorney general, except as otherwise provided by this section.

...

(g) In this section, "participant" means a member, former member, retiree, annuitant, beneficiary, or alternate payee of the retirement system.

²Although you also raise Texas Rule of Evidence 503 as a potential exception to disclosure, the information for which you claim this privilege is not subject to section 552.022 of the Government Code. Therefore, this rule does not apply in this instance. *See* Open Records Decision No. 676 at 4 (2002). We also note that although you also raise section 552.106 of the Government Code, you make no arguments in support of this exception. Therefore, we assume you have withdrawn your claim that this exception applies to any of the submitted information.

³We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Id. § 825.507(a),(g). We note that section 825.507(a) states only that “records of a participant that are in the custody of the retirement system or of an administrator, carrier, attorney, consultant, or governmental agency acting in cooperation with or on behalf of the retirement system are confidential and not subject to public disclosure in a form that would identify an individual and are exempt from the public access provisions of Chapter 552.” Thus, even if we accept your argument that some of the requested information constitutes participant records subject to section 825.507 and the information is not subject to the Act’s public access provisions, you have failed to demonstrate how this language removes the information covered by section 825.507 from the scope of the Act’s provision defining public information. *See* Gov’t Code § 552.002(a).

Furthermore, this office has also held in numerous formal decisions and informal letter rulings that information that relates to public employment and public employees is public information. *See e.g.*, Open Records Decision Nos. 470 at 4 (1987) (public has legitimate interest in job qualifications and performance of public employees), 342 at 3 (1982) (certain information about public employees, including position, experience, tenure, salary, and educational level, has long been held disclosable), 444 at 5-6 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees), 423 at 2 (1984) (scope of public employee privacy is narrow). Therefore, we conclude that all of the submitted information constitutes public information that is subject to the Act and may only be withheld if an exception to disclosure under the Act applies.

Next, we address McLagan’s contention that the submitted survey report is not responsive to the request for information. McLagan contends that the survey report does not discuss or evaluate the system’s new compensation plan and therefore should not be released. The system represents to this office, however, that the information at issue is responsive to the request. We note that a governmental body must make a good-faith effort to relate a request to information that is within its possession or control. *See* Open Records Decision No. 561 at 8-9 (1990). Therefore, we will address the public availability of the submitted survey report.

McLagan also contends that submitted survey report may not be disclosed because the information at issue has been made confidential by agreement or assurances. However, information is not confidential under the Act simply because the party submitting the information anticipates or requests that it be kept confidential. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot, through an agreement or contract, overrule or repeal provisions of the Act. Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) (“[T]he obligations of a governmental body under [the predecessor to the Act] cannot be compromised simply by its decision to enter into a contract.”); 203 at 1 (1978) (mere expectation of confidentiality by person supplying information does not satisfy requirements of statutory predecessor to Gov’t Code § 552.110). Consequently, unless the information falls within an exception to disclosure, it must be released, notwithstanding any expectations or agreement specifying otherwise. We now turn to the system’s arguments against disclosure of the submitted information.

Section 552.101 of the Government Code exempts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This section encompasses confidentiality provisions such as section 825.507 of the Government Code, which provides in relevant part:

(a) Records of a participant that are in the custody of the retirement system or of an administrator, carrier, attorney, consultant, or governmental agency acting in cooperation with or on behalf of the retirement system are confidential and not subject to public disclosure in a form that would identify an individual and are exempt from the public access provisions of Chapter 552, except as otherwise provided by this section[.]

(b) The retirement system may release records of a participant, including a participant to which Chapter 803 [of the Government Code] applies, to:

(1) the participant or the participant’s attorney or guardian or another person who the executive director determines is acting on behalf of the participant;

(2) the executor or administrator of the deceased participant’s estate, including information relating to the deceased participant’s beneficiary;

(3) a spouse or former spouse of the participant if the executive 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;

(4) an administrator, carrier, consultant, attorney, or agent acting on behalf of the retirement system;

(5) a governmental entity, an employer, or the designated agent of an employer, only to the extent the retirement system needs to share the information to perform the purposes of the retirement system, as determined by the executive director;

(6) a person authorized by the participant in writing to receive the information;

(7) a federal or state criminal law enforcement agency that requests a record for a law enforcement purpose;

(8) the attorney general to the extent necessary to enforce child support; or

(9) a party in response to a subpoena issued under applicable law if the executive director determines that the participant will have a reasonable opportunity to contest the subpoena.

...

(g) In this section, “participant” means a member, former member, retiree, annuitant, beneficiary, or alternate payee of the retirement system.

Gov’t Code § 825.507(a)-(b), (g). You contend that some of the submitted information is confidential because it constitutes records of system employees who also happen to be participants in the system’s retirement program. We note that the requestor has not asserted that any of the provisions of section 825.507(b) are applicable in this instance, nor provided any information that would allow the system to determine that any of these provisions apply. *See* Gov’t Code § 825.507(b). Based on your representations and our review, we have marked an e-mail and letters to which section 825.507 of the Government Code may be applicable. To the extent that the system can determine that the information we have marked under section 825.507 of the Government Code involves a participant in the system, the information is confidential under section 825.507 and must be withheld under section 552.101 of the Government Code.⁴ However, we find that the remaining information at issue, insofar as it concerns system employees only in their capacity as employees, is personnel information, rather than “records of a participant that are in the custody of the . . . system.” Gov’t Code § 825.507(a). You have not explained how this information constitutes records of a participant in the system. We conclude that none of the remaining information is confidential under section 825.507. This office will not imply confidentiality where it is not expressly created by the language of the statute. *See* Open Records Decision Nos. 658 at 4 (1998), 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).

Section 552.101 also encompasses the doctrine of common law privacy. Common law privacy protects information if the information (1) contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included 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. *Id.* at 683. Upon review of the remaining information, we conclude that none of it is highly

⁴As our ruling is dispositive, we need not address your remaining arguments against disclosure for this information.

intimate or embarrassing. Accordingly, none of the remaining information may be withheld under section 552.101 on the basis of common law privacy.

Section 552.107(1) of the Government Code 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 state that portions of the remaining information consist of confidential attorney-client communications that were made in connection with the rendition of professional legal services to the system. You have identified most of the parties to these communications. Based on your representations and our review of the information at issue, we conclude that the system may withhold the information that we have marked under section 552.107(1). However, we find that you have failed to demonstrate how the remaining information at issue

constitutes privileged attorney-client communications. Accordingly, no part of the remaining information may be withheld on this basis.

Section 552.111 of the Government Code 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. Section 552.111 encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). In Open Records Decision No.615, 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, and opinions 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. Tex. 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* ORD 615 at 5-6. 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, 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, 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). Section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *See* ORD 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).

Section 552.111 can also encompass communications between a governmental body and a third party consultant. *See* Open Records Decision Nos. 631 at 2 (1995) (section 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), 561 at 9 (1990) (section 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process), 462 at 14 (1987) (section 552.111 applies to memoranda prepared by governmental body’s consultants). For section 552.111 to apply, the governmental body must identify the third

party and explain the nature of its relationship with the governmental body. Section 552.111 is not applicable to a communication between the governmental body and a third party unless the governmental body establishes it has a privity of interest or common deliberative process with the third party. *See* ORD 561 at 9 (1990).

In support of your claim under section 552.111, you state that submitted documents “consist of deliberative communications related directly to the broad policy issues involving the [Board’s] adoption of and public communications about the adoption of the revised Performance Incentive Pay Plan. . .and the development of a communications policy for explaining the rationale and details of the adopted plan.” You state that the remaining submitted information includes e-mails and drafts representing the advice, opinion, and recommendations of system employees, officials, and advisors involved in the development of the compensation plan and communications policy. You state that final versions of the drafts have been released to the public. You further inform us that this information constitutes “administrative and personnel matters of broad scope” that affect the system’s policy mission. Upon review, we determine that you may withhold the information we have marked under section 552.111 of the Government Code. However, we find that you have not established that the remaining information consists of advice, opinion, or recommendation for section 552.111 purposes. Accordingly, no portion of the remaining information may be withheld on this basis.

Section 552.117 (a)(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. Gov’t Code §§ 552.024, .117(a)(1). Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). You inform us, and the submitted information reflects, that the employees at issue made timely elections for confidentiality under section 552.024. We therefore conclude that the system must withhold the information we have marked under section 552.117(a)(1) of the Government Code.

Section 552.137 of the Government Code 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 § 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 you have marked, in addition to those we have marked, under section 552.137 of the Government Code unless the owners have affirmatively consented to their disclosure.

You also assert that some of the remaining information is excepted under section 552.147 of the Government Code, which provides that “[t]he social security number of a living person is excepted from” required public disclosure under the Act. The system may withhold the social security numbers in the submitted information under section 552.147 .

Lastly, we address McLagan’s arguments under section 552.110 of the Government Code. Section 552.110 protects the proprietary interests of private parties with respect to two types of information: (1) “[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision” and (2) “commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained.” Gov’t Code § 552.110(a)-(b).

The Texas Supreme Court has adopted the definition of a “trade secret” from section 757 of the Restatement of Torts, which holds a “trade secret” to be

any formula, pattern, device or compilation of information which is used in one’s business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to a single or ephemeral event in the conduct of the business A trade secret is a process or device for continuous use in the operation of the business [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978). If the governmental body takes no position on the application of the “trade secrets” aspect of section 552.110 to the information at issue, this office will accept a private person’s claim for exception as valid under section 552.110(a) if the person establishes a *prima facie* case for the exception and no one submits an argument that rebuts the claim as a matter of law.⁵ *See* Open Records Decision No. 552 at 5 (1990). However, we cannot conclude that

⁵The Restatement of Torts lists the following six factors as indicia of whether information constitutes a trade secret:

- (1) the extent to which the information is known outside of [the company];
- (2) the extent to which it is known by employees and others involved in [the company’s]

section 552.110(a) is applicable unless it has been shown that the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim. *See* Open Records Decision No. 402 (1983).

McLagan contends that its Investment Professional Compensation Survey Report constitutes trade secret information under section 552.110(a). Having considered the arguments of McLagan and reviewed the information at issue, we find that the submitted survey report constitutes a trade secret for purposes of section 552.110(a). We thus determine that McLagan has made a *prima facie* case under section 552.110(a) for this information, and we have received no arguments to rebut this claim. Accordingly, the system must withhold the submitted survey report pursuant to section 552.110(a) of the Government Code.

In summary, to the extent that the system can determine that the information we have marked under section 825.507 of the Government Code involves a participant in the system, this information is confidential and must be withheld under section 552.101 of the Government Code. The system may withhold the information we have marked under sections 552.107 and 552.111 of the Government Code. The system must withhold the information we have marked under section 552.117 of the Government Code. The system must withhold the marked e-mail addresses under section 552.137 of the Government Code unless the owners have affirmatively consented to their disclosure. The system may withhold the social security numbers of living persons under section 552.147. The system must withhold the submitted survey report under section 552.110 of the Government Code. The remaining 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

business;

(3) the extent of measures taken by [the company] to guard the secrecy of the information;

(4) the value of the information to [the company] and [its] competitors;

(5) the amount of effort or money expended by [the company] in developing the information;

(6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, 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 challenge 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,



Paige Savoie
Assistant Attorney General
Open Records Division

PS/ma

Ref: ID# 296769

Enc. Submitted documents

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