



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 31, 2008

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

OR2008-14919

Dear Mr. Junell:

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# 325012.

The Teacher Retirement System of Texas ("TRS") received a request for all e-mails exchanged between TRS employees and a specified individual and entity over a specified period of time. You state that you have released a redacted copy of the information to the requestor. You claim that portions of the submitted information are excepted from disclosure under sections 552.104, 552.106, 552.107, 552.111, 552.116, 552.117, 552.136, 552.137, and 552.143 of the Government Code. You further claim that a portion of the submitted information may be subject to federal copyright law. Although you take no position on the public availability of the remaining submitted information, you believe that portions of the requested information may implicate the proprietary interests of a third party, Seyfarth Shaw L.L.P. ("Seyfarth"). You state that you have notified Seyfarth of the request 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) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third-party to raise and explain the applicability of exception to disclosure under the Act in certain circumstances).* We have received correspondence from Seyfarth.¹

¹We note that Seyfarth argues against the disclosure of more information than was submitted for review by TRS. This ruling only addresses the responsive information that TRS submitted to this office. *See Gov't Code § 552.301(e)(1)(D).*

We have considered all of the submitted arguments and reviewed the representative sample of information you submitted.²

Section 552.104 of the Government Code excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). The purpose of section 552.104 is to protect a governmental body's interests in competitive bidding situations, including those in which the governmental body may wish to withhold information in order to obtain more favorable offers. *See* Open Records Decision No. 592 at 8 (1991). Section 552.104 requires a showing of some actual or specific harm in a particular competitive situation; a general allegation that a bidder will gain an unfair advantage will not suffice. Open Records Decision No. 541 at 4 (1990). However, section 552.104 does not except from disclosure information relating to competitive bidding situations once a contract has been awarded. Open Records Decision Nos. 306 (1982), 184 (1978).

You inform us that a portion of the submitted information pertains to a competitive bidding situation in which a contract has not yet been awarded. You also state that release of the submitted information may harm TRS's bargaining position and provide an advantage to one or more of the competitors. After considering your representations and reviewing the information at issue, we agree that TRS may withhold the information we have marked under section 552.104 of the Government Code until such time as a contract has been executed.³ *See* Open Records Decision No. 170 at 2 (1977) (release of bids while negotiation of proposed contract is in progress would necessarily result in an advantage to certain bidders at the expense of others and could be detrimental to the public interest in the contract under negotiation).

Section 552.107 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

²We 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.

³As our ruling regarding the information at issue is dispositive, we need not address TRS's or Seyfarth's remaining arguments against disclosure.

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, *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.

You claim that portions of the submitted documents are confidential communications between privileged parties that were made in connection with the rendition of professional legal services and have remained confidential. Based on these arguments and our review of the information, we conclude that TRS may withhold some of the information, which we have marked, under section 552.107 of the Government Code.⁴

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.” This exception encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). 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, 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 from disclosure only those internal communications that consist of

⁴As our ruling regarding the information at issue is dispositive, we need not address the remaining arguments against disclosure.

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. 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).

This office also has concluded that a preliminary draft of a policymaking 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 claim that portions of the submitted information consist of advice, recommendations, and opinions that reflect the policymaking processes of the governmental body. Based on your representation and our review, we find that TRS may withhold some of the information, which we have marked, under section 552.111 of the Government Code.⁵ However, the remaining information that you have marked under section 552.111 is either factual, or pertains to administrative or personnel issues that do not rise to the level of policymaking. Therefore, this information does not represent advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body and may not be withheld under this section.

Section 552.116 provides as follows:

- (a) An audit working paper of an audit of the state auditor or the auditor of a state agency, an institution of higher education as defined by Section 61.003, Education Code, a county, a municipality, a school district, or a joint board operating under Section 22.074, Transportation Code, including any audit relating to the criminal history background check of a public school employee, is excepted from the requirements of Section 552.021. If information in an audit working paper is also maintained

⁵As our ruling regarding the information at issue is dispositive, we need not address your remaining arguments against disclosure.

in another record, that other record is not excepted from the requirements of Section 552.021 by this section.

(b) In this section:

(1) 'Audit' means an audit authorized or required by a statute of this state or the United States, the charter or an ordinance of a municipality, an order of the commissioners court of a county, a resolution or other action of a board of trustees of a school district, including an audit by the district relating to the criminal history background check of a public school employee, or a resolution or other action of a joint board described by Subsection (a) and includes an investigation.

(2) 'Audit working paper' includes all information, documentary or otherwise, prepared or maintained in conducting an audit or preparing an audit report, including:

(A) intra-agency and interagency communications; and

(B) drafts of the audit report or portions of those drafts.

Gov't Code § 552.116. You claim that a portion of the submitted information consists of documents created by TRS employees in conducting an investigation pursuant to chapter 2102 of the Government Code. *See id.* § 2102.007 (relating to the duties of an internal auditor); .005 (requiring state agencies to conduct internal audit programs); .003 (defining types of audits). Based on your representations and our review, we agree that TRS may withhold a portion of the information at issue, which we have marked, under section 552.116 of the Government Code.

Section 552.117(a)(1) of the Government Code excepts from disclosure the current and former home addresses and telephone numbers, social security number, 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. Section 552.117 also encompasses a personal cellular telephone number, provided that a governmental body does not pay for the cellular telephone service. *See* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular mobile phone numbers paid for by governmental body and intended for official use). 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). Upon review, we agree that the submitted documents contain personal cellular telephone numbers and family member information that are subject to section 552.117. You state and provide documentation that demonstrates that the employees at issue elected to keep these types of information confidential before TRS received the request for information. Therefore, TRS

must withhold the information we have marked under section 552.117 of the Government Code. However, section 552.117 applies only to home addresses, telephone numbers, social security numbers, and family member information. Thus, it is not applicable to the remaining information you have marked in the submitted documents and none of the remaining information may be withheld on that basis.

Section 552.136 of the Government Code states that “[n]otwithstanding 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. However, the submitted hotel reservation confirmation numbers you have marked do not constitute access device numbers. Therefore, TRS may not withhold the information you have marked under section 552.136 of the Government Code.

Section 552.137 excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). Gov’t Code § 552.137(a)-(c). We note that section 552.137 does not apply to a government employee’s work e-mail address because such an address is not that of the employee as a “member of the public” but is instead the address of the individual as a government employee. The marked e-mail addresses are not of a type specifically excluded by section 552.137(c) of the Government Code. Furthermore, you state that TRS has not received consent to release these e-mail addresses. Therefore, TRS must withhold the e-mail addresses we have marked in accordance with section 552.137.

Section 552.143(b) provides the following:

Unless the information has been publicly released, pre-investment and post-investment diligence information, including reviews and analyses, prepared or maintained by a governmental body or a private investment fund is confidential and excepted from the requirements of Section 552.021, except to the extent it is subject to disclosure under Subsection (c).

Gov’t Code § 552.143(b). You assert that some of the submitted information “consists of pre-investment diligence information prepared by a TRS consultant[.]” You also state that none of the information at issue is subject to section 552.0225 of the Government Code. Based on your representations, we agree that TRS must withhold the information we have marked under section 552.143(b) of the Government Code.

You also state that portions of the submitted information are protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are protected by copyright. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of materials

protected by copyright, the person must do so unassisted by the governmental body. In making 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, TRS may withhold (1) the competitive bidding information we have marked under section 552.104 of the Government Code, until such time as a contract has been executed, (2) the confidential communications we have marked under section 552.107 of the Government Code, (3) the information we have marked under section 552.111 of the Government Code, and (4) the audit working papers we have marked under section 552.116 of the Government Code. TRS must withhold (1) the telephone numbers and family member information we have marked under section 552.117 of the Government Code, (2) the e-mail addresses we have marked under section 552.137 of the Government Code, and (3) the pre-investment diligence information we have marked under section 552.143 of the Government Code. The remaining information must be released to the requestor, but any information protected by copyright may only be released in accordance with copyright law.⁶

You also ask that this office issue a previous determination that would permit TRS to withhold the submitted information in response to future similar requests. We decline to issue such a previous determination at this time. Accordingly, 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 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). If the governmental body does not file suit over 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

⁶We note that the requestor in this instance has a special right of access to some of the e-mail addresses being released. Gov't Code § 552.023 (person or person's authorized representative has special right of access to records that contain information relating to the person that are protected from public disclosure by laws intended to protect that person's privacy interests). Because such information may be confidential with respect to the general public, if TRS receives another request for this information from an individual other than this requestor or the requestor's representative, TRS should again seek our decision.

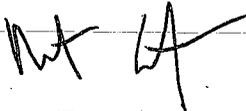
statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental 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,



Matt Entsminger
Assistant Attorney General
Open Records Division

MRE/jb

Ref: ID# 325012

Enc. Submitted documents

c: Mr. Robert Elder
Austin American-Statesman
P.O. Box 670
Austin, Texas 78767
(w/o enclosures)

Ms. Hannah Widlus
Seyfarth Shaw L.L.P.
131 South Dearborn Street, Suite 2400
Chicago, Illinois 60603
(w/o enclosures)