



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 30, 2009

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

OR2009-05729

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# 342391.

The Teacher Retirement System of Texas ("TRS") received a request for information relating to a request for proposals for master trust custodian and securities lending services, including information involving five specified business entities.¹ You claim that some of the requested information is excepted from disclosure under sections 552.111, 552.136, and 552.137 of the Government Code.² Additionally, you believe that this request for information may implicate the proprietary interests of BNY Mellon Asset Servicing, JPMorgan Chase Bank, N.A., the Northern Trust Company, and State Street Corporation.³ You notified the interested parties of this request for information and of their right to submit

¹You inform us that TRS sought and received clarification of the request. See Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information).

²Although you also initially raised sections 552.101 and 552.104 of the Government Code, you have submitted no arguments in support of the applicability of either of those exceptions. Therefore, this decision does not address sections 552.101 and 552.104. See Gov't Code § 552.301(e)(1)(A) (governmental body must submit written comments stating why claimed exceptions apply to information at issue).

³You inform us that TRS has no responsive information relating to the other third party identified by the requestor. We note that the Act does not require a governmental body to release information that did not exist when it received a request or create responsive information. See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

arguments to this office as to why the requested information should not be released.⁴ We have considered the exceptions you claim and reviewed the information you submitted.⁵

We first note that an interested third party is allowed ten business days from the date of its receipt of the governmental body's notice under section 552.305 of the Government Code to submit its reasons, if any, as to why information relating to that party should not be released. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this decision, this office has received no correspondence from any of the third parties that TRS notified. Therefore, because none of the those parties has demonstrated that any of the information at issue is proprietary for the purposes of the Act, TRS may not withhold any of the submitted information on that basis. *See id.* § 552.110(a)-(b); Open Records Decision Nos. 552 at 5 (1990), 661 at 5-6 (1999).

Next, we address TRS's exceptions to disclosure. 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. 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 advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See* ORD 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) (Gov't Code § 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). Moreover, 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,

⁴*See* Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to Gov't Code § 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances).

⁵Although this office received correspondence from Dresdner Bank AG ("Dresdner"), you inform us that information relating to Dresdner is not responsive to the request. Accordingly, this decision does not address Dresdner's arguments.

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).

TRS claims section 552.111 for information submitted as Exhibit 2 relating to TRS's evaluation of the third parties' proposals. You state that the information in question was created by TRS personnel in the course of a deliberative process, the purpose of which was to provide advice, opinion, and recommendations to TRS's board of trustees. You contend that this evaluation process implicates the policymaking functions of TRS. You also contend that although the evaluative documents contain factual information derived from the third parties' proposals, the factual information is sufficiently intertwined with information involving advice, opinion, or recommendations as to make severance of the factual data impractical. Based on your representations and our review of the information at issue, we conclude that TRS may withhold Exhibit 2 under section 552.111.

Section 552.136 of the Government Code provides in part that "[n]otwithstanding any other provision of [the Act], 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(b); *see id.* § 552.136(a) (defining "access device"). TRS must withhold the insurance policy numbers that we have marked under section 552.136.

Section 552.137 of the Government Code provides 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. *Id.* § 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. You have marked e-mail addresses that you believe may be protected by section 552.137. In this instance, however, the e-mail addresses in question fall within the scope of section 552.137(c)(3). *See id.* § 552.137(c)(3) (Gov't Code § 552.137(a) not applicable to an e-mail address contained in a response to a request for bids or proposals or to a similar invitation soliciting offers or information relating to a potential contract). We therefore conclude that TRS may not withhold any of the submitted information under section 552.137.

Lastly, we note that some of the remaining information appears to be protected by copyright. A governmental body must allow inspection of copyrighted information unless an exception to disclosure applies to the information. *See* Attorney General Opinion JM-672 (1987). An officer for public information also must comply with copyright law, however, and is not required to furnish copies of copyrighted information. *Id.* A member of the public who wishes to make copies of copyrighted information must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of

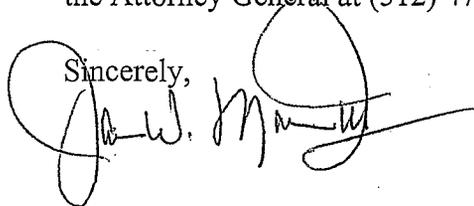
compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 at 8-9 (1990).

In summary: (1) TRS may withhold Exhibit 2 under section 552.111 of the Government Code; and (2) TRS must withhold the marked insurance policy numbers under section 552.136 of the Government Code. The rest of the submitted information must be released. Any information that is protected by copyright must be released in accordance with copyright law.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



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

JWM/eb

Ref: ID# 342391

Enc: Submitted documents

c: Requestor
(w/o enclosures)

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