



November 26, 2002

Ms. Paula A. Jones
General Counsel
Employees Retirement System of Texas
P.O. Box 13207
Austin, Texas 78711-3207

OR2002-6790

Dear Ms. Jones:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 172919.

The Employees Retirement System of Texas ("ERS") received a request for information regarding a specific public information request. You indicate that ERS has released some of the requested information. However, you claim that some of the requested information is not subject to the Public Information Act (the "Act"). Furthermore, you claim that some of the requested information is excepted from disclosure under sections 552.101, 552.107, 552.111, and 552.117 of the Government Code. We have considered your arguments and reviewed the submitted representative sample of information.¹

We begin by addressing your contention that portions of the submitted information are not subject to the Act. The Act applies only to "public information" in existence at the time a governmental body receives a request for information. *See* Gov't Code § 552.021; *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.--San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986). "Public information" is defined under section 552.002 of the Act as:

¹We 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.

information that is collected, assembled, or maintained under a law or ordinance or in connection with the 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.

Gov't Code § 552.002(a). You indicate that a portion of the requested information consists of drafts of letters and e-mails to which the draft letters were attached. Citing *City of Garland v. The Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000), you contend that these draft letters and e-mails “were not used for the ‘transaction of official business,’” but “were used to create final copies of [the] drafts.”²

In *City of Garland*, the city received a request from the Dallas Morning News for a memorandum prepared by the city manager purporting to terminate the city’s finance director. 22 S.W.3d at 354. The city argued that the requested memorandum was not public information for the purpose of the Act because the memorandum was merely a draft, and thus, was not used in the transaction of official business. *Id.* at 355, 358. The Texas Supreme Court determined that “a document, even if labeled ‘draft,’ is public information if, under a law or ordinance or in connection with the transaction of official business, it is collected, assembled, or maintained by or for a governmental body.” *Id.* at 359. The court further held that while “the mere creation of a draft is not transacting official business,” the draft can become public information if it is used in connection with the transaction of official business. *Id.* Despite the fact that the city manager’s memorandum had been labeled a draft, the court determined that the memorandum was public information for the purpose of the Act because the memorandum had been used by the city manager and the city council in deciding how to handle the personnel problem with the finance director and, therefore, the memorandum was used in connection with the transaction of official business. *Id.*

You indicate that the draft letters and e-mails at issue were produced by attorneys and other legal personnel for the purpose of responding to a public information request. Furthermore, you indicate that the draft letters and e-mails were exchanged amongst ERS legal personnel in researching and preparing a response to the request. Based on your statements, we find that the draft letters and e-mails were created by ERS in connection with the transaction of its official business and were used by ERS in connection with the transaction of its official business. *See id.*; Gov’t Code § 552.002(a). Therefore, the submitted draft letters and e-mails are public information subject to release unless otherwise excepted from disclosure. *See* Gov’t Code §§ 552.002, .021, .221, .301.

² We note that *City of Garland* is a plurality opinion of the Texas Supreme Court and therefore is not considered binding authority. *See Cincinnati Life Ins. Co. v. Cates*, 927 S.W.2d 623, 626 (Tex. 1996); *Univ. of Tex. Med. Branch at Galveston v. York*, 871 S.W.2d 175, 176 (Tex. 1994).

Next, we turn to your argument that the submitted information is excepted from disclosure under section 552.101 of the Government Code. Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” This section encompasses information protected by other statutes. Section 815.503(a) of the Government Code provides that:

[r]ecords of members, annuitants, beneficiaries, and alternate payees under retirement plans administered by the retirement system that are in the custody of the system or of an administrator, carrier, or other governmental agency acting in cooperation with or on behalf of the retirement system are confidential and not subject to public disclosure and are exempt from the public access provisions of Chapter 552, except as otherwise provided by this chapter.

Gov’t Code § 815.503; *see also* § 811.001(15) (defining “retirement system” as the ERS).

You explain that ERS administers retirement and employment related benefits for several classes of public servants, including elected officials. You further explain that “portions of Appendix ‘A’ and Appendices ‘B’-‘G’ are or disclose records of [an] ERS member.” Exhibit A consists of a redacted version of a brief previously submitted to this office requesting a separate open records ruling. Exhibit B is an unredacted version of the brief. In response to your previous request, this office issued Open Records Letter No. 2002-6246 (2002), determining that certain records of an ERS member and UGIP participant were confidential under section 815.503. Ordinarily, we consider a governmental body’s request for a ruling to be available to the public. Open Records Decision No. 459 at 1 (1987). However, when the request letter contains information that would reveal information we previously held to be excepted from disclosure under the Act, the governmental body is authorized to withhold the information in the request letter pursuant to the same exception. *Id.* at 1-2. Therefore, ERS must withhold the information in Appendices A and B that reveals the information we previously held in Open Records Letter No. 2002-6246 (2002) to be confidential under section 815.503 of the Government Code. We have marked this information. Furthermore, we agree that the information in Appendix F consists of records of an ERS member and a UGIP participant that must be withheld under section 552.101 of the Government Code in conjunction with section 815.503 of the Government Code.³ The remainder of the submitted information neither consists of an ERS member’s records nor reveals information from an ERS member’s records that we previously found to be confidential. Therefore, the remainder of the submitted information is not confidential under section 815.503.

³Based on this finding, we need not reach your argument under section 552.117 of the Government Code.

You also contend that the submitted information is confidential under section 10(c), article 3.50-2 of the Texas Insurance Code. Section 10(c), article 3.50-2 provides:

The records of a participant in the Texas Employees Uniform Group Insurance Program in the custody of the trustee, or of an administrator or carrier acting on behalf of the trustee, are confidential and not subject to disclosure and are exempt from the public access provisions of Chapter 552, Government Code, except as provided by this subsection

We find that none of the remaining submitted information consists of the records of a participant in the Texas Employees Uniform Group Insurance Program. Therefore, none of the remaining submitted information is confidential under section 10(c), article 3.50-2 of the Texas Insurance Code.

Next, you argue that the submitted information is confidential under chapter 159 of the Occupations Code, part of the Medical Practice Act (the "MPA"). Section 159.002 of the MPA provides:

- (a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.
- (b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.
- (c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Information that is subject to the MPA includes both medical records and information obtained from those medical records. *See* Occ. Code §§ 159.002, .004; Open Records Decision No. 598 (1991). This office has concluded that the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). Based on our review of the remaining information, we find that none of the information consists of a medical record or information obtained from a medical record. Therefore, ERS may not withhold any of the remaining submitted information under the MPA.

In addition, you appear to contend that the submitted information is confidential under section 181.001(5) of the Texas Health and Safety Code. Section 181.001(5) provides:

"Protected health information" means individually identifiable health information, including demographic information collected from an individual, that:

(A) relates to:

- (i) the past, present, or future physical or mental health or condition of an individual;
- (ii) the provision of health care to an individual; or
- (iii) the past, present, or future payment for the provision of health care to an individual; and

(B) identifies the individual or with respect to which there is a reasonable basis to believe the information can be used to identify the individual.

First, we note that section 181.001(5) is a definition, not a provision under which information is expressly made confidential. *See* Open Records Decision No 658 at 4 (1998) (statutory confidentiality provision must be express; confidentiality will not be inferred from statutory structure). Furthermore, we note that chapter 181 does not apply to an employee benefit plan or "any covered entity or other person, insofar as the entity or person is acting in connection with an employee benefit plan." Health & Safety Code § 181.055. Consequently, we find that none of the submitted information is confidential under section 181.001(5) of the Health and Safety Code.

Next, you contend that the submitted information is confidential under common-law privacy. Section 552.101 encompasses the doctrine of common-law privacy. Common-law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). 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. 540 S.W.2d at 683. In addition, this office has found that personal financial information generally is excepted from public disclosure under common-law privacy, except to the extent the information reflects a

transaction between the employee and the governmental body. Open Records Decision Nos. 600 at 9-12 (1992) (information about public employee's participation in a group insurance program, retirement benefits beneficiaries, tax exempt reimbursement accounts, and direct deposit), 545 (1990) (information about a public employee's participation in a deferred compensation plan). Based on our review of the information we have not already found to be excepted from public disclosure, we find that none of the information consists of highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person. Therefore, none of the remaining information is confidential under common-law privacy.

You also contend that the submitted documents contain information that is excepted from disclosure under section 552.107 of the Government Code. Section 552.107(1) excepts information that an attorney cannot disclose because of a duty to his client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107 excepts from public disclosure only "privileged information," that is, information that reflects either confidential communications from the client to the attorney or the attorney's legal advice or opinions; it does not apply to all client information held by a governmental body's attorney. Open Records Decision No. 574 at 5 (1990). You contend that some of the submitted information reveals confidential attorney-client communications made for purposes of rendering legal services to or on behalf of ERS. We agree that some of the submitted information consists of privileged attorney-client communications. ERS may withhold this information, which we have marked, under section 552.107 of the Government Code. With respect to the remainder of the submitted information, we find that you have not adequately demonstrated that the information consists of either a client confidence or attorney advice or opinion. *See id.*; *In re Monsanto Co.*, 998 S.W.2d 917, 931 (Tex. App.-Waco 1999, no pet.) (attorney's communication with third party who is not a representative of a client is not privileged).

Finally, you contend that portions of the submitted information are excepted from disclosure under section 552.111 of the Government Code. Section 552.111 provides that "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency is excepted from [required public disclosure]." This section encompasses the deliberative process privilege. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000). The deliberative process privilege, as incorporated into the Act by section 552.111, protects from disclosure interagency and intra-agency communications consisting of advice, opinion, or recommendations on policymaking matters of a governmental body. *See id.*; Open Records Decision No. 615 at 5 (1993). 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. ORD 615 at 5-6. Additionally, the deliberative process privilege does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.--Austin 2001, no pet.); ORD 615 at 4-5. Although you contend that some of the submitted information concerns the decision-making

process of ERS, we find that none of the remaining submitted information consists of advice, opinion, or recommendations on the policymaking matters of ERS. Therefore, none of the remaining submitted information may be withheld under section 552.111 of the Government Code.

In summary, submitted draft letters and accompanying e-mails are subject to the Act. We have marked portions of the submitted information that are confidential under Government Code section 815.503 and must be withheld under section 552.101 of the Government Code. We have likewise marked portions of the submitted information that consist of privileged attorney-client communications and therefore may be withheld under section 552.107 of the Government Code. ERS must release the remainder of the submitted information.

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).

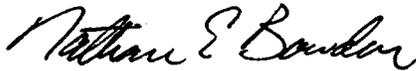
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, 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); *Tex. 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 Texas Building and Procurement Commission 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,



Nathan E. Bowden
Assistant Attorney General
Open Records Division

NEB/sdk

Ref: ID# 172919

Enc: Submitted documents

c: Ms. Sara McCuistion
3502 Hollywood
Austin, Texas 78732
(w/o enclosures)