



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

January 30, 2006

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

OR2006-00999

Dear Mr. Junell:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 240391.

The Teacher Retirement System of Texas ("TRS") received a request on October 26, 2005, for "the four (4) most recent quarterly Litigation Reports completed by the TRS," explained by the requestor as "the quarterly reports referenced on page 40 of the System's self-evaluation report to the Sunset Commission." The responsive litigation reports were those dated August 31, 2005; May 31, 2005; March 10, 2005; and December 3, 2004 (the "Litigation Reports"). You assert that all four Litigation Reports are excepted from disclosure in their entirety under section 552.107(1) of the Public Information Act (the "Act") in conjunction with Texas Rule of Evidence 503. In the alternative, you also assert that the Litigation Reports are excepted from disclosure in their entirety under section 552.111 of the Act in conjunction with Texas Rule of Civil Procedure 192.5. Finally, you assert that section 552.101 of the Act in conjunction with Texas Gov't Code § 825.507 and the Health Insurance Portability and Accountability Act of 1996 (HIPAA), 42 U.S.C. §§ 1320d-1320d-8 makes some of the responsive information in the Litigation Reports excepted from disclosure under the Act.

A governmental body that requests a letter ruling under the Act is required by the Act to supply the Attorney General with a copy of the specific public information the governmental body wishes to withhold from disclosure. Tex. Gov't Code §§ 552.301(e) and 552.303(a). You have noted that the basis for seeking to withhold documents under the Act includes an assertion of attorney-client privilege, and that certain responsive information relates to

litigation pending with the Office of the Attorney General (*Texas Growth Fund v. Texas Attorney General Greg Abbott*, No. GN402527 (353<sup>rd</sup> Dist. Ct., Travis County, Tex.)). As you state, this information would not be available by law to a party in litigation with TRS, and you request that appropriate administrative procedures be established within this office to assure that no lawyer involved in the pending litigation on behalf of General Abbott has access to the information you have submitted for review. Accordingly, the examination of documents, the consideration of your claimed exception to disclosure, and the issuance of this ruling is being handled by the General Counsel Division<sup>1</sup> and not the Open Records Division of this agency. We have considered your claimed exceptions to disclosure and have reviewed the submitted records.

We begin with your first assertion. Section 552.107(1) 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 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. Section 552.107(1) generally excepts an entire communication that is demonstrated to be

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<sup>1</sup> The General Counsel Division is located in the Clements State Office Building at 300 W. 15<sup>th</sup> Street, Austin, Texas 78711. The chief of the division is Pete Wassdorf.

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 explain that the Litigation Reports consist of information regarding various legal matters consolidated into a document created at the direction of TRS General Counsel and mailed on her behalf to TRS Board members, with copies distributed to TRS executive management before a quarterly Board meeting. You specify that the staff attorneys contributing information for inclusion in the reports did so in their capacity as professional legal counsel, as they are responsible for the areas of litigation represented in the reports. You set forth that the communications were, in developing the reports, between lawyers representing the clients (TRS staff attorneys) and the lawyers' representatives (TRS legal staff, who are employed to assist in the rendition of legal services), and, in delivering the reports, between the client's lawyer (the TRS General Counsel), the client (the TRS Board), and the client's representatives (TRS executive management, who received the reports in the scope their employment, given their expected involvement in the litigation for purposes of effectuating legal representation for TRS). You also tell us that the Litigation Reports were labeled "Confidential" and were printed entirely on pink paper as a customary practice for indicating confidential or nonpublic information, and that they have not been disclosed to the public, to other parties involved in the litigation, or to third parties to whom disclosure would waive the privilege. As an example of non-disclosure, you note that the Litigation Reports appeared on the December 2004 Board meeting agenda but that no discussion took place until the Board went into executive session under Tex. Gov't Code § 551.071.

After reviewing your arguments and the submitted documents, we agree that the requested records are privileged attorney-client communications that may be withheld from public disclosure in their entirety under section 552.107 of the Act. As we are able to make a determination under section 552.107, we need not address your remaining claimed exceptions.

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,



Becky E. Pestana  
Assistant Attorney General  
General Counsel Division

Ref: ID# 206375

Enc: Submitted documents

cc: Mr. Robert Elder  
Austin American-Statesman  
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(w/o enclosures)