



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 30, 2007

Ms. Sylvia N. Salazar
Assistant General Counsel
Employees Retirement System of Texas
P.O. Box 13207
Austin, Texas 78711

OR2007-04947

Dear Ms. Salazar:

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# 277118.

The Employees Retirement System of Texas ("ERS") received a request for: the names of ERS members who were eligible to join the elected class, as well as their agencies and dates of eligibility; the names of those elected class members previously distributed pursuant to an open records request; the rules or guidelines created by ERS to determine elected class eligibility; and the records that discuss the granting of elected class benefits to state employees who were not elected officials. You state that you will release some information, but claim that the submitted information is excepted from disclosure under sections 552.107 and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also received comments from the requestor. *See Gov't Code § 552.304 (interested third party may submit comments stating why requested information should or should not be released).*

We begin by addressing the requestor's comments to this office. The requestor argues that because he was only interested in receiving the names of the people who are eligible to receive elected class pension benefits and not their records, ERS incorrectly relied upon section 815.503 of the Government Code to withhold this information from him. You inform us that in order for ERS to compile a list of names of those members who are eligible to receive pension benefits, ERS must access information originating from its participant

records. Thus, a portion of the requested information is confidential under section 815.503. *See Gov't Code* § 815.503(a). We note that the ERS is not required to seek an opinion from this office with regards to ERS member records that are confidential under section 815.503(a). *See id.*

We now address your arguments against disclosure of the remaining requested information. Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. *See Gov't Code* § 552.107(1). 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. 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. *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. *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 a 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. *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. *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).

Based on your representations and our review of the document, we conclude that the memorandum was made for the purpose of facilitating the rendition of professional legal services. Additionally, you state that the communication has remained confidential.

Accordingly, it is protected from disclosure pursuant to the attorney-client privilege under section 552.107 of the Government Code. Since our ruling is dispositive, we need not address your other argument against disclosure.

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).

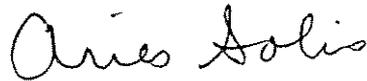
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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,

A handwritten signature in cursive script that reads "Aries Solis".

Aries Solis
Assistant Attorney General
Open Records Division

AS/eeg

Ref: ID# 277118

Enc. Submitted documents

c: Mr. Jay Root
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(w/o enclosures)