



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 25, 2007

Ms. Sylvia N. Salazar
Assistant General Counsel
Employees Retirement System of Texas
P.O. Box 13207
Austin, Texas 78711-3207

OR2007-09418

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# 284790.

The Employees Retirement System of Texas ("ERS") received a request for numerous categories of information, including calendars, e-mails, costs, LBR requests, job applications, invoices, job descriptions, job classifications, billing rates, and engagement documents. You state that you will release some of the requested information to the requestor. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.106, 552.107, 552.110, 552.111, and 552.116 of the Government Code. You have also notified the State Auditor's Office ("SAO") of the request and of its opportunity to submit comments to this office as to why the requested information should not be released to the requestor. *See generally* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released). We have considered the submitted arguments and reviewed the submitted information.

SAO contends that the passwords in Appendix P are not subject to the Act. In Open Records Decision No. 581 (1990), this office determined that certain computer information, such as source codes, documentation information, and other computer programming, that has no significance other than its use as a tool for the maintenance, manipulation, or protection of public property, is not the kind of information that is made public under section 552.021 of the Act. *See* ORD 581 at 6 (construing predecessor statute). We agree that the passwords that ERS has marked in Appendix P function solely as tools to maintain, manipulate, or protect public property and have no other significance. *Id.* As such, the marked passwords

are not public information, as defined by section 552.002 of the Government Code, and thus are not subject to the Act. Therefore, ERS need not release the marked passwords.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This section encompasses information protected by other statutes. Section 651.007 of the Government Code provides in relevant part as follows:

(b) Each state agency shall conduct an exit interview with an employee who leaves employment with the agency. The state agency shall conduct the exit interview by having the employee access the questionnaire posted on the state auditors Internet site and electronically submit the completed questionnaire to the state auditor.

....

(g) The responses to an exit interview questionnaire are confidential and not subject to disclosure under Chapter 552. The responses may be disclosed only to a law enforcement agency in a criminal investigation or on order of a court.

Id. § 651.007(b), (g). The remainder of Appendix P contains responses to an exit survey. It does not appear that any of the exceptions in section 651.007(g) apply. Accordingly, the submitted exit survey responses in Appendix P must be withheld from disclosure under section 552.101 of the Government Code in conjunction with section 651.007(g) of the Government Code.

Section 552.103 of the Government Code provides in pertinent part as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person’s office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Id. § 552.103(a), (c). The governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular

situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

To establish that litigation is reasonably anticipated, a governmental body must provide this office “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” Open Records Decision No. 452 at 4 (1986). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986). In Open Records Decision No. 638 (1996), this office stated that a governmental body has met its burden of showing that litigation is reasonably anticipated when it received a notice of claim letter and the governmental body represents that the notice of claim letter is in compliance with the requirements of the Texas Tort Claims Act (“TTCA”), chapter 101 of the Texas Civil Practice & Remedies Code, or an applicable municipal ordinance. If a governmental body does not make this representation, the claim letter is a factor that this office will consider in determining whether a governmental body has established that litigation is reasonably anticipated based on the totality of the circumstances.

You assert that ERS reasonably anticipates litigation relating to the subject of the present request. You state and provide documentation showing that, prior to the date you received this request for information, ERS received a claim letter against ERS relating to the requestor’s termination of employment. You do not affirmatively represent to this office that the claim letter is in compliance with the TTCA. However, after having reviewed the submitted documentation and your arguments, we conclude, based on the totality of the circumstances, that litigation was reasonably anticipated on the date ERS received this request for information. Furthermore, we find that the information you have marked in Appendices A, B, C, and D, as well as Appendices E, F, G, H, I, J, K, Q, R, and S, are related to the anticipated litigation for purposes of section 552.103(a). We therefore conclude that ERS may withhold the information you have marked in Appendices A, B, C, and D, as well as Appendices E, F, G, H, I, J, K, Q, R, and S, pursuant to section 552.103 of the Government Code.

However, once the information at issue has been obtained by all parties to the anticipated litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to the information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, any submitted information that has either been obtained from or provided to all other parties in the anticipated litigation is not excepted from disclosure under section 552.103(a) and must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has concluded or is no longer anticipated. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

Section 552.106 of the Government Code excepts from disclosure “[a] draft or working paper involved in the preparation of proposed legislation” and “[a]n internal bill analysis or working paper prepared by the governor’s office for the purpose of evaluating proposed legislation.” Gov’t Code § 552.106. Section 552.106 ordinarily applies only to persons with a responsibility to prepare information and proposals for a legislative body. Open Records Decision No. 460 (1987). Similar to section 552.111 of the Government Code, the purpose of section 552.106 is to encourage frank discussion on policy matters between the subordinates or advisors of a legislative body and the members of the legislative body, and therefore, it does not except from disclosure purely factual information. *Id.* at 2.

You state that Appendices T, U, and V consist of drafts, working papers, and communications prepared by or exchanged between the ERS General Counsel and ERS staff who were involved in the drafting and analysis of proposed legislation to be considered by the Eightieth Texas Legislature. We understand you to assert that this information consists of advice, opinion, and recommendations that reflect deliberative or policymaking processes. Upon review, we agree that the information at issue consists of drafts, working papers, and communications that represent the advice, opinions, and recommendations of the ERS General Counsel and ERS staff. Accordingly, ERS may withhold Appendices T, U, and V under section 552.106 of the Government Code.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. When asserting the attorney-client privilege under section 552.107, 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 Tex. 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. 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).

You assert that Appendices L, M, N, and O are protected by the attorney-client privilege. You state that this information consists of communications between and among the ERS General Counsel and client representatives that were made for the purpose of rendering legal services. You state that these communications were intended to be confidential, and that confidentiality has been maintained. Based on your representations and our review of the information at issue, we agree that this information is protected by the attorney-client privilege. We therefore conclude that ERS may withhold Appendices L, M, N, and O under section 552.107 of the Government Code.

In summary, the passwords ERS has marked in Appendix P are not public information under section 552.002 of the Government Code and need not be released. ERS must withhold the submitted exit survey responses in Appendix P under section 552.101 of the Government Code in conjunction with section 651.007(g) of the Government Code. ERS may withhold the following information: (1) the information you have marked in Appendices A, B, C, and D, as well as Appendices E, F, G, H, I, J, K, Q, R, and S, under section 552.103 of the Government Code; (2) Appendices T, U, and V under section 552.106 of the Government Code; and (3) Appendices L, M, N, and O under section 552.107 of the Government Code. As our ruling is dispositive, we need not address your remaining arguments 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,



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Assistant Attorney General
Open Records Division

JLF/ma

Ref: ID# 284790

Enc. Submitted documents

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