



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 14, 2007

Ms. Deborah H. Loomis
Sedgwick, Detert, Moran & Arnold, L.L.P.
919 Congress Avenue, Suite 1250
Austin, Texas 78701-3656

OR2007-16516

Dear Ms. Loomis:

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# 297222.

The Austin Employees' Retirement System (the "system"), which you represent, received a request for the requestor's entire file and documents regarding any appeal by the requestor. You state you have released some information to the requestor, but claim that the submitted information is excepted from disclosure under sections 552.101, 552.107, and 552.111 of the Government Code.¹ We have considered the exceptions you claim and have reviewed the information you submitted.²

We begin with section 552.107 of the Government Code, as it is the most inclusive exception you claim. Section 552.107(1) protects information that comes within the attorney-client

¹You also raise Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5, which have been held to be other law that makes information expressly confidential for the purposes of section 552.022 of the Government Code. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001); *see also* Gov't Code § 552.022(a) (providing that eighteen categories of information are subject to required public disclosure unless the information is expressly confidential under other law or subject to Gov't Code § 552.022(a)(1) and excepted from disclosure under Gov't Code § 552.108). Because section 552.022 is not applicable in this instance, we do not address Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5.

²This letter ruling assumes that the submitted representative samples of information are truly representative of the requested information as a whole. This ruling neither reaches nor authorizes the system to withhold any information that is substantially different from the submitted information. *See* Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

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 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. *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 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 have identified the information that the system seeks to withhold under section 552.107(1). You state that the information at issue consists of confidential attorney-client communications that were made for the purpose of facilitating the rendition of professional legal services to the system. You also state that the communications in question remain confidential. Based on your representations and our review of the information at issue, we conclude that the system may withhold the information that we have marked under section 552.107(1) of the Government Code. However, we find that you have failed to demonstrate how the remaining information at issue constitutes privileged attorney-client communications. Accordingly, no part of the remaining information at issue may be withheld on this basis.

You claim that some of the remaining information is protected under section 552.111 of the Government Code. Section 552.111 encompasses the attorney work product privilege found at rule 192.5 of the Texas Rules of Civil Procedure. *See* TEX. R. CIV. P. 192.5; *City of*

Garland v. Dallas Morning News, 22 S.W.3d 351, 360 (Tex. 2000); Open Records Decision No. 677 at 4-8 (2002). Rule 192.5 defines attorney work product as consisting of

(1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or

(2) a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

TEX.R.CIV.P. 192.5. A governmental body that seeks to withhold information on the basis of the attorney work product privilege under section 552.111 bears the burden of demonstrating that the information was created or developed for trial or in anticipation of litigation by or for a party or a party's representative. *See id.*; ORD 677 at 6-8. In order for this office to conclude that information was created or developed in anticipation of litigation, we must be satisfied that

(a) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue; and (b) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and [created or obtained the information] for the purpose of preparing for such litigation.

Nat'l Tank Co. v. Brotherton, 851 S.W.2d 193, 207 (Tex. 1993). A "substantial chance" of litigation does not mean a statistical probability, but rather "that litigation is more than merely an abstract possibility or unwarranted fear." *Id.* at 204; Open Records Decision No. 677 at 7.

You state that some of the remaining information consists of information prepared or developed by system employees and attorneys for the system in preparation for trial and appeal, and that this information reveals the mental impressions of system employees and attorneys for the system. Having considered your arguments and reviewed the information at issue, we find that the system may withhold the information we have marked under section 552.111 of the Government Code. However, the system has not established that the remaining information consists of privileged attorney work product; therefore, the system may not withhold the remaining information under section 552.111 of the Government Code.

Section 552.101 of the Government Code protects "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101: This exception encompasses information that other statutes make confidential. You raise section 552.101 in conjunction with section 13 of article 6243n of Vernon's Texas Civil

Statutes. You state that the system was established under and is governed by article 6243n, which provides in part:

(a) Information contained in records that are in the custody of the retirement board or the system concerning an individual member, retiree, annuitant, beneficiary, or alternate payee is confidential under this section and may not be disclosed in a form identifiable with a specific individual unless

(1) the information is disclosed to:

(A) the individual or the individual's attorney, guardian, executor, administrator, conservator, or other person who the pension director determines is acting in the interest of the individual or the individual's estate;

(B) a spouse or former spouse of the individual if the pension director determines that the information is relevant to the spouse's or former spouse's interest in member accounts, benefits, or other amounts payable by the retirement system;

(C) a governmental official or employee if the pension director determines that disclosure of the information requested is reasonably necessary to the performance of the duties of the official or employee;

(D) the individual's employer as defined in this Act; or

(E) a person authorized by the individual in writing to receive the information; or

(2) the information is disclosed pursuant to a subpoena and the pension director determines that the individual will have a reasonable opportunity to contest the subpoena.

(b) This section does not prevent the disclosure of the status or identity of an individual as a member, former member, retiree, deceased member or retiree, beneficiary, or alternate payee of the retirement system.

V.T.C.S. art. 6243n, § 13(a)-(b). You also cite to *Houston Municipal Employees Pension System v. Abbott*, 192 S.W.3d 862 (Tex. App.—Texarkana 2006, pet. denied). In that case, the court concluded that section 26 of article 6243h of Vernon's Texas Civil Statutes makes confidential the salary and bonus information of employees of the Houston Municipal Employees Pension System ("HMEPS") who were also members of the HMEPS retirement program. *Id.* at 865; *see also* V.T.C.S. art. 6243h, § 26. You concede that the language of

section 26 of article 6243h is not the same as that of section 13 of article 6243n.³ You contend, however, that section 13 could also be construed to encompass information relating to employees of the system who also are members of the system, as well as information concerning members of the system who are not employees.

We note that the submitted information consists of e-mails involving employees of the system. You inform us that some of the submitted information concerns employees of the system who also are members of the system. We find that the information in question, insofar as it is related to employees of the system solely in their employment capacities, is personnel information, not “[i]nformation concerning an individual member, retiree, annuitant, beneficiary, or alternate payee” of the system. V.T.C.S. art. 6243n, § 13(a). We therefore conclude that article 6243n, section 13 does not make confidential any of the remaining information that is related to employees of the system solely in their capacities as employees. *See* Open Records Decision Nos. 658 at 4 (1998) (statutory confidentiality provision must be express, and confidentiality requirement will not be implied from statutory structure), 649 at 3 (1996) (language of confidentiality provision controls scope of its protection), 478 at 2 (1987) (statutory confidentiality requires express language making certain information confidential or stating that information shall not be released to public).

You also state that some of the submitted information concerns members of the system in their capacities as members. Based on your representations and our review of the information in question, we conclude that the system must withhold the information we have marked that concerns its members under section 552.101 of the Government Code in conjunction with section 13 of article 6243n of Vernon’s Texas Civil Statutes. We have marked additional information that must also be withheld on this basis. We note that the requestor has a right to information concerning himself as a member of the system. *Id.* § 13(a)(1)(A).

In summary, the system may withhold the information we have marked pursuant to sections 552.107 and 552.111 of the Government Code. The system must withhold the information that we have marked under section 552.101 of the Government Code in conjunction with section 13 of article 6243n of Vernon’s Texas Civil Statutes. The remaining submitted information must be released to the requestor.

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

³Section 26 of article 6243h of Vernon’s Texas Civil Statutes provides in part that “[r]ecords that are in the custody of [HMEPS] concerning an individual member, deferred participant, retiree, eligible survivor, beneficiary, or alternate payee are not public information under Chapter 552, Government Code, and may not be disclosed in a form identifiable to a specific individual[.]” V.T.C.S. art. 6243h, § 26(a).

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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, 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).

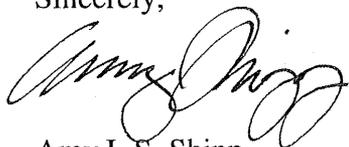
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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 challenge 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,



Amy L.S. Shipp
Assistant Attorney General
Open Records Division

ALS/jb

Ref: ID# 297222

Enc. Submitted documents

c: Mr. George E. Oswald
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(w/o enclosures)