



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 28, 2011

Ms. Rebecca Merrill
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OR2011-00881A

Dear Ms. Merrill:

This office issued Open Records Letter No. 2011-00881 (2011) on January 19, 2011. In that ruling we determined, among other things, that although Pathway Capital Management ("Pathway") had submitted comments to this office explaining why its requested information should not be released, the Teacher Retirement System of Texas (the "system") failed to submit the information at issue to this office for review. Thus, we had no basis to withhold Pathway's information, and ordered its release. The system has now submitted Pathway's information to this office and is asking this office to reconsider Open Records Letter No. 2011-00881. We have considered the system's request, and will reconsider the previously issued ruling. Consequently, this decision serves as the correct ruling and is a substitute for the decision issued on January 19, 2011. *See generally* Gov't Code § 552.011 (providing that Office of Attorney General may issue decision to maintain uniformity in application, operation, and interpretation of Public Information Act).

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. This ruling was assigned ID# 415406.

The Teacher Retirement System of Texas (the "system") received a request for four categories of information pertaining to the system's pension and defined contribution plans.¹ You state the system has no information responsive to the portions of the request pertaining to a defined contribution plan or to the Investment Committee after it was formally dissolved

¹We note the system sought and received clarification of the information requested. *See* Gov't Code § 552.222 (if request for information is unclear, governmental body may ask requestor to clarify request).

on May 25, 2000.² You inform us you will redact home telephone numbers, home addresses, social security numbers, and family member information subject to section 552.117 of the Government Code under section 552.024 of the Government Code.³ You state you will redact information under sections 552.136 and 552.137 of the Government Code pursuant to Open Records Decision No. 684 (2009).⁴ You also state you will redact system participant records under section 825.507 of the Government Code.⁵ You state you will make some information available to the requestor.⁶ You claim some of the submitted information is excepted from disclosure under sections 552.107, 552.111, and 552.143 of the Government Code. You also state release of some of this information may implicate the proprietary interests of interested third parties.⁷ Accordingly, you have notified these third parties of the request and of their right to submit arguments to this office as to why their information should not be released. *See* Gov't Code § 552.305(d) (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances). We have received comments from

²The Act does not require a governmental body to release information that did not exist when it received a request or create responsive information. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

³*See* Gov't Code § 552.024(c)(2) (if employee or official or former employee or official chooses not to allow public access to his or her personal information, the governmental body may redact the information without the necessity of requesting a decision from this office).

⁴We note Open Records Decision No. 684 was issued as a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including bank account and routing numbers under section 552.136 of the Government Code and an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

⁵We understand this information is being redacted pursuant to the previous determination issued to the system in Open Records Letter No. 2001-4873 (2001). *See* Gov't Code § 552.301(a); Open Records Decision No. 673 at 7-8 (2001).

⁶The system acknowledges that some of the submitted information is subject to section 552.0225 of the Government Code. You have highlighted this information, which the system does not seek to withhold under the Act. We note that the exceptions to disclosure found in the Act do not apply to information that is made public by section 552.0225. *See* Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1989).

⁷The third parties notified pursuant to section 552.305 are the following: Property & Portfolio Research; Tremont Partners, Inc.; Wellington Management; Hester Capital Management, LLC; Ennis Knupp; Pathway; GS Vintage Fund L.P.; State Street Global Advisors ("State Street"); Gabriel Roeder Smith & Co.; Watson Wyatt Worldwide; AON Corp.; Loma; Buck Consultants; Northern Trust Co.; Wolcott & Assoc., Inc.; and Texas Growth Fund.

Pathway. We have considered the claimed exceptions and reviewed the submitted representative sample of information.⁸

We note that an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice to submit its reasons, if any, as to why information relating to that party should not be released.⁹ See Gov't Code § 552.305(d)(2)(B). As of the date of this decision, we have not received correspondence from any of the third parties except Pathway. Thus, none of the remaining third parties have demonstrated that they have a protected proprietary interest in any of the submitted information. See *id.* § 552.110(a)-(b); Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). Accordingly, the system may not withhold the submitted information on the basis of any proprietary interests the remaining third parties may have in the information.

You assert some of the submitted information is excepted from disclosure under section 552.143 of the Government Code. Section 552.143 provides in part the following:

(a) All information prepared or provided by a private investment fund and held by a governmental body that is not listed in Section 552.0225(b) is confidential and excepted from the requirements of Section 552.021.

(b) Unless the information has been publicly released, pre-investment and post-investment diligence information, including reviews and analyses, prepared or maintained by a governmental body or a private investment fund is confidential and excepted from the requirements of Section 552.021, except to the extent it is subject to disclosure under Subsection (c).

Gov't Code § 552.143 (a), (b). You state some of the submitted information consists of information held by the system that was prepared and provided by private investment funds. You inform us that the information you seek to withhold is not subject to section 552.0225(b). See *id.* § 552.0225(b) (listing categories of information held by governmental body relating to its investments that are public and not excepted from disclosure under the Act). Based on your representations and our review, we agree the

⁸We 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.

⁹You inform us that State Street has no objection to release of its information, submitted in Exhibit 2.17.

system must withhold the information you have marked under section 552.143(a). You also state portions of the remaining information consist of pre- and post-investment due diligence information about the system's investments and proposed investment opportunities. You inform us that the information at issue has not been released to the public. Based on your representations and our review of the information at issue, we agree that the system must withhold the information you have marked in the remaining records under section 552.143(b) of the Government Code.¹⁰

You seek to withhold Exhibit 2.2 under section 552.107 of the Government Code. Section 552.107(1) protects information coming 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. 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, lawyer representatives, and a lawyer representing another party in a pending action and concerning a matter of common interest therein. *See* TEX. R. EVID. 503(b)(1)(A)-(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 pet.). 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

¹⁰As our ruling is dispositive, we need not address the remaining arguments against disclosure for this information.

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 state that the information in Exhibit 2.2 constitutes communications between system attorneys and system staff and board members. You explain these communications were made in furtherance of the rendition of legal services to the system, and you inform this office that these communications have remained confidential. Based on your representations and our review, we agree that the information at issue constitutes privileged attorney-client communications. Accordingly, the system may withhold the information in Exhibit 2.2 under section 552.107 of the Government Code.

Next, we address your argument under section 552.111 for portions of the remaining information. Section 552.111 excepts from disclosure “an interagency or intra-agency memorandum or letter that would not be available by law to a party in litigation with the agency.” Gov’t Code § 552.111. This exception encompasses the deliberative process privilege. *See Open Records Decision No. 615 at 2* (1993). The purpose of section 552.111 is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, no writ); *Open Records Decision No. 538 at 1-2* (1990).

In *Open Records Decision No. 615*, this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See ORD 615 at 5*. A governmental body’s policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *Id.*; *see also City of Garland v. Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body’s policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body’s policy mission. *See Open Records Decision No. 631 at 3* (1995).

Further, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); *see ORD 615 at 5*. But if factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, the factual information also may be withheld under section 552.111. *See Open Records Decision No. 313 at 3* (1982).

This office has also concluded a preliminary draft of a document that is intended for public release in its final form necessarily represents the drafter's advice, opinion, and recommendation with regard to the form and content of the final document, so as to be excepted from disclosure under section 552.111. *See* Open Records Decision No. 559 at 2 (1990) (applying statutory predecessor). Section 552.111 protects factual information in the draft that also will be included in the final version of the document. *See id.* at 2-3. Thus, section 552.111 encompasses the entire contents, including comments, underlining, deletions, and proofreading marks, of a preliminary draft of a policymaking document that will be released to the public in its final form. *See id.* at 2.

You state the remaining information you have marked consists of the advice, opinion, and recommendations of system staff and board members pertaining to specified policymaking matters. Upon review, we determine that the system may withhold the information you have marked in Exhibits 2.4 and 2.8 under section 552.111 of the Government Code. Although you also assert that Exhibit 2.3 contains a staff memorandum that the system seeks to withhold under section 552.111, we note that Exhibit 2.3 does not contain such a memorandum. Therefore, none of the information in Exhibit 2.3 may be withheld under section 552.111.

Pathway claims some of its information is excepted from disclosure under section 552.101 of the Government Code, which excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. In this instance, Pathway does not present any arguments against disclosure under that section nor has the company directed our attention to any law under which any of its information is considered to be confidential for the purposes of section 552.101. *See* Open Records Decision Nos. 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality), 611 at 1 (1992) (common-law privacy). In addition, this office has concluded section 552.101 does not encompass other exceptions found in the Act. *See* Open Records Decision Nos. 676 at 1-2 (2000), 575 at 2 (1990). Accordingly, none of the company's information may be withheld under section 552.101 of the Government Code.

Pathway also asserts that portions of the company's information are excepted from disclosure under section 552.110(b) of the Government Code, which excepts from disclosure "[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained." Gov't Code § 552.110(b). Section 552.110(b) requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the requested information. *See* Open Records Decision No. 661 at 5-6 (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

Upon review, we find Pathway has made only conclusory allegations that release of the information at issue would result in substantial damage to its competitive position and has provided no specific factual or evidentiary showing to support such allegations. *See*

ORD 661 at 5-6; *see also* Open Records Decision No. 319 at 3 (1982). Therefore, we determine none of Pathway's information is excepted from disclosure under section 552.110(b).

Finally, we note that some of the remaining information at issue may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; *see* Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

In summary, the system must withhold the information you have marked under section 552.143(a) and (b) of the Government Code. The system may withhold the information in Exhibit 2.2 under section 552.107 of the Government Code. The system also may withhold the information you have marked in Exhibits 2.4 and 2.8 under section 552.111 of the Government Code. The remaining submitted information must be released to the requestor, but any information that is protected by copyright may only be released in accordance with copyright law.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



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Open Records Division

CN/dls

Ref: ID# 415406

Enc. Submitted documents

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