



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 18, 2012

Ms. Charmaine Skillman
Assistant General Counsel
Teacher Retirement System of Texas
1000 Red River Street
Austin, Texas 78701-2698

OR2012-05517

Dear Ms. Charmaine Skillman:

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# 451030.

The Teacher Retirement System of Texas ("TRS") received a request for the personnel records of a named employee. You state TRS has released some of the requested documents. You also state TRS is withholding some of the requested information pursuant to section 552.0038 of the Government Code,¹ section 552.024 of the Government Code,² section 552.147 of the Government Code,³ and Open Records Decision No. 684 (2009).⁴

¹Section 552.0038(c) of the Government Code states a governmental entity that maintains records of a participant in a retirement system's retirement program in cooperation with or on behalf of the retirement system is not required to accept or comply with a request for such information or to seek an opinion from the attorney general because the records are exempt from the provisions of the Act. Gov't Code § 552.0038(c).

²Section 552.024(c)(2) of the Government Code authorizes a governmental body to redact information protected by section 552.117(a)(1) of the Government Code without the necessity of requesting a decision under the Act if the current or former employee or official to whom the information pertains timely chooses not to allow public access to the information. Gov't Code § 552.024(c)(2).

³Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act.

⁴Open Record Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold ten categories of information without the necessity of requesting an attorney general opinion.

You claim some of the submitted information is excepted from disclosure under sections 552.101 and 552.107 of the Government Code and privileged under Texas Rule of Evidence 503. We have considered your arguments and reviewed the submitted information. We have also considered comments submitted by a representative of the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Exhibit 1 consists of completed employment evaluations of the named employee. Section 552.022(a) of the Government Code provides in relevant part the following:

Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

- (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). Although you assert some of this information is excepted from disclosure under section 552.107, this section is discretionary and does not make information confidential under the Act. *See* Open Records Decision Nos. 676 at 6 (2002) (section 552.107 is not other law for purposes of section 552.022); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, TRS may not withhold any of the information in Exhibit 1 under section 552.107. However, the Texas Supreme Court has held the Texas Rules of Evidence are "other law" that make information expressly confidential for the purposes of section 552.022. *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). The attorney-client privilege, which the department claims under section 552.107 (1), also is found at Texas Rule of Evidence 503. Therefore, we will consider your arguments under Texas Rule of Evidence 503.

Rule 503(b)(1) provides the following:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

- (A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;
- (B) between the lawyer and the lawyer's representative;
- (C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a

lawyer representing another party in a pending action and concerning a matter of common interest therein;

(D) between representatives of the client or between the client and a representative of the client; or

(E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). A communication is “confidential” if 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).

Accordingly, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must do the following: (1) show the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show the communication is confidential by explaining it was not intended to be disclosed to third persons and it was made in furtherance of the rendition of professional legal services to the client. *See* ORD 676. Upon a demonstration of all three factors, the entire communication is confidential under rule 503 provided the client has not waived the privilege or the communication does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein); *In re Valero Energy Corp.*, 973 S.W.2d 453, 457 (Tex. App.—Houston [14th Dist.] 1998, orig. proceeding) (privilege attaches to complete communication, including factual information).

You claim some of the information within the completed employee performance evaluations consists of communications between a TRS attorney and another TRS attorney or TRS employees that were made for the purpose of facilitating the rendition of professional legal advice. Although the supervisor who completed the evaluations and the employee at issue in the evaluations are both TRS attorneys, we conclude you have failed to demonstrate how any of these evaluations constitutes a communication made in furtherance of the rendition of professional legal services to TRS. Therefore, we find you have failed to establish the applicability of the attorney-client privilege to the completed evaluations. Consequently, TRS may not withhold any portion of the completed evaluations under rule 503 of the Texas Rules of Evidence.

Exhibit 2 includes information that is excepted from disclosure under section 552.102(a) of the Government Code.⁵ Section 552.102(a) excepts from disclosure “information in a

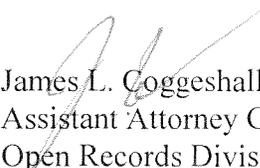
⁵The Office of the Attorney General will raise a mandatory exception like section 552.102 on behalf of a governmental body, but ordinarily will not raise other exceptions.

personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” Gov’t Code § 552.102(a). The Texas Supreme Court recently held section 552.102(a) excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 354 S.W.3d 336 (Tex. 2010). Having carefully reviewed the information at issue, we have marked the information that must be withheld under section 552.102(a) of the Government Code.⁶ TRS must release the remaining information to the requestor.

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,



James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/ag

Ref: ID# 451030

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁶As our ruling is dispositive, we do not address your argument to withhold this information.