



**ATTORNEY GENERAL OF TEXAS**  
**GREG ABBOTT**

November 2, 2012

Mr. Dan Junell  
Assistant General Counsel  
Teacher Retirement System of Texas  
1000 Red River Street  
Austin, Texas 78701-2698

OR2012-17594

Dear Mr. Junell:

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# 468426.

The Teacher Retirement System of Texas ("TRS") received a request for specified information pertaining to two named TRS employees, Apollo Management ("Apollo"), Bain Capital Partners, LLC ("Bain"), and Kohlberg Kravis Roberts & Co. L.P. ("KKR") since 2007.<sup>1</sup> You state TRS has made some of the requested information available to the requestor. You indicate TRS is withholding social security numbers pursuant to section 552.147 of the Government Code. *See* Gov't Code § 552.147(b) (governmental body may redact living person's social security number from public release without necessity of requesting decision from this office under the Act). You claim some of the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.104, 552.107,

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<sup>1</sup>TRS 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); *see also* *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (if governmental entity, acting in good faith, requests clarification of unclear or over-broad request, ten-day period to request attorney general ruling is measured from date request is clarified).

552.111, 552.116, 552.130, 552.136, 552.137, and 552.143 of the Government Code.<sup>2</sup> You also inform us, and provide documentation showing, you notified Altius Associates Limited, Apollo, Bain, Credit Suisse (the "CS Fund"), Hamilton Lane, KKR, and MacFarlane Partners ("MacFarlane") of TRS's receipt of the request for information and of the right of each to submit arguments to this office as to why the requested information should not be released to the requestor. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 at 3 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have received correspondence from Apollo, Bain, KKR, MacFarlane, and attorneys representing one of the employees whose information is at issue. *See* Gov't Code §§ 552.304 (interested party may submit comments stating why information should or should not be released), 552.305. We have also received correspondence from The Emerging Entrepreneurs Fund on behalf of the CS Fund. *See id.* § 552.305. We have considered the submitted arguments and reviewed the submitted representative sample of information.<sup>3</sup>

Initially, we note you have marked information in the submitted documents that you assert is not responsive to the request for information. This ruling does not address the public availability of any information that is not responsive to the request, and TRS is not required to release the nonresponsive information in response to this request.

Next, you have marked a portion of an e-mail that you assert is not public information for purposes of section 552.002 of the Government Code because it is "personal mail." The Act applies to "public information," which is defined in section 552.002 of the Government Code as "information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business: (1) by a governmental body; or (2) for a governmental body and the governmental body owns the information or has a right of access to it." *Id.* § 552.002. Thus, virtually all of the information in a governmental body's physical possession constitutes public information and, thus, is subject to the Act. *Id.* § 552.002(a)(1); *see* Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). The Act also encompasses information that a governmental body does not physically possess, if the information is collected, assembled, or maintained for the governmental body, and the governmental body owns the information or has a right of access to it. Gov't Code § 552.002(a)(2); *see* Open Records Decision No. 462 at 4 (1987). Upon review, we find TRS maintains the portion of the e-mail at issue in connection with the transaction of official

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<sup>2</sup>Although the cover sheets to Part 12 indicate this information is excepted from disclosure in its entirety under sections 552.104 and 552.143 of the Government Code, we understand from your markings and arguments that, in regard to Part 12, TRS asserts the applicability of sections 552.104 and 552.143 only to those portions you have marked and labeled under those sections.

<sup>3</sup>We assume 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 those records contain substantially different types of information than that submitted to this office.

TRS business. Thus, it constitutes "public information" as defined by section 552.002(a). Accordingly, this information is subject to the Act and must be released, unless it falls within an exception to public disclosure under the Act. See Gov't Code §§ 552.006, 552.021, 552.301, 552.302. Therefore, we will address your argument against its disclosure under the Act.

You inform us TRS has redacted driver's license numbers under section 552.130 of the Government Code and credit card numbers under section 552.136 of the Government Code pursuant to Open Records Decision No. 684 (2009). Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold certain categories of information, including Texas driver's license numbers under section 552.130 of the Government Code and access device numbers under section 552.136 of the Government Code, without the necessity of requesting an attorney general decision. However, on September 1, 2011, the Texas Legislature amended section 552.130 of the Government Code to allow a governmental body to redact the information described in section 552.130(a)(1), such as driver's license numbers, without the necessity of requesting a decision from this office. See *id.* § 552.130(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.130(e). See *id.* § 552.130(d), (e). The Texas Legislature also amended section 552.136 on September 1, 2011 to allow a governmental body to redact the information described in section 552.136(b) without the necessity of requesting a decision from this office. See *id.* § 552.136(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.136(e). See *id.* § 552.136(d), (e). Thus, the statutory amendments to sections 552.130 and 552.136 of the Government Code superceded Open Records Decision No. 684 on September 1, 2011. Accordingly, a governmental body may only redact information subject to sections 552.130(a)(1) and 552.136(b) in accordance with sections 552.130 and 552.136 respectively, not Open Records Decision No. 684.

You represent some of the requested information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2012-02068 (2012). In Open Records Letter No. 2012-02068, we determined TRS must withhold the requested information under section 552.143(b) of the Government Code. You state there has been no change in the law, facts, or circumstances on which the previous ruling was based. Accordingly, we conclude TRS must rely on Open Records Letter No. 2012-02068 as a previous determination and withhold the identical information in accordance with that ruling. See Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). We will address your arguments against the release of the submitted information not encompassed by Open Records Letter No. 2012-02068.

Next, you acknowledge, and we agree, you failed to comply with the procedural requirements of section 552.301(e) of the Government Code regarding the information TRS submitted to this office on October 2 and October 9, 2012.<sup>4</sup> Generally, a governmental body's failure to comply with section 552.301 results in the waiver of the claimed exceptions. *See generally id.* § 552.302. Section 552.111 of the Government Code is discretionary in nature. It serves only to protect a governmental body's interests. *See* Open Records Decision No. 677 at 10 (2002) (section 552.111 is not compelling reason to withhold information under section 552.302); *see also* Open Records Decision No. 522 (1989) (discretionary exceptions in general). Thus, TRS has waived section 552.111 for the information submitted on October 2 and October 9, 2012, and may not withhold it from release on that basis. One of the employees whose information is at issue also raises section 552.111. However, as noted above, section 552.111 does not protect the interests of third parties. Thus, TRS may not withhold any of the information under section 552.111 to protect the interests of any interested third party. Nevertheless, sections 552.101, 552.102, 552.137, and 552.143 of the Government Code and the interests of third parties cannot be waived. Therefore, we will consider whether the information submitted on October 2 and October 9 is excepted from disclosure under the Act on any of those grounds.

You state TRS has released the submitted information that is subject to the relevant portions of section 552.0225 of the Government Code. Section 552.0225(b) provides the following categories of information held by a governmental body relating to its investments are public information and not excepted from disclosure under the Act:

- (1) the name of any fund or investment entity the governmental body is or has invested in;
- (2) the date that a fund or investment entity described by Subdivision (1) was established;
- (3) each date the governmental body invested in a fund or investment entity described by Subdivision (1);
- (4) the amount of money, expressed in dollars, the governmental body has committed to a fund or investment entity;
- (5) the amount of money, expressed in dollars, the governmental body is investing or has invested in any fund or investment entity;

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<sup>4</sup>We note TRS complied with section 552.301 regarding the remaining submitted information.

(6) the total amount of money, expressed in dollars, the governmental body received from any fund or investment entity in connection with an investment;

(7) the internal rate of return or other standard used by a governmental body in connection with each fund or investment entity it is or has invested in and the date on which the return or other standard was calculated;

(8) the remaining value of any fund or investment entity the governmental body is or has invested in;

(9) the total amount of fees, including expenses, charges, and other compensation, assessed against the governmental body by, or paid by the governmental body to, any fund or investment entity or principal of any fund or investment entity in which the governmental body is or has invested;

(10) the names of the principals responsible for managing any fund or investment entity in which the governmental body is or has invested;

(11) each recusal filed by a member of the governing board in connection with a deliberation or action of the governmental body relating to an investment;

(12) a description of all of the types of businesses a governmental body is or has invested in through a fund or investment entity;

(13) the minutes and audio or video recordings of each open portion of a meeting of the governmental body at which an item described by this subsection was discussed;

(14) the governmental body's percentage ownership interest in a fund or investment entity the governmental body is or has invested in;

(15) any annual ethics disclosure report submitted to the governmental body by a fund or investment entity the governmental body is or has invested in; and

(16) the cash-on-cash return realized by the governmental body for a fund or investment entity the governmental body is or has invested in.

Gov't Code § 552.0225(b). The exceptions to disclosure found in the Act, including sections 552.104, 552.110, and 552.143, 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). Therefore, TRS must release the submitted information that is subject to section 552.0225(b).

Section 825.212 of the Government Code provides the TRS board of trustees (the "board") shall enforce an ethics policy as provided by section 825.212 for employees of and consultants and advisors to TRS. Gov't Code § 825.212(a). Section 825.212 provides, in part, the following:

(b) Each employee of [TRS] who exercises significant decisionmaking or fiduciary authority, as determined by the board, shall file financial disclosure statements with a person designated by the board. . . .

. . .

(h) The board shall prescribe forms for financial disclosure statements, disclosure statements of conflicts of interest, and waivers of the prohibition against involvement in a matter affected by a conflict of interest. The statements and waivers are open records. The board shall designate an employee to be the custodian of the statements and waivers for purposes of public disclosure.

*Id.* § 825.212(b), (h). You inform us Parts 9(a)-(c) consist of financial disclosure and conflict-of-interest statements for two key TRS employees. You state section 825.212 of the Government Code "governs the form and prescriptions for these documents." Thus, you represent the employees at issue exercise significant decisionmaking or fiduciary authority, as determined by the board, and they filed these forms with a person designated by the board pursuant to section 825.212(b). See *id.* § 825.212(b). Accordingly, we find the submitted financial disclosure and conflict-of-interest statements, which were filed with TRS in accordance with section 825.212, are expressly made public by statute. You assert or indicate some of this information is excepted from disclosure under section 552.101 of the Government Code in conjunction with common-law privacy and sections 552.102, 552.111, 552.117, and 552.136 of the Government Code, and one of the employees whose information is at issue also raises common-law privacy and section 552.102. As a general rule, the exceptions to required public disclosure provided in the Act are inapplicable to information that statutes other than the Act expressly make public. ORDs 623 at 3, 525 at 3. Further, statutory access provisions generally prevail over the common law. See *Collins v. Tex Mall, L.P.*, 297 S.W.3d 409, 415 (Tex. App.—Fort Worth 2009, no pet.) (statutory provision controls and preempts common law only when it directly conflicts with common-law principle); see also *Cash Am. Intern. Inc v. Bennett*, 35 S.W.3d 12, 16 (Tex. 2000) (statute depriving person of common-law right will not be extended beyond its plain meaning or applied to cases not clearly within its purview). However, TRS and an employee whose information is at issue also assert this information is excepted under section 552.101 of the Government Code in conjunction with the doctrine

of constitutional privacy. Under the Supremacy Clause of the United States Constitution, the United States Constitution and duly-enacted federal statutes are "the supreme law of the Land," and states have a responsibility to enforce federal law. See U.S. Const., art. VI, cl. 2; *Howlett v. Rose*, 496 U.S. 356, 367-69 (1990). As a federal law, constitutional privacy preempts any conflicting state provisions, including section 825.212 of the Government Code. See *Equal Employment Opportunity Comm'n v. City of Orange, Tex.*, 905 F. Supp 381, 382 (E.D. Tex. 1995) (federal law prevails over inconsistent provision of state law). Thus, we will address the submitted arguments under section 552.101 in conjunction with constitutional privacy for these documents, as well as the remaining information at issue.

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 the doctrine of constitutional privacy, which consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. Open Records Decision No. 455 at 4 (1987). The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected is narrower than that under the common-law doctrine of privacy. The information must concern the "most intimate aspects of human affairs." *Id.* at 5; see *Ramie v. City of Hedwig Village*, 765 F.2d 490 (5th Cir. 1985).

Upon review, we conclude any privacy interest the interested employees may have in keeping private their financial disclosure and conflict-of-interest statements in Parts 9(a)-(c) is outweighed by the legitimate public interest in the statements. See generally *Barry v. New York*, 712 F.2d 1554, 1559 (2d Cir. 1983) ("Whatever one may think of the intrusiveness of financial disclosure laws, they are widespread . . . and reflect the not unreasonable judgment of many legislatures that disclosure will help reveal and deter corruption and conflicts of interest.") (internal citations omitted). See also Attorney General Opinion H-15 at 2 (1973) ("the public does have a legitimate interest in the current financial condition and recent financial history of those of its servants who are in positions of authority where the temptation to improperly exercise public discretion for private gain may coincide with the opportunity to do so") (underlining in original); cf. *id.* H-1070 (1977) (high-ranking city officials' financial disclosure statements not *per se* protected by common-law privacy). Therefore, these statements are not confidential under constitutional privacy. Accordingly, TRS must release Parts 9(a)-(c) to the requestor in their entirety pursuant to section 825.212(h) of the Government Code. We also find none of the remaining information falls within the zones of privacy or otherwise implicates an individual's privacy interest for purposes of constitutional privacy. Therefore, TRS may not withhold any of the remaining information under section 552.101 in conjunction with constitutional privacy.

You assert some of the submitted information is excepted from disclosure under section 552.143 of the Government Code, which 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 the information you have marked under section 552.143(a) consists of information prepared by or received from private investment funds. *See id.* § 552.143(a). You also state the information you have marked under section 552.143(b) consists of due diligence information prepared by TRS or a private investment fund in order to evaluate possible investments in those funds. You inform us TRS has released the information at issue that is subject to section 552.0225 of the Government Code. Thus, TRS must withhold the information you have marked under subsections 552.143(a) and (b) of the Government Code.<sup>5</sup>

You assert some of the remaining information is excepted from disclosure under section 552.107(1) of the Government Code, which 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 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 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). Thus, a governmental body

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<sup>5</sup>As our ruling is dispositive, we do not address the other arguments to withhold this information.

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.*, 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, orig. proceeding). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain 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 explain the remaining information you have marked under section 552.107 constitutes confidential communications between attorneys for and employees of TRS that were made in furtherance of the rendition of professional legal services. You also assert the communications were intended to be confidential and their confidentiality has been maintained. After reviewing your arguments and the remaining information, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue. Therefore, TRS may withhold the information you have marked under section 552.107(1) of the Government Code.<sup>6</sup>

You assert some of the remaining information is excepted from disclosure under section 552.104 of the Government Code. Section 552.104(a) excepts from disclosure “information that, if released, would give advantage to a competitor or bidder.” Gov’t Code § 552.104(a). This exception protects a governmental body’s interests in connection with competitive bidding and in certain other competitive situations. *See Open Records Decision No. 593 (1991)* (construing statutory predecessor). This office has held that a governmental body may seek protection as a competitor in the marketplace under section 552.104 and avail itself of the “competitive advantage” aspect of this exception if it can satisfy two criteria. First, the governmental body must demonstrate that it has specific marketplace interests. *Id.* at 3. Second, the governmental body must demonstrate a specific threat of actual or potential harm to its interests in a particular competitive situation. *Id.* at 5. Thus, the question of whether the release of particular information will harm a governmental body’s legitimate interests as a competitor in a marketplace depends on the sufficiency of the governmental body’s demonstration of the prospect of specific harm to its marketplace interests in a

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<sup>6</sup>As our ruling is dispositive, we do not address your other argument to withhold this information.

particular competitive situation. *Id.* at 10. A general allegation of a remote possibility of harm is not sufficient. *See* Open Records Decision No. 514 at 2 (1988).

You contend TRS has specific marketplace interests with respect to the information at issue. You inform us TRS is constitutionally responsible for the investment of trust assets worth billions of dollars. *See* Tex. Const. art. XVI, § 67(a)(3) (requiring each statewide benefit system to have board of trustees to administer system and invest funds in accordance with prudent investor standard), (b)(1) (requiring that legislature establish "Teacher Retirement System of Texas to provide benefits for persons employed in the public schools, colleges, and universities supported wholly or partly by the state"). You state TRS has a fiduciary duty to the trust beneficiaries to diversify investments. *See* RESTATEMENT (THIRD) OF TRUSTS § 227(b), cmts. e-g (requiring trustees to diversify investments, if prudent, as part of their duty to act as prudent investors). You explain TRS fulfills its responsibilities, in part, by investing in the private marketplace and assert TRS has an on-going interest in preserving its ability to compete effectively in this marketplace. *See* Gov't Code § 825.301(a) (authorizing TRS to invest in, among other things, "securities," as that term is defined by section 4 of the Securities Act, Tex. Civ. Stat. art. 581-4). Based on your representations, we find TRS has demonstrated specific marketplace interests and may be considered to be a "competitor" in the marketplace for the purposes of section 552.104. *See* ORD 593.

You argue the remaining information you have marked under section 552.104 is excepted from release on several grounds. First, the information concerns TRS's due diligence process in deciding whether to invest in certain funds, and revealing such information would harm TRS's bargaining positions and competitive interests with other prospective funds. Second, release of information reflecting "the Fund's proposed deployment of TRS'[s] capital" would allow competitors to use that information to compete with TRS and would "compromise each Fund and the portfolio investments' negotiating positions in transacting business with and obtaining favorable transaction terms from prospective funds or other investment vehicles, thereby harming TRS'[s] investment." And third, release of the information "could result in risk-adjusted, premium pricing by prospective private investment funds [that] would generally harm TRS's ability to negotiate favorable terms," or, alternatively, cause TRS to be excluded from investing in those funds. Upon review, we find you have established TRS has an ongoing competitive interest that would be harmed by release of the remaining information you have marked under section 552.104. Therefore, TRS may withhold the remaining information you have marked under section 552.104.<sup>7</sup>

You assert some of the remaining information is excepted from disclosure under section 552.111 of the Government Code, which excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." This exception encompasses the deliberative process privilege. *See* Open

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<sup>7</sup>As our ruling is dispositive, we do not address your other argument to withhold this information.

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 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. *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.

Section 552.111 can also encompass communications between a governmental body and a third-party consultant. *See* Open Records Decision Nos. 631 at 2 (section 552.111 encompasses information created for governmental body by outside consultant acting at governmental body's request and performing task that is within governmental body's authority), 561 at 9 (1990) (section 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process), 462

at 14 (1987) (section 552.111 applies to memoranda prepared by governmental body's consultants). For section 552.111 to apply, the governmental body must identify the third party and explain the nature of its relationship with the governmental body. Section 552.111 is not applicable to a communication between the governmental body and a third party unless the governmental body establishes it has a privity of interest or common deliberative process with the third party. See ORD 561 at 9.

You inform us the remaining information you have marked under section 552.111 relates to TRS investment policies and decisions that concern TRS investment strategy. You explain some of this information consists of communications with private investment fund personnel with whom TRS had a privity of interest in the particular communication as a fellow investor. This information also includes a draft related to TRS investment policy that you inform us TRS released to the public its final form. You explain other information reflects deliberations of TRS's Internal Investment Committee in developing internal recommendations for investments and "Premier Lists." You also argue none of this information consists of routine administrative or personnel matters. Upon review, we find you have not established some of this information consist of advice, opinions, and recommendations for TRS. Therefore, TRS may not withhold this information, which we have marked for release, under section 552.111. But we agree the remaining information you have marked under the deliberative process privilege is excepted from release under section 552.111. Accordingly, with the exception of the information that we have marked for release, TRS may withhold the remaining information you have marked under section 552.111.

Section 552.101 of the Government Code encompasses the doctrine of common-law privacy, which protects information that (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found.*, 540 S.W.2d at 685. The types of information considered intimate or embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. This office has found the following types of information are excepted from required public disclosure under common-law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, see Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (prescription drugs, illnesses, operations, and physical handicaps); and personal financial information not relating to the financial transaction between an individual and a governmental body, see Open Records Decision Nos. 600 (1992), 545 (1990). Some of the remaining information is highly intimate or embarrassing and not of legitimate concern to the public. Therefore, TRS must withhold this information, which we have marked, under section 552.101 in conjunction with common-law privacy. Upon review, however, we find you have not established any of the remaining

information is confidential under common-law privacy, and TRS may not withhold it under section 552.101 on that ground.

TRS and an employee whose information is at issue claim some of the remaining information is excepted from disclosure under section 552.102(a) of the Government Code, which excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]" Gov't Code § 552.102(a). We understand TRS and one of the employees whose information is at issue to assert the privacy analysis under section 552.102(a) is the same as the common-law privacy test under section 552.101 of the Government Code, which is discussed above. *See Indus. Found.*, 540 S.W.2d at 685. In *Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court of appeals ruled the privacy test under section 552.102(a) is the same as the *Industrial Foundation* privacy test. However, the Texas Supreme Court has expressly disagreed with *Hubert's* interpretation of section 552.102(a), and held the privacy standard under section 552.102(a) differs from the *Industrial Foundation* test under section 552.101. *See Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 354 S.W.3d 336 (Tex. 2010). The Supreme Court also considered the applicability of section 552.102(a) and held it excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *See id.* at 348. Upon review, we find no portion of the remaining information is subject to section 552.102(a) of the Government Code, and TRS may not withhold any of the remaining information on that basis.

You assert some of the remaining information is excepted from disclosure under section 552.116 of the Government Code, which reads as follows:

(a) An audit working paper of an audit of the state auditor or the auditor of a state agency, an institution of higher education as defined by Section 61.003, Education Code, a county, a municipality, a school district, a hospital district, or a joint board operating under Section 22.074, Transportation Code, including any audit relating to the criminal history background check of a public school employee, is excepted from the requirements of Section 552.021. If information in an audit working paper is also maintained in another record, that other record is not excepted from the requirements of Section 552.021 by this section.

(b) In this section:

(1) 'Audit' means an audit authorized or required by a statute of this state or the United States, the charter or an ordinance of a municipality, an order of the commissioners court of a county, the bylaws adopted by or other action of the governing board of a hospital district, a resolution or other action of a board of trustees of a school

**district, including an audit by the district relating to the criminal history background check of a public school employee, or a resolution or other action of a joint board described by Subsection (a) and includes an investigation.**

**(2) 'Audit working paper' includes all information, documentary or otherwise, prepared or maintained in conducting an audit or preparing an audit report, including:**

**(A) intra-agency and interagency communications; and**

**(B) drafts of the audit report or portions of those drafts.**

**Gov't Code § 552.116. You assert the information you have marked under section 552.116 is excepted from disclosure on that ground because it consists of internal communications between internal investment and audit personnel concerning the TRS Quarterly Investment Compliance Audit, which is conducted by TRS's Investments Audit Division. We understand the audit was conducted pursuant to chapter 2102 of the Government Code. See *id.* §§ 2102.003 (defining types of audits), .005 (requiring state agencies to conduct internal audit programs), .007 (relating to the duties of an internal auditor). Based on your representations and our review, we agree the information you have marked under section 552.116 consists of audit working papers subject to that section. Accordingly, TRS may withhold the information you have marked under section 552.116 of the Government Code.**

**You inform us TRS has redacted personal information pursuant to section 552.024 of the Government Code. Section 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. See *id.* § 552.024(c)(2). Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. *Id.* § 552.117(a)(1). Section 552.117 also encompasses a personal cellular telephone number, provided that a governmental body does not pay for the cellular phone service. See Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. See Open Records Decision No. 530 at 5 (1989). Thus, information may be withheld under section 552.117(a)(1) only on behalf of a current or former official or employee who made a request for confidentiality under section 552.024**

prior to the date of the governmental body's receipt of the request for the information. Therefore, TRS must withhold the information we have marked in the remaining information, including cellular telephone numbers, under section 552.117(a)(1) if the employees at issue made a timely election to keep the information confidential; however, TRS may not withhold the cellular telephone numbers at issue if they were provided to the employees at issue at public expense.

You inform us TRS has redacted e-mail addresses under section 552.137 of the Government Code pursuant to Open Records Decision No. 684 (2009). As previously noted, Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold specified categories of information, including 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. Section 552.137 of the Government Code provides in relevant part the following:

(a) Except as otherwise provided by this section, an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.

(b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

(c) Subsection (a) does not apply to an e-mail address:

(1) provided to a governmental body by a person who has a contractual relationship with the governmental body or by the contractor's agent;

(2) provided to a governmental body by a vendor who seeks to contract with the governmental body or by the vendor's agent; [or]

(3) contained in a response to a request for bids or proposals, contained in a response to similar invitations soliciting offers or information relating to a potential contract, or provided to a governmental body in the course of negotiating the terms of a contract or potential contract[.]

Gov't Code § 552.137(a)-(c). We have marked e-mail addresses in the remaining documents that TRS must withhold under section 552.137(a) of the Government Code. However, some of the remaining information you have marked under section 552.137 does not consist of e-mail addresses or it does not consist of e-mail addresses of members of the public.

Therefore, TRS may not withhold this information under section 552.137. *See id.* § 552.137(a). In addition, from your representations and our review, we find the remaining e-mail addresses you have marked are subject to section 552.137(c). *See id.* § 552.137(c)(1)-(2). Accordingly, TRS may not withhold any of the remaining information under section 552.137(a).

An interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why requested information relating to it should be withheld from disclosure. *See id.* § 552.305(d)(2)(B). As of the date of this letter, Altius Associates, and Hamilton Lane have not submitted to this office any reasons explaining why the requested information should not be released. Thus, we have no basis for concluding any portion of the remaining information constitutes proprietary information of these third parties, and TRS may not withhold any portion of the remaining information on that basis. *See 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, 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.

Finally, you inform us some of the materials 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.

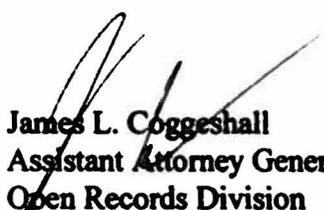
We conclude the following: TRS (1) must rely on Open Records Letter No. 2012-02068 as a previous determination and withhold the identical information in accordance with that ruling; (2) must release the submitted information that is subject to section 552.0225(b) of the Government Code; (3) must release Parts 9(a)-(c) to the requestor in their entirety pursuant to section 825.212(h) of the Government Code; (4) must withhold the information you have marked under subsections 552.143(a) and (b) of the Government Code; (5) may withhold the information you have marked under section 552.107(1) of the Government Code; (6) may withhold the remaining information you have marked under section 552.104 of the Government Code; (7) with the exception of the information that we have marked for release, may withhold the remaining information you have marked under section 552.111 of the Government Code; (8) must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy; (9) may withhold the information you have marked under section 552.116 of the Government Code; (10) must withhold the information we have marked in the remaining documents under section 552.117(a)(1) of the Government Code if the employees at issue made a timely

election to keep the information confidential; however, TRS may not withhold the marked cellular telephone numbers on that ground if they were not provided to the employees at issue at public expense; and (11) must release the remaining responsive information, but may only release any copyrighted information 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](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/tch

Ref: ID# 468426

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