



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

July 28, 1995

Charles E. Nemir, P.E.
Executive Director
Texas State Board of Registration for
Professional Engineers
P.O. Drawer 18329
Austin, Texas 78760-8329

OR95-715

Dear Mr. Nemir:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 32517.

The Texas State Board of Registration for Professional Engineers (the "board") received a request for the "names and addresses of each complainer, complainant, and Board Rule violated in the past three years." You have submitted a representative sample of the requested records for our review and claim that the names of the complainants¹ are excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with title 22, section 131.171(e) of the Texas Administrative Code and article 3271a, V.T.C.S., the Texas Engineering Practice Act. Because you have not claimed that any exception applies to disclosure of violations of board rules, we assume that you have released information relating to that portion of the request.

Section 552.101 excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." The Texas Engineering Practice Act, article 3271a, V.T.C.S., contains no provision making the identity of complainants confidential. Title 22, section 131.171(e) of the Texas Administrative Code, however, provides:

¹Because "complainant" refers to an individual who submits a complaint, we are unable to determine what other information the requestor seeks by referring to both the "complainant" and the "complainer." You may wish to consult the requestor to determine if additional information is requested.

The board may, upon request, keep the identity of the complainant confidential *to the extent permitted by law* [emphasis added].

This is not an express confidentiality statute. A governmental body may not pass an ordinance or rule purporting to make certain information confidential unless the governmental body is statutorily authorized to do so. Open Records Decision No. 594 (1991) at 3. Because article 3271a, V.T.C.S., contains no provision that makes confidential the identity of complainants, you may not withhold the information pursuant to section 552.101 in conjunction with title 22, section 131.171(e) of the Texas Administrative Code.

You assert that the individuals who have requested anonymity have done so for reasons of "possible retaliation, loss of employment, or a plain desire that their name not be released to the respondent of their complaints, or the public." We assume that you are asserting that names of certain complainants may be excepted from disclosure pursuant to either the informer's privilege or common-law privacy.

The informer's privilege protects the identity of persons who report violations of the law to officials having the duty of enforcing particular laws. *See Roviario v. United States*, 353 U.S. 53, 59 (1957). The informer's privilege does not, however, apply to information that does not describe illegal conduct. Open Records Decision No. 515 (1988) at 5. Furthermore, once the identity of the informer is known to the subject of the communication, the exception is no longer applicable. Open Records Decision No. 202 (1978) at 2.

We agree that the informer's privilege may apply when complaints allege illegal conduct. For example, where a complaint alleges violation of subsection 23(a), which makes an offense under that subsection a class A misdemeanor², the name of the complainant may be excepted from disclosure pursuant to the informer's privilege. However, the remainder of the act prescribes administrative penalties such as revocation or suspension of registration for failure to abide by the terms of the act. Violations of board rules described in sections other than subsection 23(a) do not appear to constitute illegal conduct. You submitted copies of four complaints in which the complainants request anonymity. Only one complaint alleges a violation of law; you may withhold the identity and information tending to identify this complainant pursuant to the informer's privilege. For your convenience, we have marked this information.

²Subsection 23(a) provides

any person who shall practice, or offer to practice, the profession of engineering in this State without being registered or exempted from registration in accordance with the provisions of this Act, or any person presenting or attempting to use as his own the certificate of registration or the seal of another, or any person who shall give any false or forged evidence of any kind to the Board or to any member thereof in obtaining a certificate of registration, or any person who shall violate any of the provisions of this Act, commits an offense.

You argue that certain complainants simply do not wish their names revealed to the subject of their complaints or the general public; we assume that you are claiming that the complainant's name should be withheld under the doctrine of common-law privacy. For information to be protected from public disclosure under the common-law right of privacy under section 552.101, the information must meet the criteria set out in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The *Industrial Foundation* court stated that

information ... is excepted from mandatory disclosure under Section 3(a)(1) as information deemed confidential by law if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public.

540 S.W.2d at 685; Open Records Decision No. 142 (1976) at 4 (construing former V.T.C.S. art. 6252-17a, § 3(a)(1)). Generally, disclosure of a person's name is not an invasion of privacy. Open Records Decision No. 554 (1990). Whether information should be withheld under the doctrine of common-law privacy must be determined on a case-by-case basis. See Open Records Decision Nos. 611 (1992), 215 (1978). In this case, we do not believe that the complainants' names are protected by common-law privacy. Therefore, except as noted above, you must release the names of the complainants.³

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Loretta R. DeHay
Assistant Attorney General
Open Government Section

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³In reaching our conclusion here, we 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) (where requested documents are numerous and repetitive, governmental body should submit representative sample; but if each record contains substantially different information, all must be submitted). 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.