



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 5, 2005

Mr. Charles W. Schiesser
Enforcement Attorney
Texas Board of Architectural Examiners
P.O. Box 12337
Austin, Texas 78711-2337

OR2005-03907

Dear Mr. Schiesser:

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# 223597.

The Texas Board of Architectural Examiners (the "board") received a request for all documents regarding a certain individual. You state that "copies of registration documents and prior enforcement matters have been released." You claim that the remaining requested information is excepted from disclosure under sections 552.101, 552.103 and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.103 provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

The board has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The board must meet both prongs of this test for information to be excepted under section 552.103(a).

You inform us and provide documentation showing that the requested documents pertain to a currently pending “contested case.” You also state that the board commenced this investigation pursuant to a formal complaint, and that all investigations resulting from formal complaints must be conducted according to the provisions of the Texas Administrative Procedure Act (the “APA”). For purposes of section 552.103(a), this office considers a contested case under the APA to constitute “litigation.” See Open Records Decision No. 588 (1991). We therefore find that you have established that litigation was pending on the date the board received the request. Furthermore, having reviewed your arguments and representations, we find that the requested documents contain information gathered by the board during its investigation of the complaint against the respondent for use in the currently pending case. Therefore, the requested documents constitute information that is related to the pending proceeding for purposes of section 552.103. Based on the foregoing conclusions, the board may withhold such information pursuant to section 552.103.

Generally, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Here, some of the information at issue was obtained from or provided to the opposing party. Therefore, the board may not withhold the information obtained from or provided to the opposing party under section 552.103. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

We next address your section 552.111 argument in regards to the documents that have been obtained from or provided to the opposing party. Section 552.111 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 section encompasses the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure. *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 work product as

(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.

A governmental body seeking to withhold information under this exception 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. Tex. R. Civ. P. 192.5; ORD 677 at 6-8. In order for this office to conclude that the information was made 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; ORD 677 at 7.

The Texas Supreme Court has held that "the decision as to what to include in [the file] necessarily reveals the attorney's thought processes concerning the prosecution or defense of the case." *Curry v. Walker*, 873 S.W.2d 379, 380. After reviewing the board's arguments, we conclude that the board has shown that some of the information was developed in anticipation of litigation and reflects an attorney's mental impressions. Therefore, the department may withhold some of the remaining requested documents as attorney work product.

We next address section 552.101 in conjunction with the informer's privilege. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." The informer's privilege, incorporated into the Act by section 552.101, has long been recognized by Texas courts. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969); *Hawthorne v. State*, 10 S.W.2d 724, 725 (Tex. Crim. App. 1928). It protects from disclosure the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law-enforcement authority, provided that the subject of the information does not

already know the informer's identity. Open Records Decision Nos. 515 at 3 (1988), 208 at 1-2 (1978). The informer's privilege protects the identities of individuals who report violations of statutes to the police or similar law-enforcement agencies, as well as those who report violations of statutes with civil or criminal penalties to "administrative officials having a duty of inspection or of law enforcement within their particular spheres." Open Records Decision No. 279 at 2 (1981) (citing Wigmore, Evidence, § 2374, at 767 (McNaughton rev. ed. 1961)). The report must be of a violation of a criminal or civil statute. See Open Records Decision Nos. 582 at 2 (1990) , 515 at 4-5 (1988).

The "informer's privilege" aspect of section 552.101 protects the identity of persons who report violations of the law. The privilege does not, however, protect the contents of communications if they do not reveal the identity of the informant. *Roviaro*, 353 U.S. at 60; see also Open Records Decision No. 208 (1978) (informer's privilege does not apply where informant's identity is known to individual who is subject of complaint). In this instance, the informant is not identified on most of the remaining requested documents and release of the documents does not identify any informer. The informant is, however, identified on one of the remaining requested documents, but the subject of the information is already aware of the informer's identity. We therefore conclude that the informer's privilege is inapplicable here.

In summary, the board may withhold the requested documents that are related to the case that is currently pending pursuant to section 552.103. The board may also withhold some of the remaining requested documents as attorney work product under section 552.111. We have marked the information the board must release.

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 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 appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, 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

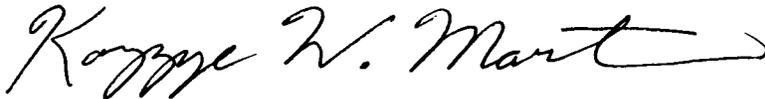
will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to 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 appeal 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 Texas Building and Procurement Commission 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,



Kazzye W. Martens
Assistant Attorney General
Open Records Division

KWM/seg

Ref: ID# 223597

Enc. Submitted documents

c: Mr. David P. Benjamin
O'Connell & Benjamin, L.L.P.
153 Treeline Park, Suite 200
San Antonio, Texas 78209
(w/o enclosures)