



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 1, 2007

Mr. A. Duane Waddill
Executive Director
Texas Residential Construction Commission
P.O. Box 13144
Austin, Texas 78711

OR2007-09728

Dear Mr. Waddill:

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# 285307.

The Texas Residential Construction Commission (the "commission") received a request for any and all information regarding the Falcon Club Development Company, the Falcon Club Building Company, the Falcon Club Utility Company, and the requestor's client.¹ You state that you have provided the requestor with a portion of the request. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.103 of the Government Code provides in part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the

¹You state, and provide documentation showing, that the requestor agreed to exclude social security numbers, driver's license numbers, bank and charge card account numbers, and e-mail addresses from his request. See Gov't Code § 552.222 (governmental body may communicate with requestor for purpose of clarifying or narrowing request). Accordingly, any such information is not responsive to the request and need not be released to the requestor.

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.

Gov't Code § 552.103(a), (c). A governmental body 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 on the date the governmental body receives the request for information, and (2) the information at issue is related to that litigation. *Thomas v. Cornyn*, 71 S.W.3d 473, 487 (Tex. App.—Austin 2002, no pet.); *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 governmental body must meet both prongs of this test for information to be excepted under section 552.103(a) of the Government Code.

You explain that sections 418 and 419 of title 16 of the Property Code allow the commission to undertake disciplinary actions against registrants. *See Prop. Code* §§ 418.001 (listings grounds for disciplinary action), 419.001 (granting the imposition of administrative penalty on a person violating title 16). You further explain that those disciplinary actions are undertaken through contested case proceedings before the State Office of Administrative Hearings. *See Open Records Decision No. 588* at 7 (1991) (deciding that contested cases conducted under the Administrative Procedure Act, chapter 2001 of the Government Code, are considered litigation for purposes of section 552.103). In this instance, you state that the commission has gathered the submitted information as part of an investigation and in preparation for a contested case involving the Falcon Club Building Company and the requestor's client. You further state that on the date the commission received the request, the commission anticipated litigation involving the Falcon Club Building Company and the requestor's client, as it relates to the registration certificate of Falcon Club Building Company and agents, including the requestor's client. Based on our review of your arguments and the information at issue, we find that the commission has established that litigation was reasonably anticipated on the date that it received the present request for information. Furthermore, we find that the commission has demonstrated that the information at issue relates to the anticipated litigation. Thus, you have demonstrated the applicability of section 552.103 of the Government Code to most of the submitted

information. Accordingly, the commission may withhold the information we have marked pursuant to section 552.103.²

We note that the purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to the litigation to obtain such information through discovery procedures. *See* Open Records Decision No. 551 at 4-5 (1990). Thus, when the opposing party has seen or had access to information relating to *anticipated litigation*, there is no interest in withholding that information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). The remaining information consists of a secondary agent registration form filled out and signed by the requestor's client, as well as a "mutual general release of all claims" agreement that was signed by the requestor's client. Thus, the opposing party to the litigation has already had access to this information. Accordingly, the commission may not withhold these documents under section 552.103 of the *Government Code*.

In summary, the commission may withhold the information we have marked pursuant to section 552.103 of the *Government Code*. The remaining information must be released to the requestor.

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

²As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

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 Office of the Attorney General 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. 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,



Jordan Johnson
Assistant Attorney General
Open Records Division

JJ/jb

Ref: ID# 285307

Enc. Submitted documents

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