



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 5, 2007

Mr. David Weaver
General Counsel
Texas State Securities Board
P.O. Box 13167
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OR2007-11566

Dear Mr. Weaver:

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# 288233.

The Texas State Securities Board (the "board") received a request for the personnel file of a former board employee. You state that you have released a portion of the requested information. You claim that the remaining information is excepted from disclosure under sections 552.101, 552.107, 552.136, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

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. Section 552.101 encompasses information protected by other statutes. Article 581-28 of the Texas Securities Act provides in relevant part:

Art. 581-28. Investigations, Investigatory Materials, and Registration Related
Materials

¹We 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). 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.

A. Investigations by Commissioner. The Commissioner shall conduct investigations as the Commissioner considers necessary to prevent or detect the violation of this Act or a Board rule or order.

...

B. Confidentiality of Certain Registration-Related and Other Materials. To the extent not already provided for by this Act, any intraagency or interagency notes, memoranda, reports, or other communications consisting of advice, analyses, opinions, or recommendations shall be treated as confidential by the Commissioner and shall not be disclosed to the public, except under order of court, for good cause shown. The Commissioner may, at the Commissioner's discretion, disclose any confidential information in the Commissioner's possession to any governmental or regulatory authority or association of governmental or regulatory authorities approved by Board rule or to any receiver appointed under Section 25-1 of this Act. The disclosure does not violate any other provision of this Act or Chapter 552, Government Code.

V.T.C.S. art. 581-28(A), (B). You contend that the information in Tab C is confidential under article 581-28(B). However, article 581-28 is entitled "Investigations, Investigatory Materials, and Registration Related Materials." We further note that article 581-28(A) is entitled "Investigations by Commissioner," while article 581-28(B) is entitled "Confidentiality of Certain Registration-Related and Other Materials." In construing article 581-28(B), we must give effect to the legislature's intent. See Gov't Code §§ 311.021, 311.023; *Albertson's, Inc. v. Sinclair*, 984 S.W.2d 958, 960 (Tex. 1999); *Mitchell Energy Corp. v. Ashworth*, 943 S.W.2d 436, 438 (Tex. 1997). To do so, we must construe it according to its plain language. See *In re Canales*, 52 S.W.3d 698, 702 (Tex. 2001); *RepublicBank Dallas, N.A. v. Interkal, Inc.*, 691 S.W.2d 605, 607-08 (Tex. 1985). But we must also consider it in the broader context of article 581-28 and the Texas Securities Act as a whole. See *Helena Chem. Co. v. Wilkins*, 47 S.W.3d 486, 493 (Tex. 2001) ("We must always consider the statute as a whole rather than its isolated provisions We should not give one provision a meaning out of harmony or inconsistent with other provisions, although it might be susceptible to such a construction standing alone."); see also Gov't Code § 311.011(a) (words and phrases to be read in context). In addition, we note that "[w]ords and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly." Tex. Gov't Code Ann. § 311.011(b).

Upon review of the Texas Securities Act as a whole and the headings and purpose of article 581-28 in particular, we find that you have failed to demonstrate how the information in Tab C constitutes intraagency or interagency notes, memoranda, reports, or other

communications consisting of advice, analyses, opinions, or recommendations for purposes of article 581-28(B). *See* House Committee on Pensions and Investment, Bill Analysis, H.B. 1295, 74th Leg. (1995) (amendments to section 28, Texas Securities Act, article 581-28, concern investigations, investigatory materials, and registration-related materials). Accordingly, none of the information in Tab C is confidential under article 581-28(B), and the board may not withhold any portion of it under section 552.101 of the Government Code on that ground.

The informer's privilege, incorporated into the Act by section 552.101, has long been recognized by Texas courts. *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 (1998), 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).

Although you raise the informer's privilege for the identity of an individual in Tab E, you have not identified the alleged violation that the reported incidents would relate to, nor have you explained whether the alleged violation carries civil or criminal penalties. Further, you have failed to establish that the complaint was made to officials having a duty of inspection or law enforcement. Accordingly, the board has not met its burden in demonstrating that the informer's privilege is applicable to the information at issue in Tab E. *See* Gov't Code § 552.301(e)(1)(A), Open Records Decision Nos. 542(1990) (concluding that Act places on governmental body burden of establishing why and how exception applies to requested information), 532 (1989), 515 (1988), 252 (1980). Thus, we conclude that you may not withhold any of the information in Tab E under section 552.101 of the Government Code in conjunction with the informer's privilege.

Section 552.101 of the Government Code also encompasses the common-law right to privacy. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976). In *Industrial Foundation*, the Texas Supreme Court stated that information is excepted from disclosure if (1) the information contains highly intimate or embarrassing facts the release of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Id.* at 685. The types of information considered intimate and 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. Generally, however, the public has a

legitimate interest in information that relates to public employment and public employees. *See* Open Records Decision Nos. 562 at 10 (1990) (personnel file information does not involve most intimate aspects of human affairs, but in fact touches on matters of legitimate public concern), 542 at 5 (1990) (information in public employee's resume not protected by constitutional or common-law privacy under statutory predecessors to 552.101 and 552.102). Information that pertains to an employee's actions as a public servant generally cannot be considered to be beyond the realm of legitimate public interest. *See* Open Records Decision Nos. 470 at 4 (1987) (public has legitimate interest in job qualifications and performance of public employees), 444 at 5-6 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees), 423 at 2 (1984) (scope of public employee privacy is narrow).

Section 552.101 also encompasses the doctrine of constitutional privacy. Constitutional privacy 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, Texas*, 765 F.2d 490 (5th Cir. 1985).

You assert that the information in Tab D may implicate the privacy interests of the former board employee and other third parties. Upon review of your arguments and the information at issue, we agree that the information we have marked in Tab D must be withheld under section 552.101 in conjunction with constitutional privacy. However, the board has not demonstrated how any of the remaining information constitutes highly intimate or embarrassing information for the purposes of common-law privacy. Furthermore, the board has failed to demonstrate how any of the remaining information falls within the "zones of privacy" or implicates the former board employee's or other third parties' privacy interests for the purposes of constitutional privacy. Therefore, no portion of the remaining information in Tab D may be withheld under section 552.101 in conjunction with either common-law or constitutional privacy.

Section 552.107 of the Government Code protects information that comes 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. *See* Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that 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. *See* 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. *See 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 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. *See* TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body 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.* § 503(b)(1), 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. *See Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that 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 assert that the information in Tab F consists of or documents communications between board employees and attorneys that were made in furtherance of the rendition of professional legal services. You have identified the parties to the communications at issue. You also inform us that the communications were intended to be confidential and that their confidentiality has been maintained. Based on your representations and our review of the information at issue, we conclude that the board may withhold the information in Tab F pursuant to section 552.107 of the Government Code.

You also assert that Tab G includes information subject to section 552.136 of the Government Code. Section 552.136 states that “[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” Gov’t Code § 552.136(b). An access device number is one that may be used to “(1) obtain money, goods, services, or another thing of value; or (2) initiate a transfer of funds other than a transfer originated solely by paper instrument.” *Id.* § 552.136(a). Upon review, we find you have failed to explain how the numbers you have marked constitute access device numbers for purposes of section 552.136. Accordingly, none of the information in Tab G may be withheld under section 552.136 of the Government Code.

You claim that Tab H includes e-mail addresses subject to section 552.137 of the Government Code. Section 552.137 excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov’t Code § 552.137(a)-(c). The e-mail address at issue is not a type specifically excluded by section 552.137(c). You do not inform us that the individual whose e-mail address is at issue has affirmatively consented to its release. Therefore, the board must withhold the e-mail address we have marked under section 552.137 of the Government Code.

In summary, the board must withhold the information we have marked in Tab D under section 552.101 in conjunction with constitutional privacy. The board may withhold the information documenting attorney-client communications in Tab F pursuant to section 552.107 of the Government Code. Finally, the board must withhold the e-mail address we have marked in Tab H under section 552.137 of the Government Code. The remaining information must be released to the requestor.²

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

²We note that some of the information being released is confidential and not subject to release to the general public. However, the requestor in this instance has a special right of access to the information. Gov’t Code § 552.023 (person or person’s authorized representative has special right of access to records that contain information relating to the person that are protected from public disclosure by laws intended to protect that person’s privacy interests). Because such information may be confidential with respect to the general public, if the board receives another request for this information from an individual other than this requestor or the individual who he represents, the board should again seek our decision.

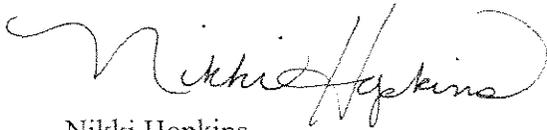
Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor 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 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,



Nikki Hopkins
Assistant Attorney General
Open Records Division

NH/mcf

Ref: ID# 288233

Enc. Submitted documents

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