



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 8, 2009

Mr. Scott Gibson
General Counsel
Texas Board of Architectural Examiners
P.O. Box 12337
Austin, Texas 78701-3942

OR2009-07813

Dear Mr. Gibson:

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# 345357.

The Texas Board of Architectural Examiners (the "board") received a request for all complaints or investigations from March 1, 2008 to the present concerning the use of the terms "interior design" or "interior designer" without authorization. You claim that the requested information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note some of the submitted information, which we have marked, is not responsive to the instant request because it does not fall within the dates specified by the requestor. The board need not release non-responsive information in response to this request, and this ruling will not address that information.

Next, we note that the submitted information contains completed investigations. Under section 552.022(a)(1), a completed report, audit, evaluation, or investigation made of, for, or by a governmental body is expressly public unless it either is excepted under section 552.108 of the Government Code or is expressly confidential under other law. Gov't Code § 552.022(a)(1). Although you assert, in part, that this information is excepted under section 552.103 of the Government Code, this section is a discretionary exception under the

Act and does not constitute "other law" for purposes of section 552.022. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision No. 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived). Accordingly, the board may not withhold any of the information that is subject to section 552.022(a)(1) under section 552.103. However, the common-law informer's privilege, which you also raise, is "other law" for the purpose of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001); *Tex. Comm'n on Env'tl. Quality v. Abbott*, No. GN-204227 (126th Dist. Ct., Travis County, Tex.). Therefore, we will consider your informer's privilege claim for the information subject to section 552.022. We will also consider your argument under section 552.103 of the Government Code for the information that is not subject to section 552.022.

Section 552.103 of the Government Code provides in relevant part 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.

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 was pending or reasonably anticipated on the date that the governmental body received the request for information, and (2) the information at issue is related to that litigation. *See 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). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a). *See* ORD 551.

In this instance, you explain that the information at issue is related to pending litigation. You state that the requestor has filed a lawsuit against the board prior to the board's receipt of the instant request. You also state that the submitted information is related to a recently-filed

request for discovery in this lawsuit. Upon review, we determine that the board has established that litigation was pending on the date that it received the request for information. Further, we determine that the information at issue is related to the pending litigation. Accordingly, we conclude that the board may generally withhold the submitted information that is not subject to section 522.022 under section 552.103 of the Government Code.

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. *See Open Records Decision Nos. 349 (1982), 320 (1982)*. Thus, information that has either been obtained from or provided to the opposing party in the pending litigation is not excepted from disclosure under section 552.103(a). Further, the applicability of section 552.103(a) ends once the litigation has been concluded. *See Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982)*.

Next, we address your argument under section 552.101 of the Government Code for the information that is subject to section 552.022 and for any information that has been released to the opposing party in the pending litigation.¹ Section 552.101 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 the common-law informer's privilege, which 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). The informer's privilege 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)*. 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 privilege excepts the informer's statement only to the extent necessary to protect that informer's identity. *Open Records Decision No. 549 at 5 (1990)*.

¹We note that although section 552.007 of the Government Code generally prohibits selective disclosure of information that a governmental body has voluntarily made available to any member of the public, release of information among litigants in the course of discovery does not constitute a "voluntary" release of information for purposes of the Act. *See Cornyn v. City of Garland*, 994 S.W.2d 258, 265 (Tex. App.—Austin 1999, no pet.) (disclosure of information pursuant to discovery does not constitute voluntary disclosure for purposes of section 552.007); *Open Records Decision No. 579 (1990)* (exchange of information among litigants in "informal" discovery is not "voluntary" release of information for purposes of statutory predecessor of section 552.007).

You state that the submitted information relates to complaints of alleged violations of section 1053.151 of the Occupations Code. *See* Occ. Code § 1053.151 (prohibiting person other than registered interior designer to use terms “interior designer” or “interior design”). You explain that the board is charged with enforcement of the code. *See* Occ. Code § 1051.501; *see also* 22 T.A.C. § 5.133. We note that this alleged violation of the Occupations Code carries with it civil and criminal penalties. *See* Occ. Code § 1053.351; *see also* 22 T.A.C. § 5.183. Based on your representations and our review of the submitted information, we conclude that the board may withhold the information we have marked under section 552.101 of the Government Code in conjunction with the informer’s privilege. However, we note that the subject of one of the complaints knows the identity of the complainant. Thus, information pertaining to this complainant may not be withheld under section 552.101 of the Government Code on this basis.

We note the submitted documents contain information that is subject to section 552.137 of the Government Code.² 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). Gov’t Code § 552.137(a)-(c). We note section 552.137 is not applicable to an institutional e-mail address, an Internet website address, or an e-mail address that a governmental entity maintains for one of its officials or employees. The e-mail addresses we have marked are not of a type specifically excluded by section 552.137(c) of the Government Code. Therefore, the board must withhold the e-mail addresses we have marked in accordance with section 552.137, unless the board has received consent for their release.

In summary, the board may withhold the information not subject to section 552.022 of the Government Code under section 552.103 of the Government Code, to the extent it has not been obtained by or provided to the opposing party in the pending litigation. With respect to the information subject to section 552.022 of the Government Code or any other information not excepted from disclosure under section 552.103 of the Government Code, the board may withhold the information we have marked pursuant to section 552.101 of the Government Code in conjunction with the common-law informer’s privilege, and must withhold the information we have marked under section 552.137 of the Government Code. The remaining responsive information must be released to the requestor.³

²The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

³We note the submitted information contains social security numbers. Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person’s social security number from public release without the necessity of requesting a decision from this office under the Act.

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, 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 at (512) 475-2497.

Sincerely,



Amy L.S. Shipp
Assistant Attorney General
Open Records Division

ALS/rl

Ref: ID# 345357

Enc. Submitted documents

cc: Requestor
(w/o enclosures)