



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 1, 2011

Ms. Kara L. Kennedy
General Counsel
Texas State Securities Board
208 East 10th Street, 5th Floor
Austin, Texas 78701-2407

OR2011-02964

Dear Ms. Kennedy:

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# 410417.

The Texas State Securities Board (the "board") received a request for the transcript and its accompanying exhibits from the December 1, 2010 examination of the requestor's client. You claim the submitted information is excepted from disclosure under sections 552.101 and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹ We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we note section 552.022 of the Government Code is applicable to one of the submitted documents. Section 552.022(a)(17) provides for required public disclosure of "information that is also contained in a public court record," unless the information is expressly confidential under other law. Gov't Code § 552.022(a)(17). The court document

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.

you have marked as exhibit 2 under tab F is subject to section 552.022(a)(17). Although you seek to withhold the court document under section 552.108 of the Government Code, that section is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See id.* § 552.007; Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 177 at 3 (1977) (statutory predecessor to Gov't Code § 552.108 subject to waiver). As such, section 552.108 is not other law that makes information expressly confidential for the purposes of section 552.022(a)(17). However, because section 552.101 of the Government Code constitutes "other law" that makes information confidential for purposes of section 552.022, we will consider the applicability of this section to the court-filed document.

You state the present request concerns information subject to a previous determination issued to the board under section 552.301 of the Government Code. *See Gov't Code* § 552.301(a). In Open Records Letter No. 2004-0239 (2004), we granted the board a previous determination finding that information obtained by the board in connection with an investigation to prevent or detect a violation of the Texas Securities Act (the "TSA") or a board rule or order is excepted from disclosure under section 552.101 in conjunction with article 581-28 of the TSA. *See V.T.C.S. art. 581-28* (information received in connection with board investigation is confidential). That previous determination authorizes the board to withhold such information without the necessity of requesting a decision from the attorney general, provided the pertinent facts and circumstances have not changed since the issuance of the prior ruling. In this case, we agree that most of the information at issue was obtained in connection with an investigation to prevent or detect a violation of the TSA or board rule or order. You do not inform us of any change in the law, facts, and circumstances on which the prior ruling is based. We therefore conclude the board must withhold the transcript and most of the exhibits, which we have marked, pursuant to section 552.101 of the Government Code in accordance with the previous determination issued in Open Records Letter No. 2004-0239.² *See also* Open Records Decision No. 673 at 7-8 (2001) (listing elements of second type of previous determination under Gov't Code § 552.301(a)). However, we note the subpoenas you have marked as exhibits 1 and 3 under tab F and the court document subject to section 552.022(a)(17) of the Government Code, which you have marked as exhibit 2 under tab F, are not information obtained by the board in connection with an investigation to prevent or detect a violation of the TSA or a board rule or order; therefore, these documents are outside the scope of this previous determination and may not be withheld on that basis. As such, we will consider your claim under article 581-28 of the TSA for these remaining documents.

²We note the board also promulgated a rule, section 127.1(b) of title 7 of the Texas Administrative Code, which interprets article 581-28 and prohibits the board from providing a witness a copy of his own statement. *See* 7 T.A.C. § 127.1(b); *see also* V.T.C.S. art. 581-28-1 (providing board with authority to adopt rules to implement TSA).

Section 552.101 exempts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information protected by other statutes. The relevant language of article 581-28 of the TSA is as follows:

A. Investigations by Commissioner. The Commissioner shall conduct investigations as the Commissioner considers necessary to prevent or detect the violation of [the TSA] or a Board rule or order. For this purpose, the Commissioner may require, by subpoena or summons issued by the Commissioner, the attendance and testimony of witnesses and the production of all records, whether maintained by electronic or other means, relating to any matter which the Commissioner has authority by [the TSA] to consider or investigate, and may sign subpoenas, administer oaths and affirmations, examine witnesses and receive evidence; provided, however, that all information of every kind and nature received in connection with an investigation and all internal notes, memoranda, reports, or communications made in connection with an investigation 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....

V.T.C.S. art. 581-28(A) (footnote omitted). You indicate the remaining documents consist of either information received or internal notes, memoranda, reports, or communications made in connection with an investigation to prevent or detect a violation of the TSA or board rule or order. Based on your representation and our review, we conclude the subpoenas marked as exhibits 1 and 3 under tab F are communications made in connection with an investigation to prevent or detect a violation of the TSA or board rule or order; therefore, the subpoenas are confidential under article 581-28 of the TSA. Accordingly, the board must withhold the subpoenas you have marked as exhibits 1 and 3 under tab F pursuant to section 552.101 of the Government Code. However, we note the court document subject to 552.022(a)(17) of the Government Code, which you have marked as exhibit 2 under tab F, is neither information received nor an internal note, memorandum, report, or communication made in connection with an investigation to prevent or detect a violation of the TSA or board rule or order; therefore, the court document is not confidential under article 581-28 of the TSA. As you raise no further exceptions to its disclosure, the court document you have marked as exhibit 2 under tab F must be released pursuant to section 552.022(a)(17) of the Government Code.

The requestor asserts his client has a right of access to the transcript under Texas Rule of Civil Procedure 203.1 as per article 581-28(A) of the TSA, which provides "[t]he Commissioner may . . . cause the deposition of witnesses . . . to be taken in the manner prescribed for depositions in civil actions under the laws of Texas. *Id.* Texas Rule of Civil Procedure 203.1 provides that "[t]he deposition officer must provide the original deposition transcript to the witness for examination and signature." Tex. R. Civ. P. 203.1(a).

Furthermore, “[t]he witness may change responses as reflected in the deposition transcript by indicating the desired changes, in writing, on a separate sheet of paper, together with a statement of the reasons for making the changes” . . . and “must then sign the transcript under oath and return it to the deposition officer[.]” *Id.* 203.1(b). We note the Act differs in purpose from statutes and procedural rules providing for discovery in judicial proceedings. *See* Gov’t Code §§ 552.005 (the Act does not affect scope of civil discovery), .0055 (subpoena duces tecum or request for discovery issued in compliance with statute or rule of civil or criminal procedure is not considered to be request for information under the Act). The discovery process is a process through which parties to litigation can obtain information pertaining to the litigation. A public information request under the Act is a process in which any individual may request information from a governmental body. Thus, the discovery process has no bearing on the availability of information requested under Act. We also note the requestor acknowledges “whether information is discoverable under the Texas Rules of Civil Procedure is beyond the scope of a request under the [Act].”

The requestor also asserts that he, as the authorized representative of his client, has a special right of access to the information at issue pursuant to section 552.023 of the Government Code. Section 552.023 provides that “a person’s authorized representative has a special right of access . . . to information held by a governmental body . . . that is protected from public disclosure by laws intended to protect that person’s privacy interests.” *Id.* § 552.023(a). However, a governmental body may assert as grounds for denial of access other provisions of the Act or other law that is not intended to protect the person’s privacy interests. *Id.* § 552.023(b). A requestor does not have a right of access under section 552.023 to information that is protected from public disclosure by a law that is not based exclusively on the requestor’s or the requestor’s client’s privacy interest. *See, e.g.,* Open Records Decision Nos. 603 at 2-3 (1992) (no section 552.023 right of access to information encompassed by section 142.009 of Health and Safety Code, which protects integrity of investigatory process as well as individual’s privacy interests), 587 at 3-4 (1990) (no right of access to information protected by former section 34.08 of Family Code, which protected law enforcement interests). We note article 581-28 of the TSA provides for the confidentiality of not only information received by the board in connection with an investigation, but also all the board’s internal notes, memoranda, reports, or communications made in connection with an investigation. The protection of the board’s internal notes, memoranda, reports, or communications made in connection with an investigation indicates article 581-28 also protects the board’s law enforcement interests in its investigatory process. *See Tex. Att’y General’s Office v. Adams*, 793 S.W.2d 771, 776 (Tex. App.—Fort Worth 1990, no writ) (recognizing legislature’s intent in protecting board’s law enforcement interest when it enacted article 581-28 of the TSA). Therefore, because article 581-28 of the TSA is not based solely on an individual’s privacy interests, the requestor does not have a right of access to any of the information made confidential by article 581-28 under section 552.023 of the Government Code.

In summary, the board must withhold the transcript and most of the exhibits we have marked pursuant to section 552.101 of the Government Code in accordance with the previous determination issued in Open Records Letter No. 2004-0239. The board must withhold the subpoenas you have marked as exhibits 1 and 3 under tab F pursuant to section 552.101 of the Government Code. The board must release the court document you have marked as exhibit 2 under tab F pursuant to section 552.022(a)(17) of the Government Code.

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, toll free at (888) 672-6787.

Sincerely,



Sean Nottingham
Assistant Attorney General
Open Records Division

SN/eeg

Ref: ID# 410417

Enc. Submitted documents

c: Requestor
(w/o enclosures)