



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

January 7, 1998

Mr. John R. Speed, P.E.  
Executive Director  
Texas Board of Professional Engineers  
P.O. Drawer 18329  
Austin, Texas 78760-8329

OR98-0081

Dear Mr. Speed:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 111738.

The Texas Board of Professional Engineers (the "board") received a request for files E-2608 and E-2487.<sup>1</sup> The board created these investigation files upon receiving complaints about the requestor. You indicate that you will release file E-2487 to the requestor because it relates to a closed case from 1995. You claim that file E-2608 is excepted from disclosure under section 552.101 of the Government Code in conjunction with the informer's privilege, V.T.C.S. art. 3271a, § 22A(c), and a board rule. We have considered your arguments and have reviewed the documents at issue.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 encompasses statutes and regulations that deem information confidential. The Board is responsible for licensing professional engineers in accordance with the Texas Engineering Practice Act, V.T.C.S. article 3271a. The Seventy-fifth Legislature amended V.T.C.S. article 3271a to provide as follows:

Sec. 22A. (a) The Board shall keep an information file about each complaint filed with Board relating to a license holder.

---

<sup>1</sup>In your letter to this office, you refer to files E-2487 and E-2497. However, it is apparent from the submitted documents that you have released file E-2487 and that you seek to withhold file E-2608.

(b) If a written complaint is filed with the Board relating to a license holder, the Board, at least as frequently as quarterly, shall notify the parties to the complaint of the status of the complaint until final disposition unless the notification would jeopardize an undercover investigation.

(c) The Board shall adopt rules that permit the Board to receive and investigate confidential complaints against license holders or any other who may have violated this Act. The Board shall maintain the confidentiality of the complaint during the investigation of the complaint.<sup>2</sup>

V.T.C.S., art. 3271a, § 22A (footnote added). The board in turn amended 22 T.A.C. § 131.171 to provide as follows:

(a) Complaints alleging violations of the Texas Engineering Practice Act (Act) or board rules must be made in good faith and be accompanied by sufficient information and factual evidence for the executive director to determine if probable cause exists. The board is not responsible for proving the basis of a complaint. If probable cause cannot be found, the executive director shall dismiss the allegation without further action.

(b) Complaints shall normally be submitted in writing along with copies or originals of all supporting evidence; however, the executive director may initiate an inquiry based on any information establishing probable cause.

(c) The board may proceed or not proceed with an investigation, regardless of any civil or criminal actions with any of the

---

<sup>2</sup>The effective date of this amendment to V.T.C.S. article 3271a is September 1, 1997. Act of May 13, 1997, 75<sup>th</sup> Leg., R.S., ch. 344, 1997 Tex. Sess. Law Serv. 1462, 1473 (Vernon). The session law also provides as follows:

Section 29. The change in law made by this Act applies only to a violation of the Texas Engineering Practice Act (Article 3271a, Vernon's Texas Civil Statutes) or a rule adopted under that Act that is reported on or after the effective date of this Act. A violation that is reported before that date is governed by the law in effect on the date the violation was reported, and the former law is continued in effect for that purpose.

*Id.* at 1473. The board received the complaint in file E-2608 after September 1, 1997. Thus, the amendment to V.T.C.S. article 3271a is applicable to the complaint.

parties involved. Withdrawal of a complaint shall not impact an ongoing investigation.

(d) The board will receive and investigate confidential complaints against license holders or any other person who may have violated this Act. The board shall maintain the confidentiality of the complaint during the investigation of the complaint. The investigation phase of the complaint shall be considered complete for the purposes of maintaining confidentiality when formal charges have been filed.

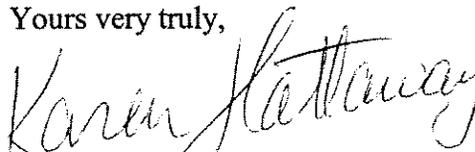
22 Tex. Reg. 8054 (1997) (to be codified as an amendment to 22 Tex. Admin. Code § 131.171) [hereinafter referred to as section 131.171]. Section 131.171(d) deems portions of file E-2608 confidential during the investigation phase of the complaint. We have marked the portions of the file that the board must withhold in order to maintain the confidentiality of the complaint in accordance with section 131.171(d). Section 131.171(d) does not make the unmarked portions of file E-2608 confidential. Therefore, the board must release the unmarked portions of the file to the requestor.

You also claim that the informer's privilege protects the identity of the individual who filed the complaint in file E-2608. The informer's privilege, incorporated into the Open Records 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 (1988) at 3, 208 (1978) at 1-2. 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 (1981) at 2 (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 (1990) at 2, 515 (1988) at 4-5.

The complainant alleges that the requestor is in violation of the Texas Engineering Practice Act, V.T.C.S. article 3271a. The board is currently investigating the complaint and has the power to impose administrative and criminal penalties for a violation of V.T.C.S. article 3271a. *See* V.T.C.S. art. 3271a, §§ 22C, 23. Based on the circumstances presented, we conclude that complainant's identity is excepted from disclosure under section 552.101 of the Government Code in conjunction with the informer's privilege. We have marked the identifying information that the informer's privilege protects. Finally, we note that the informer's privilege will continue to protect the complainant's identity even after the board has completed its investigation and section 131.171(d) no longer applies to file E-2608.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have any questions about this ruling, please contact our office.

Yours very truly,



Karen E. Hattaway  
Assistant Attorney General  
Open Records Division

KEH/ch

Ref: ID# 111738

Enclosures: Marked documents

cc: Mr. Karl P. Koppany  
HVAC Testing Company  
2400 W. Pioneer Pkwy. #114  
Arlington, Texas 76013  
(w/o enclosures)