



May 9, 2000

Mr. Rodger Barnes  
Assistant Commissioner  
Texas Appraiser Licensing and Certification Board  
P.O. Box 12188  
Austin, Texas 78711-2188

OR2000-1781

Dear Mr. Barnes:

You ask whether certain information is subject to required public disclosure under the Public Information Act, chapter 552 of the Government Code (the "Act"). Your request was assigned ID# 135189.

The Texas Appraiser Licensing and Certification Board (the "board") received a request for information regarding a named individual, including records relating to that individual's certification or licensure by the board and to any disciplinary actions, investigations, grievances, or complaints concerning him. You indicate that a portion of the requested information is being released. You claim that the balance of the requested information is excepted from disclosure under sections 552.103 and 552.111 of the Act. We have considered the exceptions you claim and have reviewed the information you submitted.

Initially we must consider the timeliness of the board's request for a decision. Section 552.301 of the Act provides in relevant part that a governmental body that seeks to withhold requested information from the public "must ask for the attorney general's decision and state the exceptions that apply ... not later than the 10<sup>th</sup> business day after receiving the written request." Gov't Code § 552.301(b). A governmental body's failure to comply with section 552.301 in requesting an attorney general decision raises a presumption that the requested information is public and subject to release unless there is a compelling reason to withhold it from disclosure. *See* Gov't Code § 552.302. The board's request for this letter ruling is dated March 8, 2000. You state that the board received the corresponding request for information the previous day, March 7. The requestor asserts, in a letter to this office dated March 17, that his request was mailed to the board on January 3 and that one of his employees was informed on March 7 that the board had received the request and had not responded to it. The requestor contends that the board's request for a decision is therefore

untimely and that the requested information is presumed to be public. You respond that the board informed the requestor's employee on March 7 that it had not received his request and that the board was not aware of any such request until its receipt of a request by facsimile on March 7. You have provided copies of the request and facsimile cover sheet, which reflect that it was sent and received on March 7. You also have provided a copy of your acknowledgment of the request, which likewise is dated March 7. The requestor has not provided us with proof of any previous date of mailing. We therefore conclude that the board's request for decision was timely under section 552.301 of the Act. Accordingly, we will consider your exceptions to the disclosure of the information that the board seeks to withhold.

Initially we note that the submitted documents include information that also is a matter of public court record. All such responsive information that also is contained in a public court record is subject to required public disclosure and must be released. *See* Gov't Code § 552.022(a)(17); *Star-Telegram, Inc. v. Walker*, 834 S.W.2d 54 (Tex. 1992). We have marked with blue tags the information that must be released under section 552.022(a)(17).

You claim that a portion of the requested information relates to anticipated litigation and is excepted from disclosure under section 552.103 of the Act.<sup>1</sup> As amended by the Seventy-sixth Legislature, section 552.103, the "litigation exception," provides in relevant 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 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 that raises a claim under section 552.103 has the burden of providing relevant facts and documentation sufficient to establish

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<sup>1</sup>We assume that the representative sample of the board's complaint file that you submitted is truly representative of the contents of that file as a whole. *See* Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988). This letter ruling does not reach, and therefore does not authorize the board to withhold, any other requested records to the extent that those records contain information substantially different from the information that you submitted.

the applicability of section 552.103 to the information that it seeks to withhold. To sustain its burden, the governmental body must demonstrate: (1) that litigation is pending or reasonably anticipated on the date that the governmental body receives the request for information and (2) that the information in question is related to that litigation. *See University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App. -- Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App. -- Houston [1<sup>st</sup> Dist.] 1984, writ ref'd n.r.e.); *see also* Open Records Decision No. 551 at 4 (1990). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *Id.*

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). To establish that litigation is reasonably anticipated, a governmental body must provide this office with "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." *Id.* Among other examples, this office has concluded that litigation was reasonably anticipated where the opposing party took the following objective steps toward litigation: (1) filed a complaint with the Equal Employment Opportunity Commission ("EEOC"), *see* Open Records Decision No. 336 (1982); (2) hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and (3) threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981). In this instance, you inform us that a complaint was lodged with the board against the individual to whom the requested information pertains. You further explain that, based on the apparent failure of efforts to resolve the matter informally, you anticipate that the complaint will be scheduled for a contested case hearing before the State Office of Administrative Hearings. A contested case under the Administrative Procedure Act, chapter 2001 of the Government Code, constitutes litigation for the purposes of section 552.103. *See* Open Records Decision No. 588 at 7 (1991). Consequently, we conclude that the information that you have designated as pertaining to the pending complaint relates to anticipated litigation for the purposes of section 552.103.

We emphasize, however, that section 552.103 does not except from public disclosure information that the opposing party to the litigation has seen or to which that person previously has had access. Most of the information that the board seeks to withhold under section 552.103 fits this description. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing a party seeking information relating to that litigation to obtain it through discovery procedures. *See* Open Records Decision No. 551 at 4-5 (1990). Therefore, if the prospective opposing party has seen or had access to requested information relating to the 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). Thus, to the extent that the individual to whom the pending complaint pertains knows the contents of or previously has had access to the information that the department seeks to withhold under section 552.103, that information is not excepted from disclosure and must be released. We have marked that

information with green tags. Additionally, the applicability of section 552.103 ends once the related litigation concludes. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

You claim that other responsive records, which you describe as memoranda and letters prepared by members and staff of the board, are excepted from disclosure under section 552.111 of the Government Code. Section 552.111 protects “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” The purpose of section 552.111 is to protect advice, opinion, and recommendation used in the decisional process from public disclosure and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App. -- San Antonio 1982, no writ); Open Records Decision No. 538 at 1-2 (1990). In Open Records Decision No. 615 (1993), this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. A governmental body’s policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *See* Open Records Decision No. 615 at 5 (1993); *see also City of Garland v. The Dallas Morning News*, 43 Tex. Sup. Ct. J. 303 (Jan. 13, 2000) (holding that personnel-related communications not involving policymaking were not excepted from public disclosure under section 552.111). However, a governmental body’s policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body’s policy mission. *See* Open Records Decision No. 631 at 3 (1995). Additionally, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *See* Open Records Decision No. 615 at 5 (1993). But if the factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, that information also may be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982). In this instance, the submitted memoranda, letters, and other materials that the board seeks to withhold relate to a specific enforcement matter and are not the kind of deliberative documents, related to policymaking, that are protected from disclosure by section 552.111. Accordingly, those records are not excepted from disclosure and must be released in their entirety.

In summary, section 552.022(a)(17) of the Government Code requires the release of information that also is a matter of public court record. A small amount of information relating to anticipated litigation is excepted from disclosure under section 552.103 and may be withheld. The rest of the submitted information is not excepted from disclosure and must be released. 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.

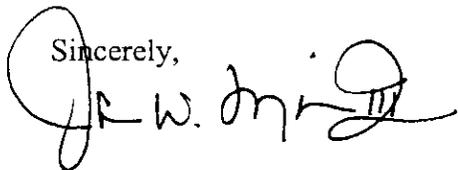
This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge 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, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, 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 Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

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,

A handwritten signature in black ink, appearing to read "J.W. Morris III". The signature is written in a cursive style with a large initial "J" and "M".

James W. Morris, III  
Assistant Attorney General  
Open Records Division

JWM/ljp

Ref: ID# 135189

Encl. Submitted documents

cc: Mr. Joseph T. Longoria  
Perdue, Brandon, Fielder, Collins & Mott, L.L.P.  
2600 Citadel Plaza, Suite 500  
Houston, Texas 77008  
(w/o enclosures)