



OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

December 17, 2002

Mr. Scott Gibson
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Texas Board of Architectural Examiners
P.O Box 12337
Austin, Texas 78711-2337

OR2002-7239

Dear Mr. Gibson:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 173801.

The Texas Board of Architectural Examiners (the "board") received a request for information regarding five enforcement cases against interior designers. You state that you have released some of the requested information to the requestor. You claim, however, that the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.130 of the Government Code, Rule 503 of the Texas Rules of Evidence, and Rule 1.05 of the Texas Disciplinary Rules of Professional Conduct. We have considered your arguments against disclosure and reviewed the submitted information.

Initially, we note that the information submitted as Exhibit D is subject to section 552.022 of the Government Code. Section 552.022(a) enumerates categories of information that are public information and not excepted from required disclosure under chapter 552 of the Government Code unless they are expressly confidential under other law. *See Gov't Code §§ 552.022(a)(1)* (a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108.) The documents in Exhibit D consist of completed reports and you do not claim that any of this information is excepted under section 552.108. You claim that the information in Exhibit D is excepted under sections 552.103 and 552.107. Sections 552.103 and 552.107 are discretionary exceptions to disclosure that protect the governmental body's interests and are therefore not other law that makes information expressly confidential for purposes of section 552.022(a). *See Dallas*

Area Rapid Transit v. Dallas Morning News, 4 S.W.3d 469 (Tex. App. - Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision No. 630 at 4-5 (1994) (governmental body may waive statutory predecessor to section 552.107). Thus, the information in Exhibit D may not be withheld under sections 552.103 or 552.107.

Although section 552.107(1) does not protect information that is subject to disclosure under section 552.022, the attorney-client privilege is also found in Rule 503 of the Texas Rules of Evidence. Recently, the Texas Supreme Court held that “[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are ‘other law’ within the meaning of section 552.022.” *In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001). Thus, we will determine whether the information that is subject to section 552.022(a)(3) is confidential under Rule 503. See Open Records Decision No. 676 at 6 (2002) (“appropriate law for a claim of attorney-client privilege for section 552.022 information is Texas Rule of Evidence 503”).

Rule 503(b)(1) provides:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

- (A) between the client or a representative of the client and the client’s lawyer or a representative of the lawyer;
- (B) between the lawyer and the lawyer’s representative;
- (C) by the client or a representative of the client, or the client’s lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;
- (D) between representatives of the client or between the client and a representative of the client; or
- (E) among lawyers and their representatives representing the same client.

Tex. R. Evid. 503(b)(1). A communication is “confidential” if 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. See Tex. R. Evid. 503(a)(5).

Accordingly, in order to withhold attorney-client privileged information from disclosure under Rule 503, a governmental body must 1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; 2) identify the parties involved in the communication; and 3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the document containing privileged information is confidential under Rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in Rule 503(d). See *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ); see also Tex. R. Evid. 511 (waiver of privilege by voluntary disclosure).

With respect to the information in Exhibit D, you state that “[t]he reports at issue are communications between legal counsel of the Board and the staff of the Board in facilitating professional legal services to the Board.” You further state that “[n]one of these communications was intended to be disclosed to third persons” and that “[t]hey have not been disclosed to any party other than those represented on the face of the documents.” Based on these representations, we conclude that the information in Exhibit D qualifies as confidential communications and may be withheld under Rule 503.

We will now address your claimed exceptions with respect to the remaining submitted information. Section 552.103 of the Government Code provides in 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). The governmental body has the burden of providing relevant facts and documents sufficient to establish the applicability of section 552.103 to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate: (1) that litigation was pending or reasonably anticipated on the date of its receipt of the request for information *and* (2) that the information at issue 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 [1st 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.*

You state that the information in Exhibit B relates to a pending investigation of an alleged violation of article 249e, Vernon's Texas Civil Statutes, which governs the board's regulation of the practice of interior design. You explain that under the board's rules and regulations, a contested case procedure is initiated on receipt of information that establishes probable cause that conduct in violation of a rule or statute that the board enforces has occurred. You state that "[a]ll contested cases that result from formal complaints *must* be conducted according to the provisions of the Administrative Procedure Act, as applicable, so this disciplinary action has been treated as a contested case since its inception." [Emphasis in original].

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 (1991). Thus, based on your representations, we find that litigation was pending when the board received this request for information. Having reviewed the submitted information, we find that it relates to the pending litigation. We therefore conclude that the information in Exhibit B is excepted from disclosure at this time under section 552.103.

In reaching this conclusion, we assume that the opposing party to the litigation has not previously seen or had access to any information that the board seeks to withhold under section 552.103. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to the litigation to obtain it through discovery procedures. *See* Open Records Decision No. 551 at 4-5 (1990). If the opposing party has seen or had access to information that relates to the pending litigation, through discovery or otherwise, then there is no interest in withholding that information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Furthermore, 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 argue that the marked portions of Exhibits E must be withheld under section 552.101 of the Government Code in conjunction with the common-law informer's privilege. The informer's privilege, incorporated into the 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 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) (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). Furthermore, as its purpose is to protect the flow of information to the governmental body, rather than to protect the interests of the person who furnishes the information, the informer's privilege, unlike other claims under section 552.101 of the Government Code, can be waived. See Open Records Decision Nos. 630 at 4 (1994), 549 at 6 (1990).

You state that the board regulates architects, interior designers and landscape architects and has the duty to enforce laws regarding these professions under sections 3(d) and 5(c) of article 249a, Vernon's Texas Civil Statutes. You have not, however, indicated which laws are alleged to have been violated. Further, you have not demonstrated that the alleged violations would result in a civil or criminal penalty. Therefore, you have not adequately demonstrated that the informer's privilege is applicable in this instance. See, e.g., Open Records Decision Nos. 542 (1990) (concluding that Public Information Act places on a governmental body the burden of establishing why and how an exception applies to requested information), 532 (1989), 515 (1988), 252 (1980). Consequently, the board must release the information in Exhibit E in its entirety.

Section 552.101 also encompasses the doctrine of common-law privacy. For information to be protected from public disclosure under common-law privacy, the information must meet the criteria set out in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), cert. denied, 430 U.S. 931 (1977). Information may be withheld from the public when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Id.* at 685; Open Records Decision No. 611 at 1 (1992). The type 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. This office has determined that some personal financial information is highly intimate or embarrassing and thus meets the first part of the *Industrial Foundation* test. Open Records Decision Nos. 600 (1992) (Employee's Withholding Allowance Certificate; designation of beneficiary of employee's retirement benefits; direct deposit authorization; and forms allowing employee to allocate pretax compensation to group insurance, health care or dependent care), 545 (1990) (deferred compensation information, mortgage payments, assets, bills, and credit history), 523 (1989) (credit reports, financial statements, and other personal financial information), 373 (1983) (assets and income source information). However, where a

transaction is funded in part by the state, it involves the employee in a transaction with the state and is not protected by privacy. We have marked the personal financial information in Exhibit G that is confidential under common-law privacy and must be withheld under section 552.101. Further, we have marked the intimate or embarrassing information in Exhibit F, that is confidential under common-law privacy and must be withheld under section 552.101.

We note that when a governmental entity compiles criminal history information pertaining to a particular individual, the compiled information takes on a character that implicates the individual's right of privacy in a manner that the same information in an uncompiled state does not. *See United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989); *see also* Open Records Decision No. 616 at 2-3 (1993). We have marked the criminal history information in Exhibit G that must be withheld under section 552.101 in conjunction with common-law privacy.

We note that some of the information in Exhibit G is subject to section 552.130 of the Government Code, which provides in relevant part:

(a) Information is excepted from the requirement of Section 552.021 if the information relates to:

- (1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or]
- (2) a motor vehicle title or registration issued by an agency of this state[.]

Thus, we have marked the information in the Exhibit G that the board must withhold under section 552.130.

Finally, you argue that some of the materials in Exhibit G are copyrighted. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

To summarize: (1) the board may withhold the information in Exhibit B under section 552.103; (2) the board may withhold the information in Exhibit D under Rule 503; (3) we have marked the information in Exhibits F and G that must be withheld under section 552.101 in conjunction with common-law privacy; (4) we have marked the

information in Exhibit G that must be withheld under section 552.130; (5) the remaining requested information must be released; and (6) while the board must allow inspection of copyrighted information not otherwise excepted from disclosure, the board need not furnish copies of such information to the requestor.

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).

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 Texas Building and Procurement Commission 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,



Karen A. Eckerle
Assistant Attorney General
Open Records Division

KAE/sdk

Ref: ID# 173801

Enc: Submitted documents

c: Ms. Mary Ann Bryan
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(w/o enclosures)