



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

May 20, 2003

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

OR2003-3376

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# 181360.

The Texas Board of Architectural Examiners (the "board") received a request for any materials in a particular complaint file that the requestor and his wife did not submit to the board. You inform us that the board has released some of the requested information. You claim that the remaining requested information is excepted from disclosure under sections 552.107 and 552.111 of the Government Code. We have considered the exceptions you claim and have reviewed the information you submitted.

We first note that some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides that

the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

- (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). In this instance, the information submitted as Exhibit C-1 is a completed report made of, for, or by a governmental body. Therefore, Exhibit C-1 must be released under section 552.022(a)(1) unless it is excepted from disclosure under section 552.108 of the Government Code or expressly confidential under other law. You do not claim an exception to disclosure under section 552.108. You do claim that Exhibit C-1

is excepted from disclosure under section 552.107(1). We note, however, that section 552.107(1) is a discretionary exception to disclosure that protects the governmental body's interests and may be waived. *See* Open Records Decision No. 630 at 4-5 (1994). As such, section 552.107(1) is not other law that makes information confidential for the purposes of section 552.022. Thus, you may not withhold Exhibit C-1 under section 552.107(1).

We note, however, that the attorney-client privilege also is found in rule 503 of the Texas Rules of Evidence. The Texas Supreme Court has held that “[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are ‘other law’ within the meaning of section 552.022.” *See In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001). Thus, we will determine whether Exhibit C-1 is confidential under Rule 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. 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. *Id.* 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. *See* Open Records Decision No. 676 (2002). Upon a demonstration of all three factors, the entire communication is confidential under rule 503 provided the client has not waived the privilege or the communication does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein); *In re Valero Energy Corp.*, 973 S.W.2d 453, 4527 (Tex. App.—Houston [14th Dist.] 1998, no pet.) (privilege attaches to complete communication, including factual information).

You inform us that Exhibit C-1 is a communication between a client representative of the board and an attorney for the board, made for the purpose of facilitating the rendition of professional legal services to the board. You state that the board has maintained the confidentiality of Exhibit C-1 and has not disclosed this information to third parties. Based on your representations and our review of Exhibit C-1, we conclude that you have demonstrated that this information is confidential under Texas Rule of Evidence 503. Therefore, you may withhold Exhibit C-1 under rule 503.

You claim that the rest of the information in Exhibit C is excepted from disclosure under section 552.107(1) of the Government Code. Section 552.107(1) protects information that comes within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. *See* Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made “for the purpose of facilitating the rendition of professional legal services” to the client governmental body. *See* TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *See In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. *See* TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a *confidential* communication, *id.* 503(b)(1), meaning that it was “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.” *Id.* 503(a)(5). Whether a communication meets this definition depends on the *intent* of the parties involved at the time the information was communicated. *See*

Osborne v. Johnson, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You inform us that the information submitted as Exhibits C-2 and C-3 consists of internal communications between or among attorneys for and client representatives of the board. You state that these communications were made for the purpose of facilitating the rendition of professional legal services to the board. You also inform us that the board has maintained the confidentiality of Exhibits C-2 and C-3 and has not disclosed any of these communications to third parties. Based on your representations and our review of Exhibits C-2 and C-3, we conclude that you have demonstrated that this information is protected by the attorney-client privilege under section 552.107(1) of the Government Code. Therefore, the board may withhold Exhibits C-2 and C-3 under section 552.107.

Lastly, we note that you have withheld the social security numbers of two registered architects from the information that you released to the requestor. In Open Records Letter No. 2000-2713 (2000), we issued a previous determination, authorizing the board to withhold the social security number of an architect, landscape architect, or interior designer registered by the board. *See Gov't Code* § 552.301(a); Open Records Decision No. 673 (2001) (delineating elements of two types of previous determinations under Gov't Code § 552.301(a)). Subsequent to the issuance of Open Records Letter No. 2000-2713 (2000), the legislature repealed the law on which that ruling was based.¹ Thus, Open Records Letter No. 2000-2713 (2000) no longer constitutes a previous determination with regard to the submitted social security numbers.² However, the same act that repealed the prior law also enacted section 56.001 of the Occupations Code, which provides as follows:

The social security number of an applicant for or holder of a license, certificate of registration, or other legal authorization issued by a licensing agency to practice in a specific occupation or profession that is provided to the licensing agency is confidential and not subject to disclosure under Chapter 552, Government Code.

¹See Act of May 22, 2001, 77th Leg., R.S., § 14.001(b), 2001 Tex. Gen. Laws 3970, 4098 (repealing section 1, chapter 314, Acts of the 76th Legislature, Regular Session, 1999).

²See Open Records Decision No. 673 at 7-8 (2001) (listing elements of second type of previous determination).

Occ. Code § 56.001.³ Thus, the submitted social security numbers are confidential under section 56.001 of the Occupations Code and therefore are excepted from disclosure under section 552.101 of the Government Code.⁴ Furthermore, this ruling will serve as a previous determination that the social security number of an architect, landscape architect, or interior designer registered by the board is excepted from public disclosure under section 552.101 in conjunction with section 56.001 of the Occupations Code. So long as the elements of law, fact, and circumstances do not change so as to no longer support the conclusion set forth above, the board need not ask for a decision from this office again with respect to the social security number of an architect, landscape architect, or interior designer registered by the board. *See* Gov't Code § 552.301(a); Open Records Decision No. 673 (2001).

In summary, the board may withhold Exhibit C-1 under Texas Rule of Evidence 503. The board may withhold Exhibits C-2 and C-3 under section 552.107(1) of the Government Code. The board must withhold the social security numbers in Exhibit B under section 552.101 in conjunction with section 56.001 of the Occupations Code. As we are able to make these determinations, we need not address your other arguments against disclosure.

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

³*See* Act of May 22, 2001, 77th Leg., R.S., § 14.001(a), 2001 Tex. Gen. Laws 3970, 4098 (to be codified as Occ. Code § 56.001).

⁴Section 552.101 of the Government Code excepts from required public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This exception encompasses information that other statutes make confidential.

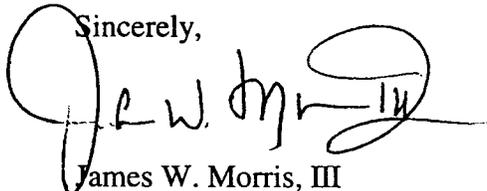
should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

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 Dep't of Pub. 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,

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

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

JWM/sdk

Ref: ID# 181360

Enc: Submitted documents

c: Mr. John Foote
903 Mariposa Drive
Austin, Texas 78704
(w/o enclosures)