



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 24, 2009

Mr. J. Randel Hill
General Counsel
Texas State Board of Public Accountancy
333 Guadalupe, Tower III, Suite 900
Austin, Texas 78701-3900

OR2009-02389

Dear Mr. Hill:

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# 334301.

The Texas State Board of Public Accountancy (the "board") received a request for thirty-six categories of information relating to the board's investigations of named companies. You state you do not have a voting record of each board member for the specified meetings.¹ You also state you have released the requested meeting and executive session recordings of the specified meetings. You claim the submitted information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.²

¹The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

²We 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.

Next, we note the submitted documents include the minutes and agendas of public meetings. The minutes and agendas of a governmental body's public meetings are specifically made public under the Open Meetings Act, chapter 551 of the Government Code. *See* Gov't Code §§ 551.022 (minutes and tape recordings of open meeting are public records and shall be available for public inspection and copying upon request), .041 (governmental body shall give written notice of date, hour, place, and subject of each meeting); *see also* Open Records Decision No. 221 (1979) (stating that records of public proceedings among most public information and are not excepted under predecessor to Gov't Code § 552.103). Accordingly, the submitted minutes and agendas, which we have marked, must be released in accordance with the Open Meetings Act.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses information other statutes make confidential. Section 551.104 provides in part "[t]he certified agenda or tape of a closed meeting is available for public inspection and copying only under a court order issued under Subsection (b)(3)." *Id.* § 551.104(c). Thus, such information cannot be released to a member of the public in response to an open records request. *See* Attorney General Opinion JM-995 at 5-6 (1988) (public disclosure of certified agenda of closed meeting may be accomplished only under procedures provided in Open Meetings Act). Section 551.146 of the Open Meetings Act makes it a criminal offense to disclose a certified agenda or tape recording of a lawfully closed meeting to a member of the public. *See* Gov't Code § 551.146(a)-(b); *see also* Open Records Decision No. 495 at 4 (1988) (attorney general lacks authority to review certified agendas or tapes of executive sessions to determine whether governmental body may withhold such information under statutory predecessor to Gov't Code § 552.101). Additionally, minutes of an executive session are confidential. *See* Open Records Decision Nos. 563 (1990) (minutes of properly held executive session are confidential under Open Meetings Act), 495 (information protected under predecessor to section 551.104 cannot be released to member of public in response to open records request). The requestor seeks access to the certified agendas and minutes of executive sessions conducted by the board. We conclude the board must withhold the requested certified agendas and minutes of the board's executive sessions under section 552.101 in conjunction with section 551.104 of the Government Code.

We also note some of the remaining information is subject to section 552.022 of the Government Code. Section 552.022 provides, in relevant part, as follows:

- (a) Without limiting the amount or kind of information that is public information under this chapter, 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;

(2) the name, sex, ethnicity, salary, title, and dates of employment of each employee and officer of a governmental body;

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body;

...

(8) a statement of the general course and method by which an agency's functions are channeled and determined, including the nature and requirements of all formal and informal policies and procedures;

...

(12) final opinions, including concurring and dissenting opinions, and orders issued in the adjudication of cases;

...

(16) information that is in a bill for attorney's fees and that is not privileged under the attorney-client privilege[.]

Id. § 552.022(a)(1), (2), (3), (8), (12), (16). We have marked the completed reports and completed investigations that are subject to section 552.022(a)(1), the lists of board members and employees of the board which are subject to section 552.022(a)(2), the vouchers and an executed contract that are related to the expenditure of public funds which are subject to section 552.022(a)(3), the rules and laws establishing the board and its governance and the board's organizational chart which are subject to 552.022(a)(8), the orders issued by the board which are subject to section 552.022(a)(12), and the attorney fee bills which are subject to section 552.022(a)(16). The information subject to section 552.022 must be released, unless it is confidential under other law. Information subject to section 552.022(a)(1) may also be withheld if it is subject to section 552.108 of the Government Code. You claim the submitted information is excepted from disclosure under section 552.103 of the Government Code. However, this section is a discretionary exception under the Act and does not constitute "other law" for purposes of section 552.022. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—

Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Accordingly, the board may not withhold the information we have marked that is subject to section 552.022 under section 552.103 of the Government Code. You also claim section 552.101 for portions of this information, which is other law for section 552.022 purposes. Accordingly, we will address your argument under section 552.101.

Next, we will address your argument under section 552.103 of the Government Code for the information that is not subject to section 552.022. Section 552.103 provides in relevant part as follows:

(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 purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information relating to litigation through discovery procedures. *See* Open Records Decision No. 551 at 4-5 (1990). A governmental body has the burden of providing relevant facts and documents to show the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing (1) litigation was pending or reasonably anticipated on the date that the governmental body received the request for information, and (2) the information at issue is related to that litigation. *Thomas v. Cornyn*, 71 S.W.3d 473, 487 (Tex. App.—Austin 2002, no pet.); *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); ORD 551 at 4. A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

You state, and the submitted documents reveal, the requested information relates to contested case proceedings before the State Office of Administrative Hearings ("SOAH"). A contested case before the SOAH is considered litigation for the purposes of section 552.103. *See* Open Records Decision Nos. 588 (1991) (concluding contested cases under Administrative Procedures Act are litigation for purposes of section 552.103), 301 (1982). The information

you have submitted for reference shows SOAH administrative law judges issued proposals for decisions regarding the proceedings, which the board adopted in part. The submitted information also shows a motion of rehearing was filed within the prescribed time period. *See* Gov't Code § 2001.146 (stating an affected party has 20 days to file a motion for rehearing). Further, the motion for rehearing was filed prior to date the request was received by the board. Thus, we find there was pending litigation prior to the date the request was received. The board informs us the respondents allege it has exceeded its authority, had improper *ex parte* communications with its attorneys, and sanctioned the respondents based on financial motives. Thus, we also find the submitted information is related the pending litigation. Accordingly, the board may generally withhold the information that is not subject to section 552.022 under section 552.103 of the Government Code.

We note, however, the purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information that is related to litigation through discovery procedures. *See* ORD 551 at 4-5. If the opposing party has obtained or otherwise been given access to the information then there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). A portion of the submitted information appears to have been provided to or obtained from the opposing parties. Accordingly, any documents that were provided to or were obtained from the opposing parties may not be withheld from the requestor under section 552.103. Further, the applicability of section 552.103(a) ends once the litigation has concluded. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982). Accordingly, except for the information obtained from or provided to the opposing parties to the litigation, the board may withhold the remaining information that is not subject to section 552.022 under section 552.103.

You claim portions of the remaining information that is subject to section 552.022 is excepted from disclosure under section 552.101. As stated above, section 552.101 encompasses information made confidential by other statutes. Section 901.160 of the Occupations Code provides as follows:

- (a) The board shall make available at the board's offices in Austin any file maintained or information gathered or received by the board from a third party regarding a license applicant or current or former license holder for inspection by the applicant or license holder during normal business hours.
- (b) A license applicant or current or former license holder may authorize the board in writing to make available for inspection by a designated person or by the public any information gathered or received by the board from a third party regarding the applicant or license holder.

(c) Except on written authorization as provided by Subsection (b), the following information gathered or received by the board is confidential and not subject to disclosure under Chapter 552, Government Code:

(1) information regarding the qualifications of an applicant or license holder to be certified as a certified public accountant;

(2) information regarding the qualifications of an applicant or firm license holder to be issued a firm license as a certified public accountancy firm; and

(3) information regarding a disciplinary action under Subchapter K against a license holder or an applicant to take the uniform CPA examination, before a public hearing on the matter.

(d) A final order of the board relating to a disciplinary action against a license holder, including a reprimand, that results from an informal proceeding or a formal public hearing is subject to disclosure to the public and is available on request.

Occ. Code § 901.160. You assert section 901.160(c) is applicable to the list of all meetings of the board at which "any matter related to accounting or auditing work for [the specified company] or its subsidiaries was discussed." This information contains meeting agenda items, employee turnover audit, and committee reports. The board argues the requestor seeks information beyond that associated with the proceedings involving her clients, as other license holders were also investigated with regards to the same incident. The board states that its investigations are confidential pursuant to section 901.160(c). We note this information was presented to the board during open meetings. After reviewing the information at issue, we find you have failed to explain how this information was specifically gathered or received by the board regarding a disciplinary action against a license holder for the purposes of section 901.160. Accordingly, the board may not withhold this information under section 901.160 of the Occupations Code.

In summary, the board must release the information we have marked which is subject to the Open Meetings Act pursuant to section 551.022 of the Government Code. The board must withhold the certified agendas and minutes of its executive sessions under section 552.101 in conjunction with section 551.104 of the Government Code. Except for the information that has been obtained from or provided to the opposing parties to the litigation, the board may withhold the remaining information that is not subject to section 552.022 under

section 552.103. The remaining information that is subject to section 552.022 must be released.³

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 at (512) 475-2497.

Sincerely,



Olivia A. Maceo
Assistant Attorney General
Open Records Division

OM/eeg

Ref: ID# 334301

Enc. Submitted documents

c: Requestor
(w/o enclosures)

³We note that the submitted information contains social security numbers. Section 552.147(b) of the Government Code authorizes a government body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act.