

Message

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Sent: 1/14/2020 5:29:06 PM
To: Bangert, Ryan [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=75b41fa611a646d9b458f5b74d826cab-RLB5]
Subject: Draft: OR2019-33291 Reconsideration - Follow Up

Ryan, pasted below is a draft of the breakdown you requested on the OR2019-33291 reconsideration request involving the Texas State Securities Board.

- Justin

1) Timeline:

- 9/9/19: Request received by Texas State Securities Board (the "Board").
- 9/20/19: Board released some information to requestor, requested an OAG ruling on some information, and notified the requestor that other information was withheld pursuant to a previous determination.*
- 9/20/19: Board's initial decision request and briefing received by ORD.
- 9/27/19: Board follow up brief received by ORD.
- 10/4/19: Requestor's first brief received by ORD.
- 10/4/19: Requestor's second request, which specifically sought FBI NDA, received by Board.
- 10/16/19: Board's third brief received by ORD.
- 10/16/19: Board's brief regarding second request received by ORD and added to pending file.
- 10/30/19: Requestor's second brief received.
- 10/30/19: FBI brief regarding requested NDA received.
- 11/25/19: ORD issues ruling concluding information must be withheld.
- Link to ruling: <https://www2.texasattorneygeneral.gov/opinions/openrecords/51paxton/orl/2019/pdf/or201933291.pdf>
- We concluded that the information identified by the Board was confidential under its broad confidentiality provision in Article 581-28(A) of the Texas Securities Act. We also concluded that the FBI NDA must be withheld under 552.101 in conjunction with federal law (552.(b)(5) of FOIA).
- 12/17/19: Request for reconsideration from requestor received by ORD.

*Note: In 2004 the Board was granted a previous determination that permits it to withhold information "obtained" by the board in connection with an investigation to prevent or detect a violation of the Texas Securities Act or a board rule or order. That previous determination is linked below:

[i.or200400239.pdf](https://www2.texasattorneygeneral.gov/opinions/openrecords/51paxton/orl/2004/pdf/or200400239.pdf)

2) Search warrant background: Our office generally treats executed search warrants as public court records that are "super-public" information under Government Code section 552.022(a)(17). However, based on a determination made in 2007, we distinguish between the search warrants and the related search warrant affidavits. Beginning in 2007, our office stopped identifying search warrant affidavits as public court records subject to section 552.022(a)(17). This distinction is important because a document subject to section 552.022(a)(17) cannot be withheld under the 552.108 law enforcement exception (552.108 is a discretionary exception as opposed to a mandatory exception). Of note in this instance, we will not call out a search warrant or search warrant affidavit under section 552.022(a)(17) if it is sealed. Additionally, because information subject to section 552.022 can still be withheld under confidentiality exceptions, even if 552.022(a)(17) information cannot be withheld under 552.108, we will address the applicability of confidentiality provisions to 552.022(a)(17) information. The search warrants and affidavits we typically see are from state courts. However, I do not believe the above analyses would differ in the context of federal warrants.

a. Example of files where 552.022(a)(17) is raised for a search warrant and thus information cannot be withheld under section 552.108:

<https://www2.texasattorneygeneral.gov/opinions/openrecords/51paxton/orl/2019/pdf/or201934113.pdf>

<https://www2.texasattorneygeneral.gov/opinions/openrecords/51paxton/orl/2019/pdf/or201931522.pdf>

3) Approach for release of search warrant affidavit: As noted above, the Board submitted representative samples of information in its decision request. The submitted representative sample did not include a search warrant or search warrant affidavit. So, our office has not reviewed these records and we have no indication of what they contain. It also appears many of the records filed in this case are under seal. However, the federal court required release of the search warrant to the requestor, and it appears the requestor has access to the warrant itself. The unsealing order does not reference the affidavit. The Board's arguments apply generally to almost all of the submitted information. Only the Board's NDA with the FBI was excluded from its arguments. Thus, we can assume that the Board asserts all of the above listed arguments for the search warrant affidavit. Release of the affidavit would then require a pour out for each raised exception. Because the Board made broadly applicable arguments for the raised exceptions and submitted representative sample, but did not specifically apply them to the affidavit, the best approach would be to generally conclude that the broad arguments fail to establish the raised exceptions are applicable to the specific affidavit. This is the approach our office typically takes when an entity asserts a broadly applicable provision, but does not specifically apply the provision to the documents at issue. This conclusion would put the burden back onto the Board, which would then be required to file suit challenging this determination. Note that this approach does not take into account the possibility that the affidavit contains information that is confidential, and that our office is not aware of because we have not reviewed the document. This approach would also be complicated if the Board withheld the affidavit information under its 2004 previous determination.

4) Based on the procedural posture of this case there are numerous potential paths that it could take. Three potential paths are summarized below:

1. Deny reconsideration. Requestor files mandamus against Board.

a. The requestor's reconsideration is currently pending and denial of the reconsideration would confirm that that the Board can continue to rely on our determination in OR19-33291.

b. The requestor does not have a deadline to file suit, and can assert his interest at any time. The requestor could assert any arguments against the Board.

c. Subject to section 552.326(b), the Board could only assert the exceptions it raised in its briefing to our office.

d. The OAG would not be a party to this lawsuit, but would likely represent the Board.

e. If the requestor substantially prevails, he would be entitled to attorney's fees.

2. Requestor submits new request for search warrant affidavit (or other specific records that were not part of representative sample).

a. Assuming the Board believes its representative sample in OR2019-33291 was accurate, the Board may decide to deny any subsequent request for information covered by the representative sample by relying on OR19-33291 as a previous determination pursuant to 552.301(a). It is also possible that the Board withheld the warrant materials based on the previous determination in OR2004-0239

i. In this instance, the requestor could file a mandamus action against the board under section 552.321, file a formal complaint with the Travis County District Attorney under section 552.3215, or file an informal complaint with our office.

b. If the Board does submit a new ruling, then our office would have the opportunity to review the document and determine whether the raised exceptions apply to the specific record.

c. If we order release, then the Board, or any other interested third party (ie: the FBI), could sue our office under sections 552.324 and 552.325.

d. If we order the information withheld, then the requestor could sue the Board as described in Path 1.

3. Grant reconsideration request and order Board to release specific records.

a. If we decide to reverse our earlier determination, we would need to amend OR2019-33291 by issuing an "A" ruling. This ruling could follow the approach listed above and would be issued to the Board and requestor.

- b. Before issuing an amended ruling that orders the release of information, our office would likely have to review the information to ensure the released records do not contain confidential information. This would require our office to ask the Board to submit the information at issue to our office.
- c. If the Board does not agree with the amended ruling, the Board would have 30 calendar days to file suit against our office. Any other interested third party could also file suit against our office. Administrative Law would defend our ruling and Financial Litigation would likely represent the Board.