

## Travis County ARB's Brief Regarding Texas.gov Request No 66075046

### SUMMARY:

The Travis County Appraisal Review Board (ARB) along with the Travis County Appraisal Review Board, along with Travis County Chief Appraiser, Marya Crigler, was sued by Texas Protax-Austin, Inc., Five Stone LLC on October 8, 2018. This suit also names 159 property owners, clients of Protax and Five Stone, claiming that through the actions of Crigler, with the cooperation of the Appraisal Review Board, they were denied hearings to which they were entitled. They also claim that

Pursuant to the holdings of the Austin Court of Appeals in *York v. Texas Guaranteed Student Loan Corp.*, 408 S.W.3d 677 (Tex. App.—Austin, 2013) and *Atty. Gen. of Texas v. Farmers Ins. Exch.*, 411 S.W.3d 139 (Tex. App.—Austin, 2013) Travis County ARB withdraws its request for an opinion regarding its claim of exemption of the notices and minutes of public Board Meetings, as requested by Mr. David Bawcom, of Texas Protax – Austin, Inc. Documents responsive to this portion of the requests have been provided to the Requestor, or will be provided promptly.

The *York* and *Farmers* opinions held that agendas and meeting minutes, expressly made available to the public by the Open Meetings Act, could not be shielded from disclosure under the PIA. The Requestor, however, requested additional materials including drafts of unapproved minutes and notes made at meetings. The ARB contends that since these materials are not expressly made available under the Open Meetings Act, they may be shielded under the PIA.

The ARB asserts that the PIA litigation exception contained in Tex. Gov. Code § 552.103 applies because the materials requested are related to ongoing litigation and may result in the additional joinder of government officials. It further alleges that these requests for disclosure are in conflict with a stay in discovery presently in place.

### I. THE REQUESTS

Mr. Bawcom submitted two PIA requests:

A. The first, submitted November 29, 2018, (Exhibit 3 to the ARB's Request for Open Records Decision) made the following request:

“With regard to a meeting this morning of members of the Travis ARB, we request copies in PDF format, of the following:

1. A copy of the meeting notice posted for this meeting.
2. A copy of any materials provided to the ARB members for this meeting.
3. A copy of any record made of the meeting.

4. A copy of ANY [sic] emails between Mrs. Thompson, or any other member of the ARB, and, any member of the ARB, informing any member of the ARB of today's meeting.

5. A copy of any memo or other documentation which was prepared or given to any ARB member prior to today [sic] that schedules, discusses or destibes today's meeting in any way.

6. A list of the ARB members who were present for today's activities.

Later that day, Mr. Bawcom submitted the following supplement to his request:

"As a supplement to the previous request (below) if any materials were distributed at [sic] the meeting, we request a PDF copy of those materials."

The portions of this request which are the focus of this Request for Open Records Decision are highlighted.

While the ARB acknowledges that meeting notices and minutes are subject to disclosure, this requirement is limited to such meetings as are defined in the Open Meetings Act, Tex. Gov't Code Ann.at § 551.001(4): that is, meetings attended by a quorum of members and at which public business is discussed and action taken. The meeting of November 29 was not such a meeting. It was called for the purpose of informing voting ARB Members and non-voting Auxiliary Members regarding the general practices and procedures of other entities, including the City of Austin, in approving property designations that may be relevant to requests for exemptions or other treatment under the Tax Code. The ARB had no duty to post public notice of this meeting, nor to take minutes of it.

B. On December 7, 2018, Mr. Bawcom submitted a second request (Exhibit 4 to the Open Records Decision Request), which reads as follows::

"For any meetings of the Full Board of the Travis ARB, for the period September,1 2018 [to the] present, we request pdf copies of the notices of the meetings, the minutes of the meetings, and any backup or explanatory material that was provided to the Board Members for the meetings, and the secretary's notes for the not yet approved or published meetings of the last meeting.

"In addition, if any audio recordings were made by anyone (secretary or clerk of the meetings), of any of those meetings, we would request copies of the audio recordings of those meetings."

The pertinent portions of this request are highlighted.

First, not all meetings of the Full Board are open meetings. Only those falling within the Open Meetings Act's definition of "meeting" are subject to the Act's requirement of public access. Notices and minutes of such meetings have been or will shortly be provided to Mr. Bawcom. There are no audio recordings of these meetings.

But *York* and *Farmers* were decided on the proposition that because the Open Meetings Act expressly calls for public access, the PIA's exceptions do not apply. But a document defined in the PIA as public, and not so defined in any other legislation, these exceptions may shield it from production. In other words, only meeting notices and minutes are automatically exempt from the PIA exceptions. In both *York* and *Farmers* the PIA exceptions were held to be properly applied to certain materials not specifically designated as public. These include materials not made part of the minutes themselves, even if discussed in the meeting.

Consequently, the ARB contends that minutes or other records of "any" meetings of the Full Board exceeds the scope of *York* and *Farmers*' holdings and may be subject to PIA exceptions. Likewise, any backup or explanatory material that was provided to the Board Members for the meetings [but not made part of the minutes or incorporated in them by reference] and the secretary's notes for the not yet approved or published meetings of the last meeting are potentially subject to the PIA's exceptions.

## II. THE LITIGATION EXCEPTION

Section 552.103(a) of the Public Information Act excepts from required public disclosure:

"[I]nformation 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."

There is no dispute as to the fact that litigation between the Requestor and the ARB is pending. The ARB need now establish only the relatedness of the information to the subject matter of the litigation, and any reasonably anticipated expansion of it. Open Records Decision No. 551 (1990)

As explained in the Requests for Open Records Opinion, the Plaintiffs complain that that the ARB in an open meeting approved the dismissal of their tax protests for failure to appear at a scheduled hearing, without providing sufficient public notice that such action would be taken. As relief, the Plaintiffs pray that these actions be declared void as taken in violation of the Open Meetings Act, which would have the effect of removing them from the appraisal rolls previously certified by the ARB. Plaintiffs ask this relief not only for themselves, but for all property owners whose protests were similarly treated, regardless of whether they are joined in the suit. Because the no-show rate in Travis County has historically been approximately 40%, granting such relief would effectively invalidate the entire appraisal roll.

Not only would such relief be clearly against public policy, the Tax Code, at §25.25(a), expressly provides that the appraisal rolls cannot be changed after their certification by the ARB, except except by determination of protests remaining after approval, corrections of errors as authorized by §25.25, or appeals through litigation or arbitration. Because this is both well established and clearly applicable to the present suit, it is the ARB's belief that the entire litigation reflects bad faith and that the application of the litigation exception is necessary to prevent its escalation.

The Plaintiffs would if these PIA requests are not deemed subject to protection, potentially be in a position to identify additional property owners to join in their action, and to make an unreasonable and unlawful collateral attack on the operation of the Tax Code's entire appraisal apparatus. It is also likely, given the open hostility expressed by Plaintiffs' attorney to the Chairman of the Appraisal Review Board, that Plaintiffs will avail themselves of any excuse they can find to join her to the lawsuit.

### III. STATUS OF DISCOVERY IN THE LAWSUIT

Plaintiffs attached extensive discovery requests to their Original Petition. Prior to the response date, however, Chief Appraiser Marya Crigler filed a motion to dismiss the action pleaded against her, under the Texas Citizen Protection Act, Tex. Civ. Prac. Rem. Code §27.001 et seq. Pursuant to §27.003(c), "on the filing of a motion under this section, all discovery in the legal action is suspended until the court has ruled on the motion to dismiss." The ARB has interpreted this provision as applicable to all discovery in the lawsuit, including that propounded to the ARB itself, and has timely objected to all such discovery. For this reason, the Plaintiffs cannot presently obtain the materials they are now seeking under the PIA in the course of discovery.

A hearing is set for December 20<sup>th</sup> on the ARB's objections, and the Plaintiffs have filed a motion to compel discovery from the Chief Appraiser. If and when the Court determines to lift the stay on discovery, the determination of what is discoverable should be made by the Court as well. If instead the Court decides that discovery should remain stayed until it has determined the Chief Appraiser's Motion, then it would undercut the Court's authority to govern the case if the Plaintiffs were allowed to make an end-run around the stay under the PIA.

### CONCLUSION

The ARB has been subjected to a legal action which is both groundless in law, and arguably brought in bad faith. It will shortly file its Motion to Dismiss on this basis, as well as on its previously filed Plea to the Jurisdiction. It has responded or agreed to respond to the Requestor to the full extent of its obligations, as it understands them. The Requestor is using its PIA requests to avoid a temporary stay in discovery, and to require the ARB to expend time and resources needed to perform its duties. THE ARB respectfully requests the Office of the Attorney General's ruling on its obligation to make further production.

Thank you for your consideration of this request.

/s/ Julia Lacy Armstrong

cc B. Thompson  
B. Aleshire

T. Stewart