



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

December 31, 1993

Mr. Joe Franco
Director of Investigations
Texas State Board of Medical Examiners
P.O. Box 149134
Austin, Texas 78714-9134

OR93-763

Dear Mr. Franco:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code (former V.T.C.S. article 6252-17a).¹ Your request was assigned ID# 20913. (20336?)

The Texas State Board of Medical Examiners (the "board") received an open records request from an attorney on behalf of his client, a physician, for a copy of a letter of complaint the board received with regard to the physician.² As a threshold issue, we first address your inquiry as to whether the open records request was properly addressed to a board investigator rather than to the board's "officer for public records." See Gov't Code §§ 552.201-203, 552.221 (former sections 4 and 5) (definitions and duties of "officer for public records"). Specifically, you contend that because the board's

¹The 73rd Legislature has repealed article 6252-17a, V.T.C.S. Acts 1993, 73d Leg., ch. 268, § 46, at 988. The Open Records Act is now codified in the Government Code at chapter 552. *Id.* § 1. The codification of the Open Records Act in the Government Code is a nonsubstantive revision. *Id.* § 47.

²The requestor also submitted a subsequent request to the board for a copy of "all Complaint(s) or other sources of current investigation(s)" of his client, in response to which the board requested a second open records decision. The board's request for a second decision was assigned ID# 20532. Because the only document the board has submitted to this office for review is the same as that requested in the first open records request, we will resolve both requests here. We note, however, that the board need only request a single open records decision for any one set of requested records, regardless of any subsequent requests the board may receive for the same information, during the pendency of the request with this office. *But see* Attorney General Opinion JM-906 (1988) (whether former section 4.05(d) confidentiality provision applies to particular information must be determined by attorney general on a case-by-case basis).

investigators "are not designated as officers for public records in this agency," the Open Records Act does not require that the board respond to the request.

The Open Records Act requires that when a "governmental body" receives a written request for records, the governmental body must either release the records or, within ten days of receipt of the request, request a decision from the attorney general as to whether the records may be withheld. *See* Gov't Code § 552.301(a). In Open Records Decision No. 497 (1988) (copy enclosed), this office held that open records requests are not invalid merely because they are addressed to someone other than the governmental body's chief administrative officer:

The purpose of sections 4 and 5 is to place a legal duty on the custodian of information, defined as the governmental body's chief administrative officer, to produce public information. The purpose of section 4 and 5 is not to require that a requestor actually name the chief administrative officer. . . . Sections 4 and 5 do not require that a requestor use any "magic" words such as naming the chief administrative officer so long as the request reasonably can be identified as a request for public records.

Open Records Decision No. 497, at 2, 3. In this instance, the current open records request was received by the board investigator to whom the current investigation is assigned. In accordance with Open Records Decision No. 497, the open records request must be viewed as valid and the requested record may be withheld only if it comes under the protection of one of the act's exceptions to public disclosure.

We next address whether the board must release the requested information. You contend that the requested letter of complaint is made confidential by section 4.05(c)³ of the Medical Practice Act, V.T.C.S. article 4495b, and thus must be withheld pursuant to section 552.101 (former section 3(a)(1)) of the Open Records Act. Section 552.101 of the Open Records Act protects "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 4.05(c) of article 4495b, V.T.C.S., provides in part:

All complaints, adverse reports, investigation files, other investigation reports, and other investigative information in the possession of, received or gathered by the board or its employees or agents relating to a licensee . . . are privileged and confidential and are not subject to discovery, subpoena, or other means of legal compulsion for their release *to anyone* other than the board or its employees or agents involved in licensee discipline. *Not later than*

³Section 4.05(d) of the Medical Practice Act, which was originally cited in the board's brief to this office, is now found at section 4.05(c). *See* Acts 1993, 73d Leg., ch. 862, § 26, at 3396.

30 days after receiving a written request from a licensee who is the subject of a formal complaint initiated and filed under Section 4.03 of this Act or from the licensee's counsel of record and subject to any other privileges or restrictions set forth by rule, statute or legal precedent, and unless good cause is shown for delay, the board shall provide the licensee with access to all information in its possession that the board intends to offer into evidence in presenting its case in chief at the contested hearing on the complaint. . . . (Emphasis added.)

The requested complaint is clearly confidential under this provision. It is apparent from the language of section 4.05(c) that until the board files a complaint against a licensee, the board's records of its investigations are not to be released to anyone, including the licensee involved.⁴ Although section 4.05(c) requires that the board grant to a physician or his attorney, with certain exceptions, "all information in its possession that the board intends to offer into evidence in presenting its case in chief at the contested hearing on the complaint," such right of access exists only after the board has initiated a complaint against the physician in question. Consequently, if the board has not initiated such a complaint against the requestor's client, the board is not authorized to release the complaint letter at this time.

We are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact this office.

Yours very truly,



Rebecca L. Payne
Section Chief
Open Government Section

RLP/RWP/rho

⁴We note that Open Records Decision No. 458, issued on February 13, 1987, reached the conclusion that the intent of former section 4.05(d) was to shield the identities of licensees against whom complaints are filed and that it did not protect non-identifying information. Former section 4.05(d), however, was amended later that same year to include the language that information is "confidential and [is] not subject to discovery, subpoena, or other means of legal compulsion for [its] release to *anyone* other than the board or its employees or agents involved in licensee discipline." Acts 1987, 70th Leg., ch. 596, § 9, at 2331 (emphasis added). The amending act also added language providing an exception from confidentiality for disclosure to law enforcement entities conducting criminal investigations. *Id.* Clearly the statute as amended is intended to protect more than the identity or privacy of the subject of a complaint. Consequently, the requestor does not have a special right of access to this information pursuant to section 552.023(b) (former section 3B) of the Open Records Act.

Ref.: ID# 20336
ID# 20532
ID# 20584
ID# 20650

Enclosures: Open Records Decision No. 497
Submitted documents

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(w/o enclosures)