



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

November 16, 1995

Ms. Barbara M. Holthaus
General Counsel
Texas State Board of Examiners of Psychologists
9101 Burnet Road, Suite 212
Austin, Texas 78758

OR95-1251

Dear Ms. Holthaus:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 36365.

The Texas State Board of Examiners of Psychologists (the "board") received two requests for information relating to conflict of interest charges filed by the board against a board member.¹ You claim that the information that you have identified as responsive to the request is excepted from disclosure under section 552.101 of the Government Code. You have submitted to this office the responsive documents.

The Open Records Act imposes a duty on governmental bodies seeking an open records decision pursuant to section 552.301 to submit that request to the attorney general within ten days after the governmental body's receipt of the request for information. The time limitation found in section 552.301 is an express legislative recognition of the importance of having public information produced in a timely fashion. *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.--Austin 1990, no writ). When a request for an open records decision is not made within the time period prescribed by section 552.301, the requested information is presumed to be public. See Gov't Code § 552.302.

¹You submitted to our office a copy of one page of a letter dated August 23, 1995 that includes a request for information. You have also submitted correspondence from the requestor which refers to a previous request for information dated March 16, 1994, but you did not submit a request for information that matches this date. The portion of the request that was submitted asks for "a brief transcript of the conflict of interest charges" You state that the board has no such transcripts, but have identified a complaint filed with the Texas Ethics Commission and an Order of Dismissal as responsive to the request.

This presumption of openness can only be overcome by a compelling demonstration that the information should not be made public. *See, e.g.*, Open Records Decision No. 150 (1977) (presumption of openness overcome by a showing that the information is made confidential by another source of law or affects third party interests).

It appears that the board received the first request on August 16, 1995. However, the board did not request a decision from this office until September 19, 1995. Therefore, the board did not comply with the mandatory ten-day deadline provided by the Government Code as to the first request. The information responsive to the first request is presumed public unless another source of law or a third-party's interest makes that information confidential.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. You claim that section 25A of article 4512c, the Psychologists' Certification and Licensing Act (the "act"), has been amended by Senate Bill 673 to include a confidentiality provision that would encompass the documents requested. Section 25A(e) of the act, as amended, provides:

Except as specifically provided in Subsection (f) of this section, a complaint and investigation under Section 8 of this Act concerning an individual licensed or certified by the Board and all information and materials compiled by the Board in connection with a complaint and investigation are not subject to disclosure under the open records law, Chapter 552, Government Code, and are not subject to disclosure, discovery, subpoena, or other means of legal compulsion for their release to any person or entity.²

Act of May 29, 1995, 74th Leg., R.S., ch. 965, § 33, 1995 Tex. Sess. Law Serv. 4789, 4836 (Vernon). Subsection (f) allows disclosure in certain circumstances that do not appear to be applicable in the present situation. Section 8 of the act specifies the powers and duties of the board, and provides that the board shall establish procedures for accepting and disposing of complaints about licensees.

Some of the documents submitted are part of an investigation of a board member in the performance of his duties as a psychiatrist licensed under the act. These documents are confidential under section 25A(e). Because this information is confidential by law, the board has demonstrated a compelling reason to overcome the presumption of openness and must withhold this information.

²This section of S.B. 673 appears to have taken effect immediately. Act of June 16, 1995, 74th Leg., R.S., ch. 965, § 89, 1995 Tex. Sess. Law Serv. 4789, 4836 (Vernon).

We find, however, that many of the documents that you have submitted to our office do not fall within the confidentiality provisions of section 25A(e). These documents relate to a complaint filed by the board with the Texas Ethics Commission (the "commission") against the board member and concern possible ethical violations by the board member in his role as a board member. Although it appears that the ethics complaint arose out of the board's investigation of the board member as a licensee, we believe that information relating to the conduct of a board member in the performance of his or her board duties is sufficiently distinct from an investigation of a licensee under the act. We do not believe that section 25A(e) extends confidentiality to information regarding the conduct of board members in their role as members of a statewide licensing board. Thus, documents that were generated by the board or the commission as a part of the ethics complaint are not confidential under section 25A(e).

Because we find that the information generated in the course of the ethics complaint is not confidential under section 25A(e) of the act, we must consider whether another statute or legal principle makes this information confidential. You also contend that the information relating to the ethics complaint is confidential pursuant to section 571.140 of the Government Code. Section 571.140 provides:

(a) Except as provided by Subsection (b), proceedings at a preliminary review or informal hearing performed by the commission, a sworn complaint, and documents and any additional evidence relating to the processing, preliminary review, informal hearing, or resolution of a sworn complaint or motion are confidential and may not be disclosed unless entered into the record of a formal hearing or a judicial proceeding, except that a document or statement that was previously public information remains public information.

(b) An order issued by the commission after the completion of a preliminary review or an informal hearing determining that a violation other than a technical or de minimis violation has occurred is not confidential.

The commission considered whether section 571.140 acts as a broad prohibition against disclosure of an ethics complaint and related documents in Ethics Advisory Opinion No. 8 (1992). Based upon federal court cases that had interpreted similar provisions, the commission determined that such a broad restriction would violate the First Amendment to the United States Constitution. Ethics Advisory Opinion No. 8 (1992) at 2-4. See generally *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978) (law allowing criminal prosecution of a newspaper for printing information about complaint proceedings was unconstitutional); *Doe v. Gonzalez*, 723 F. Supp. 690 (S.D. Fla. 1988) *aff'd* 886 F.2d 1323 (11th Cir. Fla. 1989) (statute prohibiting a complainant from discussing ethics complaint was unconstitutional); *Providence Journal Co. v. Newton*, 723 F. Supp. 846 (D.R.I. 1989) (law prohibiting all public discussion of an

ethics complaint was unconstitutional). The commission opinion construed this confidentiality provision to apply only to members and staff of the commission, not to third parties. We defer to the commission's interpretation of its own statute in this situation.³ Attorney General Opinions JM-1212 (1990) at 8 (court will give great weight to administering agency's construction of statute, though not if contrary to clear meaning), JM-1149 (1990) at 2 (court will give weight to agency's interpretation of statute).

Because the commission has interpreted its own confidentiality provision to restrict disclosure of the complaint and related documents only as to its own members and staff, the documents generated in the course of the ethics complaint and held by the board are not confidential under section 571.140. Moreover, you have not shown compelling reasons why the information at issue should not be released. The information is presumed to be public and must be released.⁴

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Robert W. Schmidt
Assistant Attorney General
Open Records Division

RWS/rho

Ref.: ID# 36365

Enclosures: Submitted documents

³The opinion makes clear that the commission construed the statute narrowly "because a statute is to be construed in a manner that renders it constitutional." Ethics Advisory Opinion No. 8 (1992) at 4. See generally *State v. Shoppers World, Inc.*, 380 S.W.2d 107, 111 (Tex. 1964); *Earle v. Program Centers of Grace Union Prsbytery, Inc.*, 670 S.W.2d 777, 779-80 (Tex. App.--Fort Worth 1984, no writ).

⁴The documents generated in the course of the ethics complaint do not appear to contain the names or identities of any mental-health patients. We caution, however, that the identity of a mental health patient and other patient information is normally confidential under section 552.101 of the Government Code. See Attorney General Opinion JM-260 (1980); Open Records Decision No. 314 (1982).

cc: Mr. Richard Taylor
Special Board Member
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(w/o enclosures)