

The ruling you have requested has been amended as a result of litigation and has been attached to this document.



OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

May 12, 2003

Ms. Jennifer A. Soffer
Assistant General Counsel
Texas State Board of Medical Examiners
P.O. Box 2018
Austin, Texas 78768-2018

OR2003-3172

Dear Ms. Soffer:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 180880.

The Texas State Board of Medical Examiners (the "board") received a request for "any and all documents in the file for [two named physicians]," including documents containing twelve specified categories of information. You claim that licensure and investigative information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and have reviewed the information you submitted. We note that certain types of information held by the board are generally available to the public. *See* Occ. Code § 154.002 (providing for preparation of information for public dissemination); 22 T.A.C. § 173.1 (providing for public availability of physician profiles). We therefore assume that you have released the submitted "public physician verifications," as well as any further information that the board generally makes public. *See* Gov't Code § 552.022(a)(15) (providing for release of information open to public under agency's policies). We also assume that you have released any other information held by or available to the board that is responsive to the present request, to the extent that such information existed on the date of the board's receipt of this request for information. If not, then you must do so at this time. *See* Gov't Code §§ 552.301, .302; Open Records Decision No. 664 (2000). We note that chapter 552 of the Government Code does not require the board to release information that did not exist when it received this request or to create responsive information. *See Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dism'd); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

You concede that the board has not complied with section 552.301 of the Government Code in requesting this decision. Section 552.301 prescribes procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Section 552.301(b) requires the governmental body to ask for the attorney general's decision and state the exceptions to disclosure that apply not later than the tenth business day after the date of its receipt of the written request for information. Section 552.301(e)(1)(D) requires the governmental body to submit to the attorney general, not later than the fifteenth business day after the date of its receipt of the request, the information that the governmental body claims is excepted from disclosure or representative samples of the information if it is voluminous. If the governmental body does not request a decision as provided by section 552.301, the information in question is presumed to be subject to required public disclosure and must be released unless there is a compelling reason to withhold the information. *See* Gov't Code § 552.302.

You inform us that the board received the present request for information on February 7, 2003. Your request for this decision is dated March 5, 2003. Thus, you requested this decision more than ten business days after the date of your receipt of the request for information. You also failed to submit some of the information, or a representative sample of the information, that you claim is excepted from disclosure. Thus, the board did not request this decision as provided by section 552.301. Therefore, the requested information is presumed to be public and must be released under section 552.302, unless there is a compelling reason to withhold any of the information. *See also Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ). The presumption that information is public under section 552.302 can generally be overcome when the information is confidential by law or third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982). As a claim under section 552.101 of the Government Code can provide a compelling reason for non-disclosure under section 552.302, we will consider your arguments.

Section 552.101 excepts from required public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information that other statutes make confidential. You claim that some of the requested information is confidential under section 164.007(c) of the Occupations Code, which provides in part:

(c) Each complaint, adverse report, investigation file, other investigation report, and other investigative information in the possession of or received or gathered by the board or its employees or agents relating to a license holder, an application for license, or a criminal investigation or proceeding is privileged and confidential and is not subject to discovery, subpoena, or other means of legal compulsion for release to anyone other than the board or its employees or agents involved in discipline of a license holder.

Occupations Code § 164.007(c). You indicate that some of the submitted information relates to complaints that were determined to be non-jurisdictional and subsequently closed. You

do not indicate that the board is authorized to release that information to the requestor. *See id.* § 164.007(f). Based on your representations, we have marked the information that we conclude is confidential under section 164.007(c) of the Occupations Code. The board must withhold the marked information under section 552.101 of the Government Code as information made confidential by law.

You also raise section 552.101 in conjunction with section 155.007(g) of the Occupations Code, which provides as follows:

(g) Each report received or gathered by the board on a license applicant is confidential and is not subject to disclosure under Chapter 552, Government Code. The board may disclose a report to an appropriate licensing authority in another state. The board shall report all licensing actions to appropriate licensing authorities in other states and to the Federation of State Medical Boards of the United States.

Occ. Code § 155.007(g). We understand you to claim that section 155.007(g) is applicable to some of the remaining requested information. However, you have not submitted the information, or a representative sample of the information, that you claim is confidential under section 155.007(g).¹ As you have not submitted the information in question, we have no basis for finding that the information is confidential. Thus, we have no choice but to order the information released per section 552.302. If you believe that this information is confidential and may not lawfully be released, you must challenge this ruling in court as outlined below.

In summary, the marked information is excepted from disclosure under section 552.101 of the Government Code in conjunction with section 164.007(c) of the Occupations Code. The board must release the rest of the requested information.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days.

¹You inform us that licensure files are maintained on microfiche and take a considerable amount of time to copy. We note that administrative inconvenience involved in responding to a request for information does not excuse a failure to comply with chapter 552 of the Government Code. *See Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 687 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977).

Id. § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

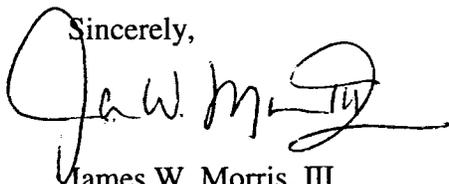
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "J.W. Morris, III". The signature is fluid and cursive, with a large initial "J" and "M".

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/sdk

Ref: ID# 180880

Enc: Submitted documents

c: Ms. Deborah Dail
The Girards Law Firm
10,000 North Central Expressway, Suite 750
Dallas, Texas 75231
(w/o enclosures)

JUN 27 2006

12:10 P

CAUSE NO. GN302004

TEXAS STATE BOARD OF MEDICAL EXAMINERS,	§	IN THE DISTRICT COURT OF
Plaintiff,	§	
	§	
V.	§	TRAVIS COUNTY, TEXAS
	§	
GREG ABBOTT, ATTORNEY GENERAL OF TEXAS,	§	
Defendant.	§	345 th JUDICIAL DISTRICT

AGREED FINAL JUDGMENT

On this date, the Court heard the parties' motion for entry of an agreed final judgment. By their motion, Plaintiff, Texas Medical Board (TMB)¹, and Defendant, Greg Abbott, Attorney General of Texas, announced to the Court that all matters of fact and things in controversy between them had been fully and finally compromised and settled. This cause is an action under the Public Information Act (PIA), Tex. Gov't Code ch. 552. The parties represent to the Court that, in compliance with Tex. Gov't Code § 552.325(c), the two requestors, Deborah Dail and Polly Bates, were sent reasonable notice of this setting and of the parties' agreement that TMB may withhold some of the information at issue; that the requestors were each individually informed of his or her right to intervene in the suit to contest the withholding of this information; and that the requestors have not informed the parties of their intention to intervene. Neither has any requestor filed a motion to intervene or appeared today. After considering the agreement of the parties and the law, the Court is

¹The Texas State Board of Medical Examiners' name was changed to the Texas Medical Board by the 79th Texas Legislature.

of the opinion that entry of an agreed final judgment is appropriate, disposing of all claims between these parties.

IT IS THEREFORE ADJUDGED, ORDERED AND DECLARED that:

1. Some of the information at issue in the named doctors' licensure files, specifically, Bates numbered pages, 1, 3-14, 16-21, 24-38, and 41-47, is confidential under Tex. Occ. Code §§ 155.007(g), 155.058(a)(3), or 164.007(c), and, thus, excepted from disclosure by Tex. Gov't Code § 552.101.

2. The TMB shall withhold the information in the named doctors' licensure files enumerated in ¶ 1 of this Final Judgment, along with any other information in the files that the Attorney General determined was excepted from disclosure in Letter Rulings OR2003-3172 and OR2003-3180 .

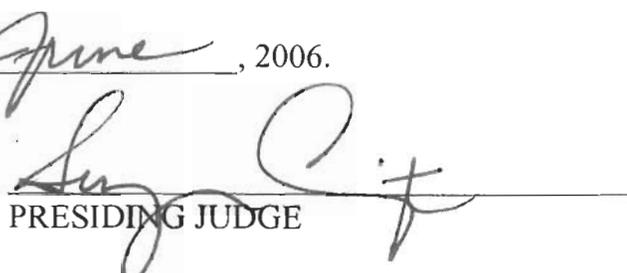
3. If it has not already done so, the TMB shall release the remaining information in the doctors' licensure files, to the respective requestor promptly upon receipt by the TMB of an agreed final judgment signed by the Court.

4. All costs of court are taxed against the parties incurring the same;

5. All relief not expressly granted is denied; and

6. This Agreed Final Judgment finally disposes of all claims between Plaintiff and Defendant and is a final judgment.

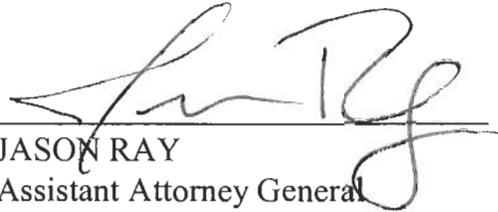
SIGNED this the 20 day of June, 2006.


PRESIDING JUDGE

APPROVED:



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