

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 30, 2003

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

OR2003-3673

Dear Ms. Soffer:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 181100.

The Texas State Board of Medical Examiners (the "Board") received a request for "any and all licensure information regarding [a named physician.]" The requestor also seeks information relating to any grievances, consumer complaint forms, care-related review hearings, and disciplinary action reports. You inform us the Board has released the disciplinary orders to the requestor; however, you assert the submitted information is excepted from disclosure under section 552.101 of the Government Code. We have reviewed the representative sample of information you submitted and we have considered the exception you claim.¹

Initially, we address the Board's obligations under section 552.301 of the Government Code. Pursuant to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply not later than the tenth business day after the date of receiving the written request. Additionally, pursuant to section 552.301(e), a governmental

¹ We assume the representative sample of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach and, therefore, does not authorize the withholding of any other requested records to the extent those records contain substantially different types of information than that submitted to this office.

body is required to submit to this office within fifteen business days of receiving an open records request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. In this case, the Board should have submitted its request for an attorney general opinion no later than February 20, 2003. The Board should have forwarded all other required documentation to this office by February 27, 2003. We received your letter requesting an opinion from our office and your supporting documentation on March 13 and May 16, 2003. Consequently, we conclude the Board failed to comply with the requirements of sections 552.301(b) and 552.301(e) of the Government Code.

According to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301 results in the legal presumption that the information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). Normally, a compelling interest is that some other source of law makes the information confidential or that third party interests are at stake. Open Records Decision No. 150 at 2 (1977). As section 552.101 of the Government Code can provide a compelling reason to overcome the presumption of openness, we will address your argument under this exception. *See 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).

Section 552.101 of the Government Code excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. Section 164.007(c) of the Occupations Code provides the following:

(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.

Occ. Code § 164.007(c). Section 164.007(c) applies to investigatory records gathered by the Board relating to an investigation of a license holder. You explain that you have submitted

excerpts from a complete investigative file. Further, you state that “this includes the complaint itself, statements by the physician against whom the complaint was filed, patient medical records, consultant reports, investigative reports, materials presented from the confidential informal settlement conference, and notes from the informal settlement conference by Board staff.” Based on your representations and our review of the submitted information, we agree the submitted investigative files constitute confidential information as contemplated by section 164.007(c). Accordingly, the Board must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 164.007(c) of the Occupations Code.

Next, you assert section 155.007(g) of the Occupations Code protects the requested licensure information from disclosure. Chapter 155 of the Occupations Code pertains to eligibility to obtain a license to practice medicine. Subchapter A enumerates the requirements to obtain such a license. Section 155.007 further describes the application process, and provides, in relevant part, as follows:

(a) The executive director [of the board] shall review each application for a license and shall:

- (1) recommend to the board each applicant eligible for a license; and
- (2) report to the board the name of each applicant determined to be *ineligible* for a license, together with the reasons for that determination.

(b) An applicant determined to be ineligible for a license by the executive director may request review of that determination by a committee of the board. . . .

(c) The executive director may refer an application to the board committee for a recommendation concerning eligibility. If the committee determines that the applicant is ineligible for a license, the committee shall submit that determination, together with the reasons for the determination, to the board unless the applicant requests a hearing

(e) A hearing requested under Subsection (c) shall be held before an administrative law judge of the State Office of Administrative hearings

(f) After receipt of the administrative law judge’s proposed findings of fact and conclusions of law, the board shall determine the applicant’s eligibility. The board shall provide an applicant who is denied a license a written statement containing the reasons for the board’s action.

(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(a), (b), (c), (e), (f), (g) (emphasis added). This section only addresses the executive director's and board committee's determination of eligibility. The licensure information you submitted consists of the licensee's application, examination information, affidavits, a public physician verification form, and a proficiency certificate. After reviewing the submitted materials and the relevant sections of the Occupations Code, we do not agree that the submitted licensure information is a "report" as contemplated by section 155.007(g). While the submitted material pertains to an application for a medical license, none of the submitted information is a report concerning the applicant's eligibility for a license. Therefore, the Board may not withhold the licensure information based on section 552.101 of the Government Code in conjunction with section 155.007 of the Occupations Code.

However, we note the submitted documents include fingerprint information that is subject to sections 559.001, 559.002, and 559.003 of the Government Code. These provisions provide the following:

Sec. 559.001. DEFINITIONS. In this chapter:

- (1) "Biometric identifier" means a retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry.
- (2) "Governmental body" has the meaning assigned by Section 552.003 [of the Government Code], except that the term includes each entity within or created by the judicial branch of state government.

Sec. 559.002. DISCLOSURE OF BIOMETRIC IDENTIFIER. A governmental body that possesses a biometric identifier of an individual:

- (1) may not sell, lease, or otherwise disclose the biometric identifier to another person unless:
 - (A) the individual consents to the disclosure;
 - (B) the disclosure is required or permitted by a federal statute or by a state statute other than Chapter 552 [of the Government Code]; or

(C) the disclosure is made by or to a law enforcement agency for a law enforcement purpose; and

(2) shall store, transmit, and protect from disclosure the biometric identifier using reasonable care and in a manner that is the same as or more protective than the manner in which the governmental body stores, transmits, and protects its other confidential information.

Sec. 559.003. APPLICATION OF CHAPTER 552. A biometric identifier in the possession of a governmental body is exempt from disclosure under Chapter 552.

Gov't Code §§ 559.001, .002, .003. We find no indications that any of the permitted disclosure provisions apply in this case. Therefore, the Board must withhold the fingerprints in the submitted documents under section 552.101 in conjunction with section 559.003 of the Government Code.

Further, the submitted information contains a social security number governed by section 56.001 of the Occupations Code. This provision makes “[t]he social security number of an applicant for or holder of a license, certificate of registration, or other legal authorization issued by a licensing agency to practice in a specific occupation or profession that is provided to the licensing agency . . . confidential and not subject to disclosure under Chapter 552, Government Code.” Occ. Code § 56.001. Thus, the Board must withhold the social security number, which we have marked, pursuant to section 552.101 of the Government Code and section 56.001 of the Occupations Code.

Also, we note the applicability of the doctrine of common-law privacy, as encompassed by section 552.101 of the Government Code. For information to be protected from public disclosure under common-law privacy, the information must meet the criteria set out in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Common-law privacy protects information when (1) it contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) the public has no legitimate interest in the disclosure of the information. *Id.* at 685; Open Records Decision No. 611 at 1 (1992). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Indus. Found.*, 540 S.W.2d at 683. In this instance, the Examination Application for Licensure contains questions, the answers to which are highly intimate or embarrassing. Further, we do not believe the public has a

legitimate interest in this information. *See Indus. Found.*, 540 S.W.2d at 685. Therefore, the Board must withhold the information we have marked based on section 552.101 of the Government Code and common-law privacy.

Lastly, you ask this office to issue a previous determination authorizing the Board to withhold similar information if requested in the future. We decline to issue a previous determination at this time which would allow the Board to withhold the general category of information at issue in this case in the future. *See Open Records Decision No. 673 (2001)*.

In summary, the Board must withhold the following information under section 552.101 of the Government Code in conjunction with the specified provision of the Occupations Code: 1) the marked investigative files under section 164.007(c) and 2) the social security number, which we have marked, under section 56.001. The Board must withhold the fingerprints as required by section 552.101 of the Government Code in conjunction with section 559.003 of the Government Code. The Board must withhold the information we have marked pursuant to section 552.101 of the Government Code and common-law privacy. The Board must release the remainder of the submitted information to the requestor.

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. *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,



Christen Sorrell
Assistant Attorney General
Open Records Division

CHS/seg

Ref: ID# 181100

Enc. Submitted documents

c: Ms. Anne Arreaga
Law Office of Ted H. Roberts
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San Antonio, Texas 78229-3500
(w/o enclosures)

JUN 27 2006

12:10 P.M.
Amalia Rodriguez-Mendoza, Clerk

CAUSE NO. GN302065

TEXAS STATE BOARD OF MEDICAL EXAMINERS,	§	IN THE DISTRICT COURT OF
Plaintiff,	§	
	§	
V.	§	TRAVIS COUNTY, TEXAS
	§	
GREG ABBOTT, ATTORNEY GENERAL OF TEXAS,	§	
Defendant.	§	250 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 requestor, Anne Arreaga, was sent reasonable notice of this setting and of the parties' agreement that TMB may withhold some of the information at issue; that the requestor was individually informed of her right to intervene in the suit to contest the withholding of this information; and that the requestor has not informed the parties of her intention to intervene. Neither has the requestor filed a motion to intervene or appeared today. After considering the agreement

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

of the parties and the law, the Court is 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 doctor's licensure file, specifically, Bates numbered pages, 2-10, 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 doctor's licensure file 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 Ruling OR2003-3673.

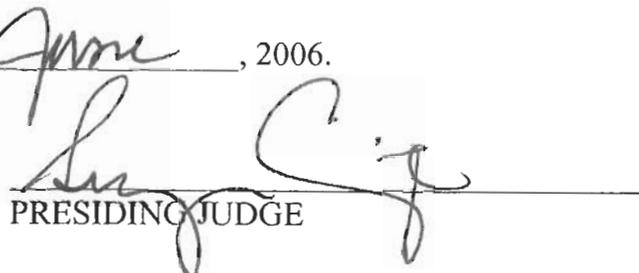
3. If it has not already done so, the TMB shall release the remaining information in the doctor's licensure file, to the requestor promptly upon receipt by the TMB of an agreed final judgment signed by the Court.

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.

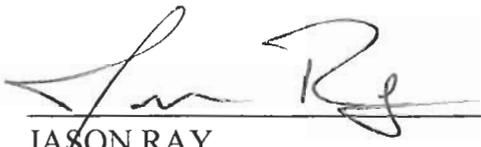


PRESIDING JUDGE

APPROVED:



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