

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

July 2, 2003

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

OR2003-4554

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# 183682.

The Texas State Board of Medical Examiners (the "board") received a request for "any and all documents in the file of [a named physician]," to include "all documents regarding disciplinary actions, license suspensions, applications for licensing, transcripts, grades, insurance, lawsuits, claims, board certifications, correspondence, [and] other requests for the file." You state that no disciplinary orders pertaining to the named licensee exist. The Public Information Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex.Civ.App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986). You contend that all investigative and licensure information pertaining to the licensee at issue is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Initially, we note, and you acknowledge, that the board did not submit this request for a decision from this office within the ten-business-day time period prescribed by section 552.301 of the Government Code. *See* Gov't Code § 552.301(a), (b). The board also failed to submit the information required under section 552.301(e) within the fifteen-business-day time period mandated under that section. *See* Gov't Code § 552.301(e). When a governmental body fails to comply with the procedural requirements of

section 552.301, the information at issue is presumed public. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex. App.—Austin 1990, no writ); *City of Houston v. Houston Chronicle Publ'g Co.*, 673 S.W.2d 316, 323 (Tex. App.—Houston [1st Dist.] 1984, no writ); Open Records Decision No. 319 (1982). The governmental body must show a compelling interest to withhold the information to overcome this presumption. *See id.* Normally, a compelling interest exists when some other source of law makes the information confidential or when third party interests are at stake. Open Records Decision No. 150 at 2 (1977). As the presumption of openness can be overcome by a showing that information is confidential by law, we will consider your arguments under section 552.101.

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 as follows:

(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.

Section 164.007(c) applies to investigatory records gathered by the board during an investigation of a license holder. You indicate that the submitted information relates to the investigation of the licensee at issue by the board. Based on your representation and our review of the submitted information, we find that the majority of the submitted records consist of investigative information in the possession of the board relating to a license holder. The submitted investigative information must be withheld pursuant to section 552.101 of the Government Code in conjunction with section 164.007(c) of the Occupations Code.

We next address your claim under section 155.007(g) of the Occupations Code with respect to the submitted licensure information. 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. [emphasis added]

(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 not later than the 20th day after the date the applicant receives notice of the determination.

(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 not later than the 20th day after the date the applicant receives notice of the determination.

....

(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.

Thus, section 155.007 addresses the procedure by which the executive director and the board determine an applicant's eligibility for a license. Section 155.007(g) makes confidential the report of the executive director to the board that an applicant is ineligible for a license. In this case, the remainder of the submitted information consists of documents relating to the license application of the named licensee. We note that this licensure information is not a report to the board concerning the licensee's eligibility for a license. Therefore, we do not agree that the licensure information you have submitted constitutes a "report" as contemplated by section 155.007(g) of the Occupations Code. Consequently, we determine that the board may not withhold the submitted licensure information pursuant to

section 552.101 of the Government Code in conjunction with section 155.007 of the Occupations Code.

We note, however, that the licensure documents at issue include fingerprint information that is subject to sections 559.001, 559.002, and 559.003 of the Government Code. Sections 559.001, 559.002, and 559.003 provide as follows:

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.

Upon review, we find that section 559.002 does not permit the disclosure of the submitted fingerprint information in this instance. Therefore, the board must withhold the fingerprints,

which we have marked, under section 552.101 in conjunction with section 559.003 of the Government Code.

The submitted licensure documents also contain the licensee's social security number. Section 56.001 of the Occupations Code provides that "[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 is confidential and not subject to disclosure under Chapter 552, Government Code." Occ. Code § 56.001. Thus, the board must withhold the marked social security number pursuant to section 552.101 of the Government Code in conjunction with section 56.001 of the Occupations Code.

Next, criminal history record information ("CHRI") is confidential and not subject to disclosure. Federal regulations prohibit the release of CHRI maintained in state and local CHRI systems to the general public. *See* 28 C.F.R. § 20.21(c)(1) ("Use of criminal history record information disseminated to noncriminal justice agencies shall be limited to the purpose for which it was given."), (2) ("No agency or individual shall confirm the existence or nonexistence of criminal history record information to any person or agency that would not be eligible to receive the information itself."). Section 411.083 provides that any CHRI maintained by the Department of Public Safety ("DPS") is confidential. Gov't Code § 411.083(a). Similarly, CHRI obtained from the DPS pursuant to statute is also confidential and may only be disclosed in very limited instances. *Id.* § 411.084; *see also id.* § 411.087 (restrictions on disclosure of CHRI obtained from DPS also apply to CHRI obtained from other criminal justice agencies). Therefore, any CHRI falling within the ambit of these state and federal regulations must be withheld pursuant to section 552.101 of the Government Code.

Section 552.101 of the Government Code also incorporates the doctrine of common-law privacy. 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. We have marked information in the submitted licensure documents that must be withheld pursuant to section 552.101 of the Government Code in conjunction with common-law privacy.

Finally, you ask this office to issue a previous determination regarding licensure and investigative information pertaining to persons licensed by the board. We decline to issue a previous determination for licensure and investigative information at this time.

In summary, we have marked licensure information that the board must release to the requestor, with the exception of the following information that is confidential by law: (1) fingerprint information must be withheld under section 552.101 in conjunction with section 559.003 of the Government Code; (2) the social security number of the licensee must be withheld under 552.101 in conjunction with section 56.001 of the Occupations Code; (3) we have marked information that must be withheld pursuant to section 552.101 in conjunction with common-law privacy. Any criminal history record information must be withheld pursuant to section 552.101 in conjunction with chapter 411 of the Government Code and federal regulations. The board must withhold the remaining submitted documents pursuant to section 552.101 of the Government Code in conjunction with section 164.007(c) of the Occupations Code.

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,



David R. Saldivar
Assistant Attorney General
Open Records Division

DRS/seg

Ref: ID# 183682

Enc: Submitted documents

c: Ms. Bonnie McKenzie
Morgan & Weisbrod, L.L.P.
P.O. Box 821329
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(w/o enclosures)

JUN 27 2006

At 12:10 p.m.
Amalia Rodriguez-Mendoza, Clerk

CAUSE NO. GN302509

TEXAS STATE BOARD OF MEDICAL EXAMINERS, Plaintiff,	§	IN THE DISTRICT COURT OF
	§	
	§	
V.	§	TRAVIS COUNTY, TEXAS
	§	
GREG ABBOTT, ATTORNEY GENERAL OF TEXAS, Defendant.	§	
	§	
	§	353 rd 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, Bonnie McKenzie, 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 3-11, 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 OR2003-4554.

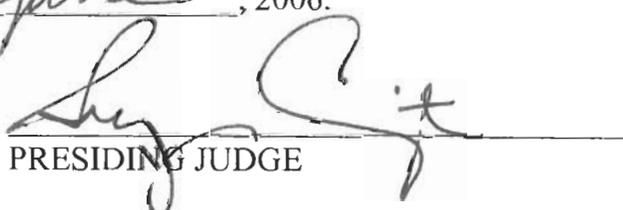
3. If it has not already done so, the TMB shall release the remaining information in the doctor's licensure file, to the requestor promptly upon receipt by the TMB of an agreed final judgment signed by the Court.

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

5. All relief not expressly granted is denied; and

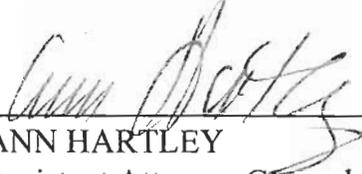
6. This Agreed Final Judgment finally disposes of all claims between Plaintiff and Defendant and is a final judgment.

SIGNED this the 20 day of June, 2006.

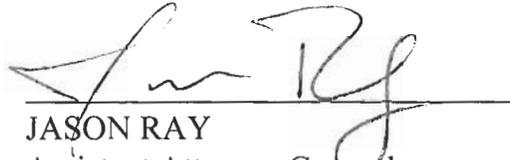


PRESIDING JUDGE

APPROVED:



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