ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 21, 2003

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

OR2003-7524

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# 189731.

The Texas State Board of Medical Examiners (the "board") received a request for information regarding complaints filed against a named physician licensed by the board. You claim that the requested information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted information.[1]

Initially, we must address the board's obligations under section 552.301 of the Government Code. Sections 552.301(a) and (b) provide:

> (a) A governmental body that receives a written request for information that it wishes to withhold from public disclosure and that it considers to be within one of the [Public Information Act's] exceptions . . . must ask for a decision

[1]We note that you have notified the physician at issue of the present request pursuant to section 552.305 of the Government Code, and we have received written comments from counsel for the physician. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under Public Information Act in certain circumstances). Based on our finding under your claimed exception to disclosure, we do not reach arguments submitted by counsel for the physician in this instance.

> from the attorney general about whether the information is within that exception if there has not been a previous determination about whether the information falls within one of the exceptions.
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> (b) The governmental body must ask for the attorney general's decision and state the exceptions that apply within a reasonable time but not later than the tenth business day after the date of receiving the written request.

You state that the board received the present request for information on July 31, 2003. Accordingly, you were required to submit your request for a decision from this office no later than August 14, 2003. You delivered your request for a decision on August 18, 2003. Consequently, we determine that the board failed to request a decision within the ten business day period as mandated by section 552.301(b) of the Government Code. *See* Gov't Code § 552.308(b) (state agency can meet the ten day requirement if: 1) if the request is sent to the attorney general by first class mail, and the request bears post office cancellation mark indicating time within ten day period or the governmental body furnishes satisfactory proof that the request was deposited in the mail within that period; or 2) if the request is sent by interagency mail and the agency provides evidence sufficient to establish that the request was deposited in interagency mail within that period).

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See* Gov't Code § 552.302; *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). Section 552.101 provides a compelling reason to overcome the presumption of openness. *See* Open Records Decision No. 630 (1994) (presumption of openness overcome by a showing that the information is made confidential by another source of law or affects third party interests). Thus, we next address 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 consists of investigative information gathered by the board during investigations of the named licensed physician. Based on your representation and our review of the submitted information, we determine that the submitted records are confidential under section 164.007(c) of the Occupations Code. We therefore conclude that the board must withhold the submitted records pursuant to section 552.101 of the Government Code.[2]

You request that this office issue a previous determination, to be applied retroactively by the board, that would categorically encompass the types of investigation records at issue in the present request. We decline to issue a previous determination at this time. Accordingly, this letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us. 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).

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[2]Because we are able to make this determination under section 552.101 in conjunction with section 164.007, we do not reach your argument under section 160.006 of the Occupations Code.

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# 189731

Enc: Submitted documents

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