



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 14, 2003

Ms. Terrie L. Hairston
Executive Director
Board of Vocational Nurse Examiners
333 Guadalupe Street, Suite 3-400
Austin, Texas 78701

OR2003-8188

Dear Ms. Hairston:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 191007.

The Board of Vocational Nurse Examiners (the "board") received a request for information relating to a named individual, including application forms, license renewals, complaints, investigations, and disciplinary actions. You claim that the requested information is excepted from disclosure under sections 552.101, 552.102, 552.103, and 552.111 of the Government Code.¹ We have considered the exceptions you raise and have reviewed the information you submitted.

Initially, we address your claim under the federal Health Insurance Portability and Accountability Act of 1996 ("HIPAA"). *See* Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. §§ 1320d-1320d-8. Section 552.101 of the Government Code excepts from required public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This exception encompasses information that other statutes make confidential. You claim that some of the submitted

¹The board also initially raised section 552.107, but has submitted no arguments in support of that exception, and therefore we do not address section 552.107. *See* Gov't Code § 552.301(e)(1)(A). We also note that the board did not timely assert its claim under section 552.102. *See id.* § 552.301(b). We will address section 552.102, however, as it is a mandatory exception to disclosure that a governmental body may not waive. *See id.* §§ 552.007, 552.352; Open Records Decision No. 665 at 2 n.5 (2000).

information is subject to HIPAA.² At the direction of Congress, the Secretary of Health and Human Services (“HHS”) promulgated regulations setting privacy standards for medical records, which HHS issued as the Federal Standards for Privacy of Individually Identifiable Health Information. *See id.*, 42 U.S.C. § 1320d-2 (Supp. IV 1998) (historical & statutory note); Standards for Privacy of Individually Identifiable Health Information, 45 C.F.R. Pts. 160, 164; *see also* Attorney General Opinion JC-0508 at 2 (2002). These standards govern the releasability of protected health information by a covered entity. *See* 45 C.F.R. Pts. 160, 164. Under these standards, a covered entity may not use or disclose protected health information, except as provided by parts 160 and 164 of title 45 of the Code of Federal Regulations. *See* 45 C.F.R. § 164.502(a). Section 160.103 defines a covered entity as a health plan, a health clearinghouse, or a health care provider that transmits any health information in electronic form in connection with a transaction covered by subchapter C, subtitle A of title 45. *See* 45 C.F.R. § 160.103. In this instance, you have not demonstrated how or why the board is a covered entity under HIPAA. Thus, we conclude that HIPAA is not applicable to any of the submitted information, and therefore none of the submitted information may be withheld on that basis.

You also claim that all of the submitted information is excepted from disclosure under section 552.103 of the Government Code. This exception provides in part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person’s office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov’t Code § 552.103(a), (c). The governmental body that raises section 552.103 has the burden of providing relevant facts and documents that are sufficient to establish the applicability of this exception to the information that the governmental body seeks to withhold. The governmental body must demonstrate: (1) that litigation was pending or reasonably anticipated on the date of its receipt of the request for information *and* (2) that the information at issue is related to the pending or anticipated litigation. *See University of*

²We note that, if applicable, HIPAA generally preempts a contrary provision of state law. *See* 45 C.F.R. §§ 160.202, 160.203.

Tex. Law Sch. v. Texas Legal Found., 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); *see also* Open Records Decision No. 551 at 4 (1990). Both elements of the test must be established in order for information to be excepted from disclosure under section 552.103. *Id.*

In this instance, you inform us that the submitted information relates to proceedings before the State Office of Administrative Hearings (“SOAH”). You state that the board “has compiled a record that will be utilized to establish certain statutory violations or grounds for disciplinary action” against the individual to whom the submitted information pertains. You also state that “this information was compiled in anticipation of litigation.” You further explain that “informal disposition or litigation of this contested case is currently pending in this matter pursuant to § 302.411 of the Occupations Code” and that “further litigation of this contested case is anticipated before SOAH pursuant to § 302.455 of the Occupations Code.” We note that a contested case under the Texas Administrative Procedure Act (the “APA”), chapter 2001 of the Government Code, constitutes “litigation” for purposes of section 552.103. *See* Open Records Decision No. 588. Therefore, based on your representations, we find that the board was a party to pending litigation when it received this request for information. We also find that the submitted information relates to the pending litigation. We therefore conclude that the board may withhold most of the submitted information under section 552.103 of the Government Code.

We note that the opposing party to the pending litigation already has seen or had access to the rest of the submitted information. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to the litigation to obtain it through discovery procedures. *See* Open Records Decision No. 551 at 4-5 (1990). Therefore, if the opposing party to the litigation has already seen or had access to information that relates to the litigation, through discovery or otherwise, there is no interest in withholding that information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, the submitted information that the opposing party already has seen or to which he has already had access may not now be withheld under section 552.103. The rest of the submitted information is excepted from disclosure at this time under section 552.103. We note that the board may no longer withhold this information under section 552.103 once the related litigation concludes. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982). The board must not release confidential information, however, even at the conclusion of the litigation. *See* Gov’t Code §§ 552.007, .352.

We next note that section 552.101 is or may be applicable to some of the information that the board may not withhold under section 552.103. A W-4 form is confidential under section 6103 of title 26 of the United States Code. Section 6103(a) makes federal tax return information confidential. The term “return information” includes “the nature, source, or amount of income” of a taxpayer. *See* 26 U.S.C. § 6103(b)(2). The board must withhold the

W-4 forms that we have marked under section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code.

Section 552.101 also incorporates the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. *See* Occ. Code § 151.001. The MPA governs the disclosure of medical records. Section 159.002 of the MPA provides in part:

- (a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.
- (b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.
- (c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Id. § 159.002(a)-(c). This office has determined that in governing access to a specific subset of information, the MPA prevails over the more general provisions of chapter 552 of the Government Code. *See* Open Records Decision No. 598 (1991). Medical records must be released upon the patient's signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. *See* Occ. Code §§ 159.004, .005. Any subsequent release of medical records must be consistent with the purposes for which the governmental body obtained the records. *See id.* § 159.002(c); Open Records Decision No. 565 at 7 (1990). We have marked the submitted information that is encompassed by the MPA. The board must not release that information unless the MPA permits the board to do so. *See* Open Records Decision No. 598 (1991).

You assert that a social security number contained in the remaining information is confidential under section 552.101 in conjunction with section 56.001 of the Occupations Code. This section provides as follows:

The 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. You state that the social security number at issue belongs to a licensee. However, you do not inform us, nor does it appear from our review of the submitted information, that this social security number was provided to the board by the individual as an applicant or holder of a license, certificate of registration, or other legal authorization to practice in a specified occupation or profession. *See id.* Accordingly, we conclude that the board may not withhold this social security number under section 552.101 of the Government Code in conjunction with section 56.001 of the Occupations Code.

Nevertheless, this social security number may be confidential under section 552.101 in conjunction with 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), if it was obtained or is maintained by the board under any provision of law enacted on or after October 1, 1990. *See Open Records Decision No. 622 at 2-4 (1994).* In this instance, we have no reason to conclude that the social security number in question is confidential under section 405(c)(2)(C)(viii)(I) of the federal law and therefore excepted from disclosure under section 552.101 of the Government Code. We caution you, however, that chapter 552 of the Government Code imposes criminal penalties for the release of confidential information. *See Gov't Code §§ 552.007, .352.* Therefore, before releasing the social security number that we have marked, the board should ensure that it was not obtained and is not maintained pursuant to any provision of law enacted on or after October 1, 1990.

Section 552.101 of the Government Code also encompasses the common-law right to privacy. Information must be withheld from the public under section 552.101 in conjunction with common-law privacy when the information is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, *and* (2) of no legitimate public interest. *See Industrial Found. v. Texas Ind. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Common-law privacy encompasses the specific types of information that the Texas Supreme Court held to be intimate or embarrassing in *Industrial Foundation*. *See* 540 S.W.2d at 683 (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). This office has since concluded that other types of information also are private under section 552.101. *See generally* Open Records Decision No. 659 at 4-5 (1999) (summarizing information attorney general has determined to be private). Common-law privacy also encompasses certain types of personal financial information. In prior decisions, this office has determined that financial information relating only to an individual ordinarily satisfies the first element of the common-law privacy test, but the public has a legitimate interest in the essential facts about a financial transaction between an individual and a governmental body. *See, e.g.*, Open Records Decision Nos. 545 at 4 (1990) (“In general, we have found the kinds of financial information not excepted from public disclosure by common-law privacy to be those regarding the receipt of governmental funds or debts owed to governmental entities”), 523 at 4 (1989) (noting distinction under common-law privacy between confidential background financial information furnished to public body about

individual and basic facts regarding particular financial transaction between individual and public body), 373 at 4 (1983) (determination of whether public's interest in obtaining personal financial information is sufficient to justify its disclosure must be made on case-by-case basis). We have marked the information that the board must withhold under section 552.101 of the Government Code in conjunction with common-law privacy.

The board also claims that section 552.102 of the Government Code is applicable to some of the information that is not protected by section 552.103.³ Section 552.102(a) excepts from required public disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]" Section 552.102(a) is applicable only to personnel information that relates to a governmental official or employee. *See Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.); Open Records Decision No. 327 at 2 (1982) (anything relating to public employee's employment and its terms constitutes information relevant to employment relationship and is part of employee's personnel file). In this instance, the information at issue does not relate to an official or employee of a governmental entity, and therefore none of the remaining information may be withheld from disclosure under section 552.102(a) of the Government Code.

We note, however, that the remaining information includes a Texas driver's license number. Section 552.130 of the Government Code excepts from disclosure information that relates to "a motor vehicle operator's or driver's license or permit issued by an agency of this state[.]" Gov't Code § 552.130(a)(1). We have marked Texas driver's license information that the board must withhold under section 552.130.

In summary: (1) most of the submitted information is excepted from disclosure at this time under section 552.103 of the Government Code; (2) the board must withhold the W-4 forms under section 552.101 of the Government Code in conjunction with section 6103 of title 26 of the United States Code; (3) the board must not release the information that is confidential under section 552.101 in conjunction with the MPA, unless the MPA permits the board to do so; (4) the board may be required to withhold the social security number under section 405(c)(2)(C)(viii)(I) of title 42 of the United States Code; (5) the board must withhold the information that is protected by common-law privacy under section 552.101; and (6) the board must withhold the Texas driver's license information under section 552.130. The rest of the submitted information must be released. As we are able to make these determinations, we need not address your other arguments against disclosure.

³In conjunction with your claim under section 552.102, you also assert that personnel records may be excepted from disclosure under section 552.305 of the Government Code. Please note that section 552.305 is not an exception to public disclosure. Rather, this section permits a governmental body to decline to release information for the purpose of requesting an attorney general decision if the governmental body believes that a person's privacy or property interests may be involved. *See Gov't Code § 552.305(a)*; Open Records Decision No. 542 at 1-3 (1990) (discussing statutory predecessor).

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).

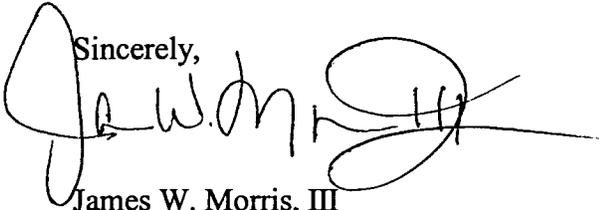
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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,

A handwritten signature in black ink, appearing to read "James W. Morris, III". The signature is stylized with a large initial "J" and a long horizontal stroke at the end.

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

JWM/sdk

Ref: ID# 191007

Enc: Submitted documents

c: Ms. Colleen Harmon
The Fillmore Law Firm, L.L.P.
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(w/o enclosures)