



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 4, 2003

Ms. Sandra Smith
Executive Director
Texas Board of Chiropractic Examiners
333 Guadalupe, Suite 3-825
Austin, Texas 78701-3942

OR2003-8714

Dear Ms. Smith:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 192067.

The Texas Board of Chiropractic Examiners (the "board") received a request for a specified chiropractor's "professional file." The requestor subsequently amended her request to exclude the chiropractor's social security number. You state that the board is providing the requestor with some responsive information. You claim, however, that the remaining requested information is excepted from disclosure pursuant to sections 552.026, 552.101, and 552.102 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted information.

Initially, we must address the procedural requirements of section 552.301 of the Government Code. Pursuant to section 552.301(b), a governmental body must ask the attorney general for a decision as to whether requested information must be disclosed and state the exceptions to disclosure that apply to the requested information not later than the tenth business day after the date of receiving the written request for information. *See* Gov't Code § 552.301(b). In addition, section 552.301(e) provides that a governmental body that requests an attorney general decision under section 552.301(a) must, within a reasonable time, but not later than the fifteenth business day after the date of receiving the written request, submit to the attorney general, among other items, written comments stating the reasons why the stated exceptions to disclosure apply that would allow the requested information to be withheld and a copy of the specific information requested or representative samples, labeled to indicate which exceptions to disclosure apply to which parts of the documents. *See id.* § 552.301(e).

You state that the board received the original request for information on September 18, 2003. Therefore, the board had until October 2, 2003 to state all of the exceptions to disclosure that apply to the information at issue. Further, the board had until October 9, 2003 to provide us with all written comments stating the reasons why the stated exceptions to disclosure apply that would allow the information at issue to be withheld and until that same date to provide us with a copy of the specific information at issue that was requested or representative samples of such information. We note, however, that the board did not claim that any portion of the information at issue was excepted from disclosure under sections 552.026 and 552.102 of the Government Code until October 15, 2003. Further, the board did not submit some of the information at issue until that same date. Accordingly, we conclude that the board failed to comply with the procedural requirements of section 552.301 in requesting this decision from us with regard to this particular information.

Because the board failed to comply with the procedural requirements of section 552.301 in requesting this decision from us with regard to this particular information, that information is now presumed public. *See* Gov't Code § 552.302; *see also 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 board must demonstrate a compelling interest in order to overcome the presumption that this particular information is now public. *See id.* Normally, a compelling interest is demonstrated when some other source of law makes the information at issue confidential or when third party interests are at stake. *See* Open Records Decision No. 150 at 2 (1977). Since the board claims that this particular information is excepted from disclosure under sections 552.026, 552.101, and 552.102 of the Government Code, we will address these claims with regard to this information, as well as the remaining submitted information.

You claim that a portion of the submitted information is excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with federal law.¹ We note that section 11131(a) of title 42 of the United States Code provides that an "entity (including an insurance company) which makes payment under a policy of insurance, self-insurance, or otherwise in settlement (or partial settlement) of, or in satisfaction of a judgment in, a medical malpractice action or claim shall report, in accordance with section 11134 of this title, information respecting the payment and circumstances thereof." 42 U.S.C. § 11131(a). In addition, section 11137(b)(1) of title 42 of the United States Code provides:

Information reported under this subchapter is considered confidential and shall not be disclosed (other than to the physician or practitioner involved) except with respect to professional review activity, as necessary to carry out

¹ Section 552.101 of the Government Code excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. *See* Gov't Code § 552.101. Section 552.101 encompasses information that is protected from disclosure by federal law.

subsections (b) and (c) of section 11135 of this title (as specified in regulations by the Secretary), or in accordance with regulations of the Secretary promulgated pursuant to subsection (a) of this section. Nothing in this subsection shall prevent the disclosure of such information by a party which is otherwise authorized, under applicable State law, to make such disclosure. Information reported under this subchapter that is in a form that does not permit the identification of any particular health care entity, physician, other health care practitioner, or patient shall not be considered confidential . . .

42 U.S.C. § 11137(b)(1). Further, section 11137(b)(2) prescribes a civil monetary penalty for a violation of section 11137(b)(1). *See* 42 U.S.C. § 11137(b)(2). We understand you to contend that this particular information constitutes a report filed by an insurance company pursuant to section 11131. You do not indicate that there is any applicable law, regulation, or exception to section 11137(b)(1) under which this information may be made available to the requestor. Given that assumption, we agree that section 11131 is applicable to this particular information and that it is, thus, made confidential under section 11137 of title 42 of the United States Code. *See id.* Accordingly, we conclude that the board must withhold the information that we have marked pursuant to section 552.101 of the Government Code in conjunction with section 11137(b)(1) of title 42 of the United States Code.²

In addition, you claim that most of the remaining submitted information is excepted from disclosure pursuant to section 552.026 of the Government Code. Section 552.026 provides:

This chapter does not require the release of information contained in education records of an educational agency or institution, except in conformity with the Family Educational Rights and Privacy Act of 1974, Sec. 513, Pub. L. No. 93-380, 20 U.S.C. Sec. 1232g [(FERPA)].

Gov't Code § 552.026. Section 552.114 of the Government Code excepts from disclosure student records at an educational institution funded completely or in part by state revenue. *See* Gov't Code § 552.114. This office generally applies the same analysis under section 552.114 and FERPA. *See* Open Records Decision No. 539 (1990).

FERPA provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases personally identifiable information (other than directory information) contained in a student's education records to anyone but certain enumerated federal, state, and local officials and institutions, unless otherwise authorized by

² Because we base our ruling regarding this particular information on section 552.101 of the Government Code in conjunction with section 11137(b)(1) of title 42 of the United States Code, we need not address your claim regarding the Medical Practice Act ("MPA"), chapter 159 of the Occupations Code.

the student's parent. *See* 20 U.S.C. § 1232g(b)(1). "Education records" are those records, files, documents, and other materials which

- (i) contain information directly related to a *student*; and
- (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.

20 U.S.C. § 1232g(a)(4)(A) (emphasis added). A "student"

includes any person with respect to whom an educational agency or institution maintains education records or personally identifiable information, but does not include a person who has not been in attendance at such agency or institution.

Id. § 1232g(a)(6) (emphasis added). We note that the board is not an educational institution attended by students. Consequently, the records you seek to withhold are not "education records" as defined by FERPA. *See* Open Records Decision No. 390 (1983). Accordingly, we conclude that the board may not withhold any portion of the remaining submitted information pursuant to section 552.026 of the Government Code or FERPA.

Further, you claim that most of the remaining submitted information is excepted from disclosure pursuant to section 552.102 of the Government Code. Section 552.102 excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). Section 552.102(a) is generally applicable to information relating to a public official or employee. *See* Open Records Decision No. 327 at 2 (1982) (anything relating to employee's employment and its terms constitutes information relevant to person's employment relationship and is part of employee's personnel file). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected from disclosure under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation* for information claimed to be protected from disclosure under the common-law right to privacy as incorporated by section 552.101 of the Government Code. *See Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Accordingly, we address the board's section 552.102 claim under section 552.101 of the Government Code in conjunction with the common-law right to privacy.

Information must be withheld from disclosure under the common-law right to privacy when it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *See Industrial Found.*, 540 S.W.2d at 685. The types 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. *See id.* at 683. After carefully considering your arguments and reviewing the remaining submitted information, we find that no portion of this information is protected from disclosure under the common-law right to privacy. Accordingly, we conclude that the board may not withhold any portion of the remaining submitted information under section 552.101 or section 552.102 of the Government Code in conjunction with the common-law right to privacy.

In summary, the board must withhold the submitted information that we have marked pursuant to section 552.101 of the Government Code in conjunction with section 11137(b)(1) of title 42 of the United States Code. With the exception of the social security numbers contained within the remaining submitted information, the board must release the remaining 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).

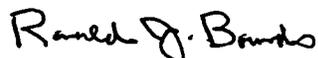
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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,



Ronald J. Bounds
Assistant Attorney General
Open Records Division

RJB/lmt

Ref: ID# 192067

Enc. Marked documents

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