



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 5, 2004

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

OR2004-3668

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# 200851.

The Texas State Board of Chiropractic Examiners (the "board") received a request for information relating to a named chiropractor and a specified facility. You state that the board is providing some responsive information to the requestor. You claim that portions of the submitted information are excepted from disclosure under sections 552.026, 552.101, 552.108, and 552.136 of the Government Code, and the Family Educational Rights and Privacy Act of 1974 ("FERPA"), section 1232g of Title 20 of the United States Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," and encompasses information protected by other statutes. You assert that the submitted college transcripts are confidential under FERPA. 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 the student's parent. *See* 20 U.S.C. § 1232g(b)(1). "Education records" means those records that contain information directly related to a student and are maintained by an educational agency or institution or by a person acting for such agency or institution. *Id.* § 1232g(a)(4)(A).

We note that the board is not an educational agency or institution. However, FERPA also contains provisions governing access to information in education records transferred by an educational agency or institution to a third party. FERPA provides that an educational

agency or institution may only transfer personal information to a third party “on the condition that such party will not permit any other party to have access to such information without the written consent of the parents of the student.” *Id.* § 1232g(b)(4)(B). Federal regulations provide that a third party that receives such information from an educational agency may use the information only for the purposes for which the disclosure was made. 34 C.F.R. § 99.33(a)(2). It appears that the submitted transcripts may have been received by the board from an educational institution. If the board received the transcripts from an educational institution, pursuant to sections 1232g(b)(4)(B) and 99.33(a)(2), the board may only release the transcripts upon consent of the named chiropractor. If, however, the board did not receive the transcripts from the colleges at issue, then the board may not withhold the submitted transcripts under FERPA.

Next, the information at issue contains the social security number of the chiropractor at issue. Section 58.001 of the Occupations Code 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 § 58.001. The chiropractor’s social security number is confidential under section 58.001 of the Occupations Code and must be withheld pursuant to section 552.101 of the Government Code.

You also contend that portions of the submitted information are excepted under section 552.101 in conjunction with section 201.402 of the Occupations Code. Chapter 201 of the Occupations Code governs the practice of chiropractic. Section 201.402 of the Occupations Code provides in part:

(a) Communications between a chiropractor and a patient relating to or in connection with any professional services provided by a chiropractor to the patient are confidential and privileged and may not be disclosed except as provided by this subchapter.

(b) Records of the identity, diagnosis, evaluation, or treatment of a patient by a chiropractor that are created or maintained by a chiropractor are confidential and privileged and may not be disclosed except as provided by this subchapter.

(c) A person who receives information from the confidential communications or records, excluding a person listed in Section 201.404(a) 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.

Occ. Code § 201.402(a)-(c). Chapter 201 includes exceptions to confidentiality and consent provisions. *See id.* §§ 201.403, .404, .405. We have marked the information that is subject to chapter 201 of the Occupations Code. The board may release this information only if chapter 201 of the Occupations Code permits the board to do so.

Next, you contend that a portion of the submitted information is excepted from disclosure under section 552.108 of the Government Code. Section 552.108(a) generally excepts information held by a law enforcement agency that deals with the detection, investigation, or prosecution of crime, if release of the information would interfere with the detection, investigation, or prosecution of crime. *See Gov't Code* §§ 552.108(a)(1), (2). Section 552.108(b) generally excepts an internal record or notation of a law enforcement agency that is maintained for internal use in matters relating to law enforcement, if release of the internal record or notation would interfere with law enforcement or prosecution. *See Gov't Code* §§ 552.108(b)(1), (2). A governmental body that claims information is excepted from disclosure under section 552.108 must reasonably explain how and why section 552.108 is applicable to the information. *See Gov't Code* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Open Records Decision No. 434 at 2-3 (1986).

The board is not a law enforcement agency. *See* Open Records Decision No. 199 (1978) (agency whose function is essentially regulatory in nature is not "law enforcement agency" for purposes of statutory predecessor to section 552.108). By its terms, section 552.108 applies only to a law enforcement agency or a prosecutor. This office has determined, however, that where an incident involving alleged criminal conduct is still under active investigation or prosecution, section 552.108 may be invoked by any proper custodian of information that relates to the incident. *See* Open Records Decision Nos. 474 (1987), 372 (1983) (where incident involving allegedly criminal conduct is still under active investigation or prosecution, section 552.108 may be invoked by any proper custodian of information relating to incident). Where a non-law enforcement agency has custody of information relating to a pending case of a law enforcement agency, the agency having custody of the information may withhold the information under section 552.108 if the agency demonstrates that the information relates to the pending case and provides this office with a representation from the law enforcement entity that the law enforcement entity wishes to withhold the information. In this case, we find that the board has failed to demonstrate that the information at issue relates to a pending case. Furthermore, you have not provided this office with a representation from any law enforcement entity that wishes to withhold the information. We therefore determine that the board may not withhold any of the submitted information pursuant to section 552.108 of the Government Code.

We note that the submitted documents contain information that is protected by common-law privacy. Section 552.101 of the Government Code incorporates the doctrine of common-law privacy, which protects information if (1) the information contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). 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. 540 S.W.2d at 683. This office has found that some kinds of medical information or information indicating disabilities or specific illnesses are protected by common-law privacy. See Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). Furthermore, an individual's criminal history information, when compiled by a law enforcement agency, takes on a character that implicates the individual's right to privacy. See Open Records Decision No. 565 (citing *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989)). We have marked information in the submitted documents that the board must withhold pursuant to section 552.101 in conjunction with the doctrine of common-law privacy.

In summary, the board must withhold the social security number of the named chiropractor pursuant to section 552.101 of the Government Code in conjunction with section 58.001 of the Occupations Code. We have marked portions of the submitted information that may only be released as provided under section 201.402 of the Occupations Code. In the event the board received the submitted transcripts from an educational institution, the board may only release the transcripts upon consent of the named chiropractor. Otherwise, the transcripts must be released. We have marked portions of the submitted information that must be withheld under section 552.101 in conjunction with the doctrine of common-law privacy. Based on these findings, we need not reach your claim under section 552.136 of the Government Code. The remainder of the submitted information must be released 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,



David R. Saldivar
Assistant Attorney General
Open Records Division

DRS/seg

Ref: ID# 200851

Enc: Submitted documents

c: Ms. Cecilia Dalli
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