

The ruling you have requested has been amended as a result of litigation and has been attached to this document.



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

November 22, 2005

Mr. Robert Simpson  
Assistant General Counsel  
Texas State Board of Medical Examiners  
P.O. Box 2018  
Austin, Texas 78768-2018

OR2005-10574

Dear Mr. Simpson:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 236828.

The Texas State Board of Medical Examiners (the "board") received a request for information relating to a named physician, including records pertaining to disciplinary actions and orders, complaints, and licensing. You state that the board has provided the requestor a copy of the public verification/physician profile information, including any disciplinary action, and other information the board believes is not excepted from required public disclosure.<sup>1</sup> You claim that certain additional information that is responsive to this request and that you have submitted to this office for our review is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted information.<sup>2</sup>

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<sup>1</sup>We note that the Texas Medical Practice Act, subtitle B of title 3 of the Occupations Code, requires the board to make public certain information concerning physicians licensed in this state. See Occ. Code §§ 154.004 (requiring board to make public on request summary of any previous disciplinary board order against specific physician licensed in Texas), .006 (requiring board's compilation of physician profiles in format easily available to the public).

<sup>2</sup>We note that the board also provided notice of this request for information to the physician whose records are requested. As of the date of this decision, this office has received no correspondence from the physician in question. See Gov't Code § 552.304 (any person may submit written comments stating why information at issue in request for attorney general decision should or should not be released).

Initially, we address your assertion that some of the submitted information should not be released because the board received that information under a confidentiality provision. We note that information is not confidential under the Act simply because the party that submits the information anticipates or requests that it be kept confidential. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot, through an agreement or contract, overrule or repeal provisions of the Act. *See* Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) (“[T]he obligations of a governmental body under [the predecessor to the Act] cannot be compromised simply by its decision to enter into a contract.”), 203 at 1 (1978) (mere expectation of confidentiality by person supplying information did not satisfy requirements of statutory predecessor to Gov’t Code § 552.110). Consequently, unless the submitted information falls within an exception to disclosure under the Act, the information must be released, notwithstanding any expectation or agreement to the contrary.

Section 552.101 excepts from required public disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This exception encompasses information that another statute makes confidential. You contend that the submitted information is confidential under section 164.007(c) of the Occupations Code. Section 164.007(c) 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. For purposes of this subsection, investigative information includes information relating to the identity of, and a report made by, a physician performing or supervising compliance monitoring for the board.

Occ. Code § 164.007(c). You inform us that the submitted documents consist of investigative information that is in the possession of or was received or gathered by the board in connection with complaints, disciplinary matters, and an application for licensure. You assert that section 164.007(c) is applicable to all of the submitted information. You explain that section 154.056 of the Occupations Code requires the board to investigate complaints. You also explain that section 155.003(d) of the Occupations Code authorizes the board to investigate applicants for licensure to determine that the applicant is eligible to be licensed. *See id.* § 155.003(d); *see also id.* § 164.001 (setting out circumstances under which board may refuse to admit person to its examination or to issue or renew a license).

Having considered your arguments, we conclude that the submitted complaint and disciplinary files and some of the documents in the submitted license application file are confidential under section 164.007(c) of the Occupations Code and are therefore excepted from required disclosure under section 552.101 of the Government Code. We have marked

the documents in the license application file that the board must withhold on this basis. We further conclude, however, that the remaining documents in the license application file are not confidential under section 164.007(c). Consequently, the board may not withhold any of the remaining documents in the license application file under section 552.101 of the Government Code on the basis of section 164.007(c).

We note, however, that the remaining information in the license application file includes fingerprints. The public availability of that information is governed by sections 560.001, 560.002, and 560.003 of the Government Code. These sections provide as follows:

Sec. 560.001. 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. 560.002. 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. 560.003. APPLICATION OF CHAPTER 552. A biometric identifier in the possession of a governmental body is exempt from disclosure under Chapter 552.

Gov't Code §§ 560.001, 560.002, 560.003. The fingerprints that we have marked are confidential under section 560.003 of the Government Code. As there is no indication that the requestor would have a right of access to the fingerprints under section 560.002, they must also be withheld under section 552.101 of the Government Code.

We also note that some of the information that the board must release appears to be protected by copyright law. A governmental body must allow inspection of copyrighted information unless an exception to disclosure applies to the information. *See* Attorney General Opinion JM-672 (1987). An officer for public information also must comply with copyright law, however, and is not required to furnish copies of copyrighted information. *Id.* A member of the public who wishes to make copies of copyrighted information must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 at 8-9 (1990).

In summary: (1) the board must withhold the complaint and disciplinary files and the marked documents in the license application file under section 552.101 of the Government Code in conjunction with section 164.007(c) of the Occupations Code; and (2) the board must withhold the marked fingerprints under section 552.101 in conjunction with section 560.003 of the Government Code. The rest of the submitted information must be released. In releasing information that is protected by copyright, the board must comply with copyright law.

You also ask this office to issue a previous determination that would permit the board to withhold all investigative information, whether gathered as a disciplinary investigation or as a licensure investigation, without the necessity of seeking a ruling from this office under section 552.101 in conjunction with section 164.007(c). *See* Gov't Code § 552.301(a); Open Records Decision No. 673 (2001). 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; 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

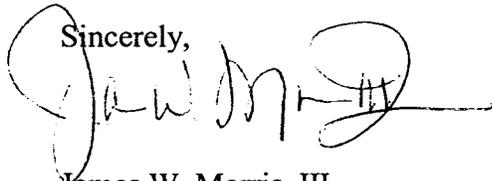
statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 Office of the Attorney General 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. 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,



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

JWM/sdk

Ref: ID# 236828

Enc: Submitted documents

c: Mr. Joel T. Gomez  
Van Wey & Johnson, L.L.P.  
3100 Monticello Avenue, Suite 500  
Dallas, Texas 75205  
(w/o enclosures)

Dr. Alan Scott Clark  
4211 Joe Ramsey Boulevard, Suite 100  
Greenville, Texas 75402-1508  
(w/o enclosures)

NOV 21 2006

At 9:134 M.  
Amalia Rodriguez-Mendoza, Clerk

CAUSE NO. GV505206

TEXAS MEDICAL BOARD,  
Plaintiff,

V.

GREG ABBOTT, ATTORNEY GENERAL  
OF THE STATE OF TEXAS,  
Defendant.

§ IN THE DISTRICT COURT OF  
§  
§  
§ TRAVIS COUNTY, TEXAS  
§  
§  
§ 201<sup>st</sup> JUDICIAL DISTRICT

**AGREED FINAL JUDGMENT**

On this date, Plaintiff Texas Medical Board (Board) and Defendant Greg Abbott, Attorney General of Texas, appeared, by and through their respective attorneys, and 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 Ann. ch. 552, by which Plaintiff seeks relief from compliance with Letter Rulings OR2005-10046 and OR2005-10574. The parties represent to the Court that, in compliance with Tex. Gov't Code Ann. § 552.325(c), the requestors, Jean Robb Hubert and Joel T. Gomez, respectively, were sent reasonable notice of this setting and of the parties' agreement that the Board must withhold the information at issue; that the requestors were also informed of their right to intervene in the suit to contest the withholding of this information; and that neither requestor has informed the parties of his intention to intervene. Neither has either requestor filed a motion to intervene or appeared today. After considering the agreement 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. The information at issue, specifically, investigative information in the possession of or received or gathered by the Board or its employees or agents relating to an application for license for Thomas Lane Dykes, M.D., that was ordered released by the Attorney General in the underlying letter ruling, is confidential under Tex. Occ. Code § 164.007(c) and therefore excepted from disclosure by Tex. Gov't Code § 552.101;

2. The information at issue, specifically, investigative information in the possession of or received or gathered by the Board or its employees or agents relating to an application for license for Allan Scott Clark, M.D., that was ordered released by the Attorney General in the underlying letter ruling, is confidential under Tex. Occ. Code § 164.007(c) and therefore excepted from disclosure by Tex. Gov't Code § 552.101;

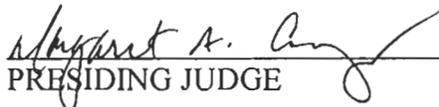
3. The Board shall withhold from the requestors the information at issue described in Paragraphs 1 and 2 of this Agreed Final Judgment;

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 21 day of November, 2006.

  
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PRESIDING JUDGE

APPROVED:

*L Ginn*

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LESLI GATTIS GINN  
Assistant Attorney General  
Financial Litigation Division  
Office of the Attorney General  
P. O. Box 12548, Capitol Station  
Austin, Texas 78711-2548  
Telephone: 463-2018  
Fax: 477-2348  
State Bar No. 24050664  
ATTORNEY FOR PLAINTIFF

*B Loudermilk*

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BRENDA LOUDERMILK  
Chief, Open Records Litigation  
Administrative Law Division  
Office of the Attorney General  
P. O. Box 12548, Capitol Station  
Austin, Texas 78711-2548  
Telephone: 475-4292  
Fax: 320-0167  
State Bar No. 12585600  
ATTORNEY FOR DEFENDANT