



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 9, 2005

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

OR2005-11068

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# 237814.

The Texas State Board of Medical Examiners (the "board") received a request for all information pertaining to a named licensee of the board. You state that the board has provided the requestor with 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.¹ You claim that the remaining 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. We have also considered comments submitted by an attorney representing the physician who is the subject of the requested information. *See* Gov't Code § 552.304 (providing that member of public may submit comments stating why information 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

¹We 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).

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 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This section encompasses information protected by other statutes. Section 164.007(c) of the Occupations Code provides as follows:

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.

Section 552.101 also encompasses the doctrine of common law privacy, which protects information if 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 Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). 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. *Id.* at 683. In addition, this office has found that the following types of information are excepted from required public disclosure under common law privacy: an individual's criminal history when compiled by a governmental body, *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)); personal financial information not relating to a financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990); some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps); and identities of victims of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982). We have reviewed the submitted records and marked the private information that must be withheld by the board under section 552.101 of the Government Code in conjunction with common law privacy.

We note that the remaining submitted information contains social security numbers. Section 552.147 of the Government Code² provides that "[t]he social security number of a living person is excepted from" required public disclosure under the Act. Therefore, the board must withhold the social security numbers contained in the submitted information that we have marked under section 552.147.³

We also note that some of the remaining information 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

²Added by Act of May 23, 2005, 79th Leg., R.S., S.B. 1485, ch. 397, 2005 Tex. Sess. Law Serv. 1091 (Vernon) (to be codified at Tex. Gov't Code § 552.147).

³We note that section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act.

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. The board must withhold the marked fingerprints under section 552.101 in conjunction with section 560.003 of the Government Code. The board must withhold the information we have marked pursuant to section 552.101 in conjunction with the common law right to privacy. The board must withhold social security numbers under section 552.147. 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,



Brian J. Rogers
Assistant Attorney General
Open Records Division

BJR/krl

Ref: ID# 237814

Enc. Submitted documents

c: Ms. Rebecca Whitehouse
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(w/o enclosures)