

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

December 12, 2005

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

OR2005-11108

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# 237859.

The Texas State Board of Medical Examiners (the "board") received a request for information relating to a named physician. 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.¹ 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.²

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).

²We 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 fingerprint information that is subject to sections 560.001, 560.002, and 560.003 of the Government Code. They 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.

It does not appear to this office that section 560.002 permits the disclosure of the submitted fingerprint information. Therefore, the board must withhold this information, which we have marked, under section 552.101 in conjunction with section 560.003 of the Government Code.

Criminal history record information ("CHRI") is confidential and not subject to disclosure. Federal regulations prohibit the release of CHRI maintained in state and local CHRI systems to the general public. *See* 28 C.F.R. § 20.21(c)(1) ("Use of criminal history record information disseminated to noncriminal justice agencies shall be limited to the purpose for which it was given."), (2) ("No agency or individual shall confirm the existence or nonexistence of criminal history record information to any person or agency that would not be eligible to receive the information itself."). Section 411.083 provides that any CHRI maintained by the Department of Public Safety ("DPS") is confidential. Gov't Code § 411.083(a). Similarly, CHRI obtained from the DPS pursuant to statute is also confidential and may only be disclosed in very limited instances. *Id.* § 411.084; *see also id.* § 411.087 (restrictions on disclosure of CHRI obtained from DPS also apply to CHRI obtained from other criminal justice agencies). Therefore, assuming that you have CHRI about the applicant in your possession and it falls within the ambit of these state and federal regulations, you must withhold the CHRI from the requestor.

We note that the submitted information contains a social security number. Section 552.147 of the Government Code 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 number contained in the submitted information under section 552.147.³

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).

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.

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; (2) the board must withhold the marked fingerprint information under section 552.101 in conjunction with section 560.003 of the Government Code; (3) CHRI must be withheld under section 552.101 in conjunction with applicable state and federal regulations, and (4) the social security number must be withheld 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,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/krl

Ref: ID# 237859

Enc. Submitted documents

c: Ms. Kimberly M. Bertram
Johnson and Hanan
100 North Broadway, Suite 2750
Oklahoma City, Oklahoma 73102-8846
(w/o enclosures)

NOV 21 2006

At 9:13A. M.
Amalia Rodriguez-Mendoza, Clerk

CAUSE NO. D-1-GN-06-000102

TEXAS MEDICAL BOARD,
Plaintiff,

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IN THE DISTRICT COURT OF

V.

TRAVIS COUNTY, TEXAS

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

353rd 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 Ruling OR2005-11108. The parties represent to the Court that, in compliance with Tex. Gov't Code Ann. § 552.325(c), the requestor, Kimberly M. Bertram, was sent reasonable notice of this setting and of the parties' agreement that the Board must withhold the information at issue; that the requestor was also informed of her right to intervene in the suit to contest the withholding of this information; and that the requestor has not informed the parties of her intention to intervene. Neither has the 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:

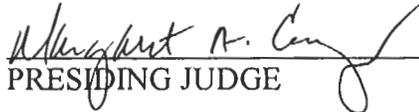
1. The information at issue, specifically, investigative information in the possession of or received or gathered by the Board or its employees or agents relating to an application for license

for Robert Mark Hoyle, 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;

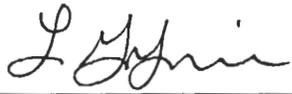
2. The Board shall withhold from the requestor the information at issue;
3. All costs of court are taxed against the parties incurring the same;
4. All relief not expressly granted is denied; and
5. This Agreed Final Judgment finally disposes of all claims between Plaintiff and

Defendant and is a final judgment.

SIGNED this the 21 day of November, 2006.


PRESIDING JUDGE

APPROVED:



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