



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 3, 2006

Mr. Hemant Makan
Executive Director
Texas State Board of Podiatric Medical Examiners
P. O. Box 12216
Austin, Texas 78711-2216

OR2006-04530

Dear Mr. Makan:

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# 247877.

The Texas State Board of Podiatric Medical Examiners (the "board") received a request for fifteen items of information related to a named doctor and four specified cases. You state that some responsive information has been released to the requestor. You state that on the date the board received the request for information it did not have any documents responsive to items 2 and 5 of the request. You further state that the board has no documents responsive to items 8-15 and a part of item 4 of the request. The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App. – San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983). Moreover, the Act does not require a governmental body to answer factual questions, conduct legal research, or create new information in responding to a request. *See Open Records Decision Nos. 563 at 8 (1990), 555 at 1-2 (1990)*. You claim that the submitted 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.¹

Initially, we must address the board's obligations under section 552.301 of the Government Code, which prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Pursuant to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply within ten business days of receiving the written request. Pursuant to section 552.301(e), a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. The board received the request for information on December 16, 2005, but did not request a decision from this office or submit the information required by section 552.301(e) until February 27, 2006. *See Gov't Code* § 552.301(b), (e). Thus, the board failed to comply with the procedural requirements mandated by section 552.301.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 319 (1982). This office has held that a compelling reason exists to withhold information when the information is confidential by another source of law. *See* Open Records Decision No. 150 (1977) (presumption of openness overcome by a showing that the information is made confidential by another source of law or affects third party interests). The application of section 552.101 of the Government Code can be such a compelling reason. We will therefore address your arguments under section 552.101.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision" and

¹We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

encompasses information protected by other statutes. Section 202.509 of the Occupations Code provides in part:

(a) A complaint, report, investigation file, or other investigative information in the possession of or received or gathered by the board or an employee or agent of the board that relates to a license holder, a license application, or a criminal investigation or proceeding is privileged, confidential, and not subject to discovery, subpoena, or any other legal method of compelling release.

Occ. Code § 202.509(a). Section 202.509 also provides for the release of information relating to a complaint under specified circumstances and to certain persons. *See id.* § 202.509(b), (d), (e), (f). Subsection (b) requires that the board release certain information that would otherwise be protected by subsection (a) when the information is requested by the license holder or the license holder's attorney, and the board intends to offer the information into evidence at the contested case hearing on the complaint. *Id.* § 202.509(b). In this case, the requestor is the license holder's attorney. However, you state that no contested case has been filed against this license holder, and therefore, subsection (b) does not apply to the requested information. We agree. Therefore, based on your representations, we conclude that the board must withhold the submitted information from the requestor pursuant to section 202.509 of the Occupations Code in conjunction with section 552.101 of the Government Code.

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/eb

Ref: ID# 247877

Enc. Submitted documents

c: Mr. Craig L. Henry
P.O. Box 3226
723 Main Street
Texarkana, Texas 75504-3226
(w/o enclosures)