



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 9, 2006

Mr. David E. Cherry
Campbell-Cherry-Harrison-Davis-Dove, P.C.
P.O. Drawer 21387
Waco, Texas 76702-1387

OR2006-04798

Dear Mr. Cherry:

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# 248569.

The Woodway Public Safety Department (the "department"), which you represent, received a request for information related to a specified incident and three named individuals. You claim that the 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.

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 encompasses information made confidential by other statutes. You claim that the requested information was created by a pharmacy peer review committee and is therefore confidential under the Pharmacy Act, which provides that "all proceedings and records of a pharmacy peer review committee are confidential and all communications made to a pharmacy peer review committee are privileged." Occ. Code § 564.103(a). A "pharmacy peer review committee" is defined as a committee "established to evaluate the quality of pharmacy services or the competence of pharmacists and suggest improvements in pharmacy systems to enhance patient care." *Id.* § 564.102(a). You state that the committee which provided the information at issue to the department was convened "to evaluate the quality of pharmacy services." *See id.* The submitted information contains witness statements which you state were obtained by the pharmacy peer review committee in the course of its investigation and were "turned over to the [department] for further investigation and possible criminal prosecution if warranted." *See id.* § 564.104(c) (provision of access to privileged pharmacy peer review committee communications or records in cooperation with law

enforcement authority in criminal investigation not waiver of privilege). You do not inform us, nor do the submitted documents indicate, that the requestor in this instance is entitled to this information pursuant to section 564.103(c). Based upon your representations and our review, we find that the witness statements at issue are records of, or communications made to, a pharmacy peer review committee that are confidential and privileged under section 564.103(a). Therefore, the department must withhold the witness statements under section 552.101 of the Government Code in conjunction with section 564.103(a) of the Occupations Code.

You further state that the submitted DEA Form 106 “was derived exclusively out of the confidential Peer Review investigation [and] was provided to [the department] for possible law enforcement purposes.” We conclude, however, that information contained in the DEA Form 106, which was completed pursuant to federal regulations, does not qualify as information or records of a pharmacy peer review committee. *See* 21 C.F.R. § 1301.76(b) (registrant must notify DEA and complete Form 106 regarding theft or significant loss of controlled substances). Therefore, such information may not be withheld under section 552.101 of the Government Code in conjunction with section 564.103(a) of the Occupations Code.

We note that you have provided this office with an affidavit from the Texas State Board of Pharmacy (the “board”) that states that the “DEA Form 106 is maintained as part of the investigative file” of the board. Section 565.055(b) of the Occupations Code states that “[i]nformation or material compiled by the board in connection with an investigation, including an investigative file of the board, is confidential[.]” *Id.* § 565.055(b). Section 565.055(c) provides that “information or material compiled by the board in connection with an investigation may be disclosed to: . . . (4) a law enforcement agency” without waiver of confidentiality. *Id.* § 565.055(c)(4). However, the confidentiality provided by section 565.055 is applicable only to investigative information compiled by the board and disclosed to a law enforcement agency by the board. You inform us that the DEA Form 106 at issue was provided to the department by the pharmacy peer review committee, not by the board. Therefore, section 565.055 is inapplicable to this information, and the department may not withhold the Form 106 under section 552.101 of the Government Code on that basis.

Accordingly, the department must withhold the witness statements under section 552.101 of the Government Code in conjunction with section 564.103(a) of the Occupations Code. The DEA Form 106 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).

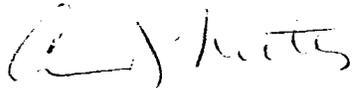
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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# 248569

Enc. Submitted documents

c: Mr. Harold J. Lotz, Jr.
Lotz & Associates, L.L.P.
1210 Nacogdoches Road
San Antonio, Texas 78209-3338
(w/o enclosures)