



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 13, 2008

Mr. Jim B. Simpson
Assistant County Attorney
Johnson County
Guinn Justice Center
204 South Buffalo Avenue, Suite 410
Cleburne, Texas 76033-5404

OR2008-03357

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# 304791.

The Johnson County Judge's Office (the "office") received a request for any demand letter, correspondence or legal filings regarding an inmate's complaint against a named individual which commissioners addressed in a meeting on December 18, 2007. You state that you have no responsive information regarding a portion of the request.¹ You claim that the submitted information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we must address the office's obligations under section 552.301 of the Government Code, which prescribes the procedures that a governmental body must follow in asking this

¹The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.— San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990).

office to decide whether requested information is excepted from public disclosure. Section 552.301(d) provides that a governmental body that requests an attorney general decision must provide to the requestor, not later than the 10th business day after the date of its receipt of the written request for information:

(1) a written statement that the governmental body wishes to withhold the requested information and has asked for an attorney general decision about whether the information is within an exception to public disclosure; and

(2) a copy of the governmental body's written communication to the attorney general asking for the decision or, if the governmental body's written communication to the attorney general discloses the requested information, a redacted copy of that written communication.

Gov't Code § 552.301(d). You forwarded this office a copy of the letter you mailed to the requestor dated January 7, 2008, which you claim timely complies with subsections 552.301(d)(1) and (d)(2). In that letter, you inform the requestor that you are seeking to withhold information and have asked for a decision from our office. While this letter is sufficient to satisfy the notification requirement of section 552.301(d)(1), it does not constitute a copy of the office's written communication to the attorney general for the purposes of section 552.301(d)(2). Thus, the office failed to comply with the procedural requirements of section 552.301(d)(2).

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). The presumption that information is public under section 552.302 can be overcome by demonstrating that the information is confidential by law or third-party interests are at stake. *See Open Records Decision Nos. 630 at 3* (1994), *325 at 2* (1982). Although you claim that the submitted information is excepted from disclosure under section 552.103 of the Government Code, this is a discretionary exception that protects a governmental body's interests and may be waived. *See Gov't Code § 552.007; Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App. — Dallas 1999, no pet.) (governmental body may waive Gov't Code § 552.103). Therefore, the office has waived section 552.103 and may not withhold any of the submitted information under this exception. However, because section 552.101 of the Government Code can provide a compelling reason to withhold information, we will address your arguments concerning this exception.

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 [Texas Medical 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).² By its terms, section 164.007(c) makes information confidential when in the possession of the Texas Medical Board (the "board"), its employees, or agents. In this case, however, the information at issue consists of communications between the board and a licensed physician relating to a complaint against the physician that are in the possession of the office. See 22 TAC §§ 178.5-178.7 (providing for communications between board and physician regarding complaint against physician.). Although section 164.007 of the Occupations Code provides that confidential information in the possession of the board may be transferred in certain circumstances, you do not inform us, nor is it apparent from our review of the submitted information, that the office received the information from the board pursuant to any of the release provisions in section 164.007. See Occ. Code § 164.007(d), (f)-(h). See also 22 TAC § 179.3 (enumerating entities and persons to whom confidential complaint information may be released). Further, you do not assert, and the submitted documents do not reflect, that the office is holding these documents as an agent of the board. Accordingly, we conclude that section 164.007(c) does not make the information confidential in this instance, and it may not be withheld on this basis.

However, we note that section 552.101 also encompasses the doctrine of common-law privacy, which protects information that (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. *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

²Although you raise section 167.007 of the Occupations Code, we note that the proper citation is section 164.007 of the Occupations Code. Thus, we will consider your arguments in relation to this section.

organs. *Id.* at 683. We have marked the information that is confidential under common-law privacy. The office must withhold this information under section 552.101 of the Government Code. The remaining information must be released.

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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, 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 challenge 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,

A handwritten signature in black ink, appearing to read 'Jessica J. Maloney', with a long, sweeping flourish extending to the right.

Jessica J. Maloney
Assistant Attorney General
Open Records Division

JJM/jh

Ref: ID# 304731

Enc. Submitted documents

c: Mr. Matt Smith
Cleburne Times-Review
108 South Anglin Street
Cleburne, Texas 76031
(w/o enclosures)