



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 8, 2008

Mr. Robert D. Simpson
General Counsel
Texas Medical Board
P.O. Box 2018
Austin, Texas 78768-2018

OR2008-16690

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# 329416.

The Texas Medical Board (the "board") received a request for all complaints against a named physician since June 2, 2006 and several categories of information pertaining to the named physician's compliance with a specified board order, including proof of payment of a fine assessed. You state the board has released proof of payment of the fine, as well as public verification and physician profile information the board does not believe is excepted from public disclosure under the Act.¹ You state the board is withholding some of the remaining requested information pursuant to the previous determination issued by our office in Open Records Letter No. 2006-14198. *See* Open Records Letter No. 2006-14198 at 2 (2006) (investigatory records pertaining to licensing investigations of applicant for license as a physician excepted under section 552.101 of the Government Code in conjunction with section 164.007 of the Occupations Code); *see also* Gov't Code § 552.301(a) (governmental body may withhold information subject to previous determination); Open Records Decision No. 673 (2001). You claim the submitted compliance documents are excepted from disclosure under section 552.101 of the Government Code. You also state you notified the

¹ We note 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).

named physician of the request and of his right to submit arguments to this office as to why the submitted compliance documents should not be released. *See* Gov't Code § 552.304 (providing interested party may submit comments stating why information should or should not be released). We have considered the exception you claim and reviewed the submitted information. We have also considered comments submitted by the requestor. *See id.*

Initially, we note a portion of the submitted information does not pertain to the physician named in the request. Thus, this information, which we have marked, is not responsive to the request. This decision does not address the public availability of the non-responsive information, and that information need not be released.

Section 552.101 of the Government Code exempts 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, such as section 164.007(c) of the Occupations Code, which provides:

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). Some of the documents include information relating to the identity of, or a report made by, a physician performing or supervising compliance monitoring for the board. Thus, we agree the documents in folder numbers 1 and 4, plus the chart monitor vouchers and advisement letter in folder number 6, are confidential under section 164.007(c), and must be withheld under section 552.101 on that basis. However, you have failed to demonstrate the remaining information consists of a complaint, adverse report, investigation file, other investigation report, or other investigative information for purposes of section 164.007(c). Furthermore, the remaining documents do not include information relating to the identity of, or a report made by, a physician performing or supervising compliance monitoring for the board. Therefore, the remaining information is not confidential under section 164.007 of the Occupations Code, and the board may not withhold it under section 552.101 of the Government Code on that ground.

We note the remaining compliance documents contain patient names. 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). To demonstrate

the applicability of common-law privacy, both prongs of this test must be established. *Id.* at 681-82. This office has found some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). We find the patient names in the documents are highly intimate or embarrassing and not of legitimate public concern. Thus, the department must withhold these names, which we have marked in the documents from folder number 2, under section 552.101 of the Government Code in conjunction with common-law privacy.

We note the remaining information includes an e-mail address subject to section 552.137 of the Government Code, which excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body," unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c).² *See* Gov't Code § 552.137(a)-(c). The e-mail address in the remaining information is not specifically excluded by section 552.137(c). As such, this e-mail address, which we have marked in the documents from folder number 3, must be withheld under section 552.137, unless the owner of the address has affirmatively consented to its release. *See id.* § 552.137(b).

In summary, the board must withhold the documents in folder numbers 1 and 4, plus the chart monitor vouchers and advisement letter in folder number 6, under section 552.101 of the Government Code in conjunction with section 164.007 of the Occupations Code; the information we have marked in the documents from folder number 2 under section 552.101 of the Government Code in conjunction with common-law privacy; and the e-mail address we have marked in the documents from folder number 3 under section 552.137 of the Government Code, unless the owner of the address has affirmatively consented to its release. The remaining information must be released.

You also ask this office to issue a previous determination permitting the board to withhold the disciplinary, licensure, and compliance information in its investigative files under section 552.101 of the Government Code in conjunction with section 164.007 of the Occupations Code, without requesting a ruling from this office. We decline to issue such 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

² The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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). If the governmental body does not file suit over 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).

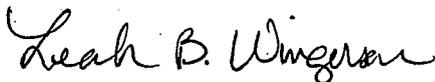
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records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



Leah B. Wingerson
Assistant Attorney General
Open Records Division

LBW/ma

Ref: ID# 329416

Enc. Submitted documents

cc: Requestor
(w/o enclosures)