



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 11, 2009

Ms. Gay Dodson, R.Ph.
Executive Director/ Secretary
Texas State Board of Pharmacy
333 Guadalupe Street, Suite 3-600
Austin, Texas 78701-3943

OR2009-12874

Dear Ms. Dodson:

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# 354971.

The Texas State Board of Pharmacy (the "board"), received a request for all information relating to a specified investigation. You claim the submitted information is excepted from disclosure under sections 552.101, 552.107, and 552.111 of the Government Code. We have considered the exceptions 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." Gov't Code § 552.101. Section 552.101 encompasses information made confidential by other statutes such as section 565.055 of the Occupations Code. Section 565.055 of the Occupations Code provides:

(a) The board or the board's authorized representative may investigate and gather evidence concerning any alleged violation of this subtitle or a board rule.

(b) Information or material compiled by the board in connection with an investigation, including an investigative file of the board, is confidential and not subject to:

(1) disclosure under Chapter 552, Government Code; or

(2) any means of legal compulsion for release, including disclosure, discovery, or subpoena, to anyone other than the board or a board employee or board agent involved in discipline of a license holder.

(c) Notwithstanding Subsection (b), information or material compiled by the board in connection with an investigation may be disclosed to:

- (1) a person involved with the board in a disciplinary action against the license holder;
- (2) an entity in another jurisdiction that licenses or disciplines pharmacists or pharmacies;
- (3) a pharmaceutical or pharmacy peer review committee as described under Chapter 564;
- (4) a law enforcement agency; or
- (5) a person engaged in bona fide research, if all information identifying a specific individual has been deleted.

Occ. Code § 565.055. You state that the portions of the submitted information, which you have marked, consist of “compilations of evidence [that] were made at the request of the [board] or an authorized representative in the course of investigating and gathering evidence concerning an alleged violation of the Texas Pharmacy Act or Board Rule.” You do not inform us that the requestor is entitled to this information pursuant to section 565.055(c). Thus, based on your representations and our review of the information at issue, we agree that the information you have marked is generally confidential under section 565.055(b). *See* Open Records Decision No. 474 at 2-3 (1987) (construing predecessor statute).

You contend the remaining information is confidential under section 564.002 of the Occupations Code. Section 564.001 of the Occupations Code provides that “[a] person, including a pharmaceutical peer review committee, who has knowledge relating to an action or omission of a pharmacist in this state or a pharmacy student . . . that might provide grounds for disciplinary action under Section 565.001(a)(4) or (7) may report relevant facts to the board,” and that a “committee of a professional society composed primarily of pharmacists, the staff of the committee, or a district or local intervenor participating in a program established to aid pharmacists . . . impaired by chemical abuse or mental or physical illness may report in writing to the board the name of an impaired pharmacist . . . and the relevant information relating to the impairment.” Occ. Code § 564.001(a), (b). Section 564.002 provides that “[t]he records and proceedings of the board, an authorized agent of the board, or a pharmaceutical organization committee described under Section 564.001(a) or (b), in connection with a report under Section 564.001(a) or (b), are confidential and are not considered public information for purposes of Chapter 552, Government Code.” *Id.* 564.002. Section 564.003 provides:

- a) The board may disclose information confidential under Section 564.002 only:

(1) in a disciplinary hearing before the board or in a subsequent trial or appeal of a board action or order;

(2) to a pharmacist licensing or disciplinary authority of another jurisdiction;

(3) under a court order; or

(4) as provided by Subsection (b).

(b) The board may disclose that the license of a pharmacist who is the subject of an order of the board that is confidential under Section 564.002 is suspended, revoked, canceled, restricted, or retired or that the pharmacist is in any other manner limited in the practice of pharmacy. The board may not disclose the nature of the impairment or other information that resulted in the board's action.

Id. § 564.003. You state the information you have marked was obtained in connection with a report made in accordance with section 564.001(a). You state that none of the exceptions in section 564.003 apply in this instance. Therefore, we conclude that the information you have marked is generally confidential pursuant to section 564.002 of the Occupations Code.

We note, however, that the submitted information contains records created or maintained by a mental health professional that pertain to the requestor's client, which are governed under chapter 611 of the Health and Safety Code. Section 611.002(a) provides as follows:

Communications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.

Health & Safety Code § 611.002(a). Section 611.001 defines a "professional" as (1) a person authorized to practice medicine, (2) a person licensed or certified by the state to diagnose, evaluate or treat mental or emotional conditions or disorders, or (3) a person the patient reasonably believes is authorized, licensed, or certified. *Id.* § 611.001(b). Mental health records are confidential under section 611.002. However, as the attorney of the patient at issue, the requestor may have a right of access to the submitted mental health records in this instance. Sections 611.004 and 611.0045 provide for access to mental health records by certain individuals. *See* Open Records Decision No. 565 (1990). These sections permit disclosure of mental health records to a patient, a person authorized to act on the patient's behalf, or a person who has the written consent of the patient. *See* Health & Safety Code § 611.004, .0045 (professional may disclose confidential information to person who has patient's written consent). We have marked the submitted information that is subject to

section 611.002 of the Health and Safety Code and may only be released in accordance with sections 611.004 and 611.0045.

Thus, although the submitted information is generally confidential under sections 565.055 and 564.002 of the Occupations Code, sections 611.004 and 611.0045 of the Health and Safety Code may provide the requestor with a right of access to the mental health records pertaining to her client. Therefore, there is a conflict between the provisions of section 565.055 and 564.002 of the Occupations Code and sections 611.004 and 611.0045 of the Health and Safety Code. Where general and specific statutes are in irreconcilable conflict, the specific provision typically prevails as an exception to the general provision unless the general provision was enacted later and there is clear evidence that the legislature intended the general provision to prevail. *See* Gov't Code § 311.026(b); *City of Lake Dallas v. Lake Cities Mun. Util. Auth.*, 555 S.W.2d 163, 168 (Tex. Civ. App.—Fort Worth 1977, writ ref'd n.r.e.). In this instance, although sections 565.055 and 564.002 of the Occupations Code generally make investigation records relating to pharmacists and records relating to impaired pharmacists confidential, sections 611.004 and 611.0045 of the Health and Safety Code specifically permit release of mental health records to certain parties and in certain circumstances. Therefore, sections 611.004 and 611.0045 of the Health and Safety Code prevail over sections 565.055 and 564.002 of the Occupations Code. Accordingly, we conclude that the mental health records we have marked are subject to chapter 611 and may only be released in accordance with sections 611.004 and 611.0045. Thus, if the requestor provides the proper consent, the marked mental health records must be released to her. *See* Health & Safety Code §§ 611.004, 611.0045. Otherwise, the marked mental health records must be withheld under section 552.101 in conjunction with the chapter 611 of the Health and Safety Code.

In summary, the board must withhold the information you have marked under section 552.101 of the Government Code in conjunction with sections 565.055 and 564.002 of the Occupations Code.¹ However, the mental health records we have marked may only be released in accordance with chapter 611 of the Health and Safety Code.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll-free, at (877) 673-6839. Questions concerning the allowable charges for providing public

¹As our ruling is dispositive, we do not address your other arguments against disclosure for this information.

information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Pamela Wissemann
Assistant Attorney General
Open Records Division

PFW/jb

Ref: ID# 354971

Enc. Submitted documents

c: Requestor
(w/o enclosures)