



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

February 2, 2010

Ms. Joy Sparks
General Counsel
State Board of Dental Examiners
333 Guadalupe, Tower 3, Suite 800
Austin, Texas 78701-3942

OR2010-01606

Dear Ms. Sparks:

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# 369166 (SBDE No. 09-0546-0224).

The State Board of Dental Examiners (the "board") received a request for information relating to specified investigation. You indicate the board has released some of the responsive information. You claim 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. We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing that a person may submit comments stating why information should or should not be released).

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. *See id.* § 552.301(a), (b). Under 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) 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. *See id.* § 552.301(e). In this instance, the board received the request for information on September 24, 2009, but did not request a ruling or submit the information required by section 552.301(e) for our review until November 20, 2009. Consequently, we find the board failed to comply with the procedural requirements of 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; *City of Dallas v. Abbott*, 279 S.W.3d 806, 811 (Tex. App.—Amarillo 2007, pet. granted); *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ); *see also* Open Records Decision No. 630 (1994); Open Records Decision No. 319 (1982). A compelling reason exists when third-party interests are at stake or when information is confidential under other law. *See* Open Records Decision No. 150 (1977). Because section 552.101 of the Government Code can provide a compelling reason to overcome this presumption, we will consider this exception.

Next, we note that one of the documents we have marked is not responsive as it does not fall within the scope of the request. The board need not release non-responsive information in response to this request, and this ruling will not address that 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, including section 254.006 of the Occupations Code, which states:

- (a) Except as provided by this section, the investigation files and other records of the board are public records and open to public inspection at reasonable times.
- (b) Investigation files and other records are confidential and shall be divulged only to the persons investigated at the completion of the investigation. The board may share investigation files and other records with another state regulatory agency or a local, state, or federal law enforcement agency.
- (c) The exception from public disclosure of investigation files and records provided by this section does not apply to the disclosure of a disciplinary action of the board, including:

- (1) the revocation or suspension of a license;
- (2) the imposition of a fine on a license holder;
- (3) the placement on probation with conditions of a license holder whose license has been suspended;
- (4) the reprimand of a license holder; or
- (5) the issuance of a warning letter to a license holder.

Occ. Code § 254.006. You indicate that the submitted information consists of investigation files and records of the board compiled in response to a complaint filed against a dentist licensed by the board. You do not indicate, and the submitted information itself does not reflect, that subsection 254.006(c) is applicable to any of the information at issue. Therefore, based on your representations and our review of the submitted information, we conclude that the submitted information is generally confidential under section 254.006(b) of the Occupations Code.

However, we note that a portion of the submitted documents consist of the requestor's dental records to which the requestor may have a right of access under chapter 258 of the Occupations Code. Section 258.102 of the Occupations Code provides as follows:

(a) The following information is privileged and may not be disclosed except as provided by this subchapter:

- (1) a communication between a dentist and a patient that relates to a professional service provided by the dentist; and
- (2) a dental record.

(b) The privilege described by this section applies regardless of when the patient received the professional service from the dentist.

Id. § 258.102. A "dental record" means dental information about a patient that is created or maintained by a dentist and relates to the history or treatment of the patient. *See id.* § 258.101(1). Section 258.104 of the Occupations Code provides:

(a) A person may disclose privileged information if the patient consents to the disclosure as provided in this section.

(b) Consent for the release of privileged information must be in writing and be signed by:

(1) the patient;

(2) a parent or legal guardian of the patient, if the patient is a minor;

(3) a legal guardian of the patient, if the patient has been adjudicated incompetent to manage the patient's personal affairs;

(4) an attorney ad litem appointed for the patient, as authorized by [citations omitted]; or

(5) a personal representative of the patient, if the patient is deceased.

Id. § 258.104(a),(b). Thus, information that is privileged under chapter 258 of the Occupations Code may be disclosed only to certain individuals and under certain specified circumstances. *See id.*; *see also id.* §§ 258.105, .106, .107 (exceptions to privilege). The written consent for the release of privileged information required under section 258.104 must specify (1) the information covered by the release, (2) the person to whom the information is to be released, and (3) the purpose for the release. *See id.* § 258.104(c). A person who receives information that is privileged under section 258.102 of the Occupations Code may disclose that information to another person only to the extent that disclosure is consistent with the purpose for which the information was obtained. *See id.* § 258.108. In this instance, the requestor has a right of access to the submitted dental records, which we have marked, if proper consent is provided for their release.

Thus, the instant situation presents a conflict between sections 258.104 and 254.006 of the Occupations 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.). Although section 254.006 generally makes investigative records of the board confidential, section 258.104 specifically permits release of dental records to certain parties when proper consent is received. Accordingly, section 258.104 prevails over section 254.006. We therefore conclude that, notwithstanding the provisions of section 254.006 of the Occupations Code, the board must release the marked dental records if it receives consent from the requestor that complies with section 258.104. In that instance, the board must withhold the remainder of the information under section 552.101 of the Government Code in conjunction with section 254.006. If the board does not receive consent that complies with section 258.104, the board must withhold the submitted information in

its entirety under section 552.101 of the Government Code in conjunction with section 254.006 of the Occupations 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 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/cc

Ref: ID# 369166

Enc. Submitted documents

c: Requestor
(w/o enclosures)