



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

July 29, 2010

Ms. Kerstin Arnold
General Counsel
Texas State Board of Pharmacy
333 Guadalupe Street, Suite 3-600
Austin, Texas 78701-3943

OR2010-11437

Dear Ms. Arnold:

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# 388535.

The Texas State Board of Pharmacy (the "board") received a request for information related to the investigation of a complaint filed by the requestor on September 18, 2009. You state the board "is releasing" some of the requested information. You claim that the submitted information is excepted from disclosure under sections 552.102 and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also considered comments submitted by the requestor. See Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

Initially, we note section 552.022 of the Government Code is applicable to the submitted information. Section 552.022(a)(1) provides for required public disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body[,]" unless the information is expressly confidential under other law or excepted from disclosure under section 552.108 of the Government Code. *Id.* § 552.022(a)(1). In this instance, the submitted information consists of documents that are part of a completed investigation and thus subject to section 552.022(a)(1). Although you seek to withhold the submitted information under section 552.107 of the Government Code, this section is a discretionary

exception to disclosure that protects a governmental body's interests and may be waived. *See* Open Records Decision Nos. 677 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, section 552.107 is not "other law" that makes information confidential for the purposes of section 552.022. Therefore, the board may not withhold any of the submitted information under section 552.107 of the Government Code.

However, the Texas Supreme Court has held that the Texas Rules of Evidence are "other law" within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). The attorney-client privilege is also found under rule 503 of the Texas Rules of Evidence. Accordingly, we will consider your assertion of the privilege under rule 503 for the submitted information. Furthermore, we note section 552.102 of the Government Code is "other law" for section 552.022 purposes. Accordingly, we will also consider your arguments under section 552.102.

You contend the submitted information is protected by the attorney-client privilege. Rule 503 of the Texas Rules of Evidence provides:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

- (A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;
- (B) between the lawyer and the lawyer's representative;
- (C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;
- (D) between representatives of the client or between the client and a representative of the client; or
- (E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. *Id.* 503(a)(5). Thus, in order to withhold attorney-client privileged

information from disclosure under rule 503, a governmental body must: (1) show the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the information is privileged and confidential under rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in Rule 503(d). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You state the submitted information consists of “investigatory information . . . relating to . . . an alleged conduct violation by [a board] employee[.]” You state that the board’s attorney “authorized and directed an investigation” regarding the complaint, and assert that the submitted information was gathered by board employees for the purpose of providing legal advice to the board. You also indicate this information has remained confidential. Based on these representations and our review of the information at issue, we agree you have established that most of the submitted information is privileged under rule 503 of the Texas Rules of Evidence. *See Harlandale Indep. Sch. Dist. v. Cornyn*, 25 S.W.3d 328 (Tex. App.—Austin 2000, pet. denied) (concluding that attorney’s entire investigative report was protected by attorney-client privilege where attorney was retained to conduct investigation in her capacity as attorney for purpose of providing legal services and advice). We note, however, that one of the documents you seek to withhold under rule 503 consists of the complaint filed by the requestor, a non-privileged party. This non-privileged document, which we have marked, may not be withheld under rule 503. Accordingly, except for the marked complaint, the board may withhold the submitted information under rule 503.

We next address your claim under section 552.102 of the Government Code for the complaint. Section 552.102(a) excepts from disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” Gov’t Code § 552.102(a). In *Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546, 550 (Tex. App.—Austin 1983, writ ref’d n.r.e.), the court ruled the test to be applied to information protected under section 552.102 is the same test formulated by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101. Common-law privacy protects information if it (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. *See Indus. Found.*, 540 S.W.2d at 685. To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82.

The types of information considered intimate or 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 organs. *Id.* at 683. In addition, this office has found certain 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), 455 (1987) (information pertaining to prescription drugs, specific illnesses, operations and procedures, and physical disabilities protected from disclosure). In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied), the court addressed the applicability of the common-law privacy doctrine to files of an investigation of allegations of sexual harassment in an employment context. You assert the information at issue is confidential under common-law privacy as expressed in *Ellen*. We note, however, the submitted information pertains to an investigation into an alleged threat of physical harm, not sexual harassment. Further, the investigation involves an employee of the board and an employee of another agency with offices in the same building. Therefore, the privacy concerns expressed in *Ellen* do not apply to the submitted information.

However, this office has stated, in numerous decisions, that information pertaining to the work conduct and job performance of public employees is subject to a legitimate public interest and, therefore, generally not protected from disclosure under common-law privacy. *See* Open Records Decision Nos. 470 (public employee's job performance does not generally constitute employee's private affairs), 455 (public employee's job performance or abilities generally not protected by privacy), 405 at 2-3 (1983) (public has interest in manner in which public employee performs job), 329 at 2 (1982) (information relating to complaints against public employees and discipline resulting therefrom is not protected under former section 552.101), 208 at 2 (1978) (information relating to complaint against public employee and disposition of the complaint is not protected under common-law right of privacy); *see also* Open Records Decision No. 423 at 2 (1984) (scope of public employee privacy is narrow).

Upon review, we find the complaint is not highly intimate or embarrassing or consists of employment information that is of legitimate public interest. *See* Open Records Decision Nos. 562 at 10 (1990) (personnel file information does not involve most intimate aspects of human affairs, but in fact touches on matters of legitimate public concern), 470 at 4, 444 at 5-6 (1986) (public has legitimate interest in public employee's qualifications, work performance, and circumstances of employee's resignation or termination); *see also* Open Records Decision No. 423 at 2. Therefore, the board may not withhold the complaint under section 552.102(a) of the Government Code. As you raise no other exception to disclosure for this information, the complaint must be released to the requestor.

In summary, with the exception of the marked complaint, the board may withhold the submitted information pursuant to rule 503 of the Texas Rules of Evidence. The complaint must be released to the requestor.

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,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/dls

Ref: ID# 388535

Enc. Submitted documents

c: Requestor
(w/o enclosures)