



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

August 26, 2010

Ms. Jena R. Abel  
Assistant General Counsel  
Texas Board of Nursing  
333 Guadalupe Street, Suite 3-460  
Austin, Texas 78701

OR2010-13039

Dear Ms. Abel:

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# 391878.

The Texas Board of Nursing (the "board") received a request for the board's entire file regarding a named individual. You state the board released Exhibit A with redactions to the requestor. You also state you have redacted social security numbers pursuant to section 552.147(b) of the Government Code.<sup>1</sup> You claim portions of the submitted information are excepted from disclosure under sections 552.101, 552.111, 552.130, and 552.137 of the Government Code. Additionally, you state the board notified the Texas Department of Aging and Disability Services ("DADS") of the request and of its right to submit arguments to this office as to why the requested information should not be released. *See Gov't Code § 552.304* (interested party may submit comments stating why information should or should not be released). We have considered the submitted arguments and reviewed the submitted information, part of which is a representative sample.<sup>2</sup>

---

<sup>1</sup>Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act. Gov't Code § 552.147.

<sup>2</sup>We assume the representative sample of records submitted to this office is truly representative of the requested records as a whole. *See Open Records Decision Nos. 499 (1988), 497 (1988)*. This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than that submitted to this office.

Initially, we address DADS' assertion most of the requested information is subject to a previous determination issued by this office in Open Records Letter No. 94-787 (1994). In that ruling, we found the Texas Department of Human Services (the "department") must withhold attachments to investigation reports created pursuant to chapter 242 of the Health and Safety Code under section 552.101 of the Government Code in conjunction with section 242.127 of the Health and Safety Code.<sup>3</sup> We stated "the legislature intended to protect all information that is related to an investigation of alleged abuse and neglect at a nursing facility and that a department investigator accumulates or creates during the course of [an investigation under chapter 242 of the Health and Safety Code]." Section 552.301(a) of the Government Code provides a governmental body that receives a written request for information that it wishes to withhold from public disclosure must request a ruling from this office unless a previous determination applies. *Id.* § 552.301(a). In Open Records Decision No. 673 (2001), we discussed the specific criteria required in order for a previous determination to apply as contemplated by section 552.301(a). In that decision, we noted there are only two instances in which a previous determination under section 552.301(a) exists. The first type of previous determination requires the following criteria to be met:

1. the records or information at issue are precisely the same records or information that were previously submitted to this office pursuant to section 552.301(e)(1)(D) of the Government Code;
2. the governmental body which received the request for the records or information is the same governmental body that previously requested and received a ruling from the attorney general;
3. the attorney general's prior ruling concluded that the precise records or information are or are not excepted from disclosure under the Ac; and
4. the law, facts, and circumstances on which the prior attorney general ruling was based have not changed since the issuance of the ruling.

ORD 673 at 6-7. The second type of previous determination requires all of the following criteria to be met:

1. the requested records or information at issue fall within a specific, clearly delineated category of information about which this office has previously rendered a decision;

---

<sup>3</sup>We note the department was abolished in 2003 and the powers, duties, functions, programs, and activities related to providing long-term care services of the department were transferred to DADS. *See Act of Sept. 1, 2003, 78th Leg., R.S. ch. 198, § 1.20(a)(2), (d), 2003 Tex. Gen. Laws 611, 637-38, 641.*

2. the previous decision is applicable to the particular governmental body or type of governmental body from which the information is requested;
3. the previous decision concludes that the specific, clearly delineated category of information is or is not excepted from disclosure under the Act;
4. the elements of law, fact, and circumstances are met to support the previous decision's conclusion that the requested records or information at issue is or is not excepted from required disclosure; and
5. the previous decision explicitly provides that the governmental body or bodies to which the decision applies may withhold the information without the necessity of again seeking a decision from this office.

*Id.* at 7-8. DADS asserts Open Records Letter No. 94-787, which was issued to the department, applies to the requested information at issue in this ruling. Thus, DADS asserts a previous determination of the second type applies to the information now at issue.

If a previous determination of the second type is addressed to a particular governmental body and does not explicitly provide that it also applies to other governmental bodies or to all governmental bodies of a certain type, then only the particular governmental body to which the decision is addressed may rely on the decision as a previous determination. *See, e.g.*, Open Records Decision No. 662 (1999) (constituting the second type of previous determination but only with respect to information held by the Texas Department of Health). We note Open Records Letter No. 94-787 was issued to the department and while some of the powers, functions, and duties of the department were transferred to DADS, the previous determination does not apply to the board. Furthermore, DADS does not explain how any of the submitted information constitutes attachments to investigation reports created pursuant to an investigation of alleged abuse or neglect at a nursing facility conducted under chapter 242 of the Health and Safety Code. Consequently, we find Open Records Letter No. 94-787 does not apply to the documents the board submitted for our review and none of it may be withheld in accordance with that ruling.

We now turn to the board's arguments. 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 exception encompasses information other statutes make confidential, such as section 301.466 of the Occupations Code, which provides:

- (a) A complaint and investigation concerning a nurse under this subchapter and all information and material compiled by the board in connection with the complaint and investigation are:

- (1) confidential and not subject to disclosure under [the Act]; and
- (2) not subject to disclosure, discovery, subpoena, or other means of legal compulsion for release to anyone other than the board or a board employee or agent involved in license holder discipline.

(b) Notwithstanding Subsection (a), information regarding a complaint and an investigation may be disclosed to:

- (1) a person involved with the board in a disciplinary action against the nurse;
- (2) a nursing licensing or disciplinary board in another jurisdiction;
- (3) a peer assistance program approved by the board under Chapter 467, Health and Safety Code;
- (4) a law enforcement agency; or
- (5) a person engaged in bona fide research, if all information identifying a specific individual has been deleted.

(c) The filing of formal charges against a nurse by the board, the nature of those charges, disciplinary proceedings of the board, and final disciplinary actions, including warnings and reprimands, by the board are not confidential and are subject to disclosure in accordance with [the Act].

Occ. Code § 301.466. You state Exhibits B and C consist of information compiled by the board in connection with the board's investigation of the named individual. Based on your representations and our review, we agree Exhibits B and C are confidential under section 301.466(a). We find the requestor is not entitled to receive this information under section 301.466(b). Furthermore, you state the information at issue does not fall under section 301.466(c). Therefore, we conclude the board must withhold Exhibits B and C under section 552.101 in conjunction with section 301.466(a)(1).<sup>4</sup>

You assert the information you marked in Exhibit A is confidential pursuant to section 301.466(a)(1). You indicate the board compiled and used this information during its investigation. You seek to withhold information in Exhibit A that pertains to formal charges filed by the board against the named individual during its investigation of the named individual under section 301.466(a)(1). Subsection 301.466(c) provides this information is

---

<sup>4</sup>As our ruling is dispositive for this information, we need not address your remaining arguments against its disclosure.

not confidential under subsection 301.466(a)(1). Consequently, the board may not withhold information pertaining to formal charges filed by the board against the named individual pursuant to section 301.466(a)(1). The remaining information you seek to withhold in Exhibit A pertains to the named individual's appeal of formal charges. An appeal takes place after the board's order becomes final. *See id.* § 301.507 (providing for judicial review contesting board's order and administrative penalty after board's order becomes final); *see also id.* § 301.555 (person against whom board has taken adverse action may appeal to district court). An appeal of a board order necessarily occurs after the board's investigation concludes. Therefore, you have failed to demonstrate how the board compiled the marked information about the named individual's appeal in connection with its investigation of the named individual. *Cf.* Open Records Decision No. 683 (2009) (when Texas Board of Veterinary Medical Examiners issues order after receiving administrative judge's findings of fact and conclusions of law, investigation has concluded, and thus, order is not investigation record made confidential by statute protecting investigation record). Thus, section 301.466(a)(1) is not applicable to this information. Accordingly, the board may not withhold any portion of Exhibit A under section 552.101 in conjunction with section 301.466.

Section 552.101 of the Government Code also encompasses section 301.207 of the Occupations Code. Section 301.207 provides:

Information regarding a person's diagnosis or treatment for a physical condition, mental condition, or chemical dependency that the person submits to the board for a petition for a declaratory order of eligibility for a license or for an application for an initial license or a license renewal under this chapter is confidential to the same extent information collected on a nurse as part of an investigation of a complaint is confidential under Section 301.466.

*Id.* § 301.207. You contend some of the information you redacted from Exhibit A is confidential under section 301.207. We have marked information regarding the named individual's diagnosis or treatment for a physical condition, mental condition, or chemical dependency the named individual submitted to the board in a license application. The information we marked is confidential under section 301.207. We find the requestor is not entitled to receive this information under section 301.466(b) and the information at issue does not fall under section 301.466(c). Therefore, we conclude the board must withhold the information we marked in Exhibit A under section 552.101 in conjunction with section 301.207. However, the remaining information you marked does not pertain to diagnosis or treatment for a physical condition, mental condition, or chemical dependency. Consequently, the board may not withhold this information under section 552.101 in conjunction with section 301.207.

You contend some information redacted from Exhibit A is excepted pursuant to common-law privacy, which is also encompassed by section 552.101 of the Government

Code. Common-law privacy protects information if (1) the information contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The type 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. Upon review, we find none of the information you marked in Exhibit A constitutes highly intimate or embarrassing information. Therefore, the board may not withhold any portion of Exhibit A under section 552.101 in conjunction with common-law privacy.

Section 552.111 of the Government Code excepts from disclosure “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” Gov’t Code § 552.111. This exception encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). The purpose of section 552.111 is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, no writ); Open Records Decision No. 538 at 1-2 (1990).

In Open Records Decision No. 615, this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See* ORD 615 at 5. A governmental body’s policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *Id.*; *see also City of Garland v. Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body’s policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body’s policy mission. *See* Open Records Decision No. 631 at 3 (1995). Further, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *See* ORD 615 at 5. But, if factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, the factual information also may be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982).

You state portions of Exhibit A consist of “[s]taff’s advice, opinions, and recommendations regarding the course and resolution of the investigation [of the named individual].” Upon

review, however, we find the information at issue consists of general administrative information that does not relate to policymaking or is purely factual in nature. You have failed to demonstrate how this information consists of advice, recommendations, or opinions that pertain to the policymaking processes of the board. Accordingly, the board may not withhold any of the marked information in Exhibit A under section 552.111.

Section 552.130 of the Government Code excepts from disclosure “information [that] relates to . . . a motor vehicle operator’s or driver’s license or permit issued by an agency of this state[.]” Gov’t Code § 552.130. Accordingly, we agree the board must withhold the Texas driver’s license number you marked in Exhibit A under section 552.130.

Section 552.137 of the Government Code 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). *Id.* § 552.137(a)-(c). The e-mail address you marked is not of a type specifically excluded by section 552.137(c). Thus, the board must withhold the e-mail address you have marked under section 552.137, unless its owner consents to its release.

In summary, the board must withhold Exhibits B and C under section 552.101 of the Government Code in conjunction with section 301.466(a)(1) of the Occupations Code. The board must withhold the information we marked in Exhibit A under section 552.101 of the Government Code in conjunction with section 301.207 of the Occupations Code. The board must also withhold the Texas driver’s license number you marked under section 552.130 of the Government Code and the e-mail address you marked under section 552.137 of the Government Code, unless the owner of the marked e-mail address consents to its release.<sup>5</sup> The remaining information must be released.

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.

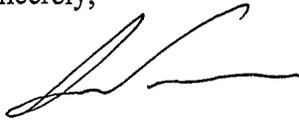
This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at [http://www.oag.state.tx.us/open/index\\_orl.php](http://www.oag.state.tx.us/open/index_orl.php), 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

---

<sup>5</sup>We note this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including Texas driver’s license numbers under section 552.130 of the Government Code and e-mail addresses of members of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

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,

A handwritten signature in black ink, appearing to read 'Ana Carolina Vieira', with a long horizontal flourish extending to the right.

Ana Carolina Vieira  
Assistant Attorney General  
Open Records Division

ACV/eeg

Ref: ID# 391878

Enc. Submitted documents

c: Requestor  
(w/o enclosures)