



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 20, 2010

Mr. Glenn Parker
Executive Director
Texas Board of Chiropractic Examiners
333 Guadalupe, Suite 3-825
Austin, Texas 78701-3942

OR2010-15929

Dear Mr. Parker:

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# 397622.

The Texas Board of Chiropractic Examiners (the "board") received a request for all files pertaining to a named chiropractor. You state the board no longer possesses two of the requested files because one file was disposed of in accordance with the state records retention schedule and the other file was referred to another agency.¹ You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information, a portion of which consists of representative samples.²

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 section encompasses information made confidential by other statutes, including section 201.206 of the Occupations Code. Section 201.206 provides in part:

¹We note the Act does not require a governmental body to release information that did not exist when it received a request or to create responsive information. See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

²We assume the "representative samples" of records submitted to this office are 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.

(a) The board's investigation files are confidential, privileged, and not subject to discovery, subpoena, or any other means of legal compulsion for release other than to the board or an employee or agent of the board.

...

(d) Notwithstanding Subsection (a), the board may:

- (1) disclose a complaint to the affected license holder; and
- (2) provide to a complainant the license holder's response to the complaint, if providing the response is considered by the board to be necessary to investigate the complaint.

Occ. Code § 201.206(a), (d). You inform us section 201.206 applies to "all investigations pending or opened on or after September 1, 2003." You indicate Attachments C, D, and E consist of or are contained in investigation files of complaints about a chiropractors licensed by the board that are maintained by the board pursuant to section 201.204 of the Occupations Code. *See id.* § 201.204 (setting forth board's record keeping requirements with respect to complaints filed with board). You assert the information at issue is confidential under section 201.206. You do not inform us the requestor is entitled to any of the information at issue pursuant to section 201.206(d)(2). Thus, based on your representations and our review, we agree the board must withhold Attachments C, D, and E under section 552.101 of the Government Code in conjunction with section 201.206 of the Occupations Code. However, you inform us the investigation file referenced in Attachment B was opened prior to September 1, 2003, and the submitted information indicates it was closed prior to this date. *See Act of May 29, 2003, 78th Leg., R.S., ch. 329, § 7(b), 2003 Tex. Gen. Laws 1405, 1407* (providing § 201.206 applies to "a complaint or investigation pending on [September 1, 2003] or filed on or after that date"). Therefore, Attachment B is not confidential under section 201.206, and it may not be withheld under section 552.101 of the Government Code on that basis.

Section 552.103 of the Government Code provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated

on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). A governmental body has the burden of providing relevant facts and documents to show the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a). For purposes of section 552.103(a), this office considers a contested case under the Texas Administrative Procedure Act (the "APA"), Government Code chapter 2001, to constitute "litigation." See Open Records Decision No. 588 (1991).

You inform us, and our review indicates, Attachment G relates to a contested case hearing, Docket No. 508-10-0592, in the State Office of Administrative Hearings ("SOAH"). We note a contested case before SOAH is considered litigation for the purposes of the APA. See *id.* Based on your representations and our review, we find litigation was pending on the date the board received the request for information. Additionally, we agree the information at issue relates to the pending litigation. Accordingly, section 552.103 of the Government Code is generally applicable to Attachment G.

We note, however, once the information has been obtained by all parties to the pending litigation, no section 552.103(a) interest exists with respect to that information. Open Records Decision No. 349 at 2 (1982). Thus, information that has either been obtained from or provided to the opposing party in the pending litigation is not excepted from disclosure under section 552.103, and it must be disclosed. In this instance, a portion of the information in Attachment G has been obtained from or provided to the opposing party to the pending litigation. Therefore, this information may not be withheld under section 552.103. However, the remaining information in Attachment G, which we have marked, may be withheld under section 552.103 of the Government Code. We note that the applicability of section 552.103(a) ends when the litigation has concluded. Attorney General Opinion MW-575 (1982) at 2; Open Records Decision Nos. 350 at 3 (1982), 349 at 2 (1982).

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. Section 552.111 encompasses the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); Open Records Decision No. 677 at 4-8 (2002). Rule 192.5 defines work product as:

- (1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including

the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or

(2) a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

TEX. R. CIV. P. 192.5. A governmental body seeking to withhold information under this exception bears the burden of demonstrating that the information was created or developed for trial or in anticipation of litigation by or for a party or a party's representative. *Id.*; ORD 677 at 6-8. In order for this office to conclude that the information was made or developed in anticipation of litigation, we must be satisfied that

a) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue; and b) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and [created or obtained the information] for the purpose of preparing for such litigation.

Nat'l Tank Co. v. Brotherton, 851 S.W.2d 193, 207 (Tex. 1993). A "substantial chance" of litigation does not mean a statistical probability, but rather "that litigation is more than merely an abstract possibility or unwarranted fear." *Id.* at 204; ORD 677 at 7. The attorney work product privilege applies to materials prepared in preparation for an administrative hearing. *See* ORD 588 (contested case under APA constitutes litigation for purposes of predecessor to section 552.103); *see also* Gov't Code § 2001.083 ("In a contested case [subject to the APA] a state agency shall give effect to the rules of privilege recognized by law.").

You state Attachment F consists of handwritten notes made by the board's legal staff and an expert witness in anticipation of and during a contested case before SOAH. You also indicate this information contains the individuals' mental impressions concerning the board's position in the proceeding. Based on your representations and our review, we conclude the board may withhold Attachment F as attorney work product under section 552.111 of the Government Code.

We note the information being released contains an e-mail address. 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). Gov't Code § 552.137(a)-(c). The e-mail address we have marked in Attachment B does not appear to be of a type specifically excluded by section 552.137(c) of the Government Code. Further, you do not inform us the owner of the e-mail address at issue have not consented to the release of the e-mail address. Therefore,

the board must withhold the marked e-mail address under section 552.137 of the Government Code.³

In summary, the board must withhold Attachments C, D, and E under section 552.101 of the Government Code in conjunction with section 201.206 of the Occupations Code. The board may withhold the information we have marked in Attachment G under section 552.103 of the Government Code. The board may withhold Attachment F under section 552.111 of the Government Code pursuant to the work product privilege. The board must withhold the e-mail address we have marked in Attachment B under section 552.137 of the Government Code. The board must release the remaining information.

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,



Mack T. Harrison
Assistant Attorney General
Open Records Division

MTH/em

Ref: ID# 397622

Enc. Submitted documents

c: Requestor
(w/o enclosures)

³We note this office issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.