



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 9, 2011

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

OR2011-16555

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#435974.

The Texas State Board of Pharmacy (the "board") received a request for all information prepared by a named investigator during a specified time period regarding fourteen named individuals and entities, as well as the investigator's personnel records. You state you will release some information to the requestor. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.108, 552.111, and 552.119 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

Initially, we note some of the submitted information, which we have marked, is not responsive to the instant request for information because it was created after the date the request was received. This ruling does not address the public availability of non-responsive information, and the board is not required to release non-responsive information in response to this request.

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

¹We 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 those submitted to this office.

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 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 portions of the submitted information 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 the requestor is entitled to this information pursuant to section 565.055(c). Upon review, we find that some of the information at issue is confidential under section 565.055(b). Therefore, the board must withhold this information, which we have marked, under section 552.101 of the Government Code in conjunction with section 56.005 of the Occupations Code.² *See* Open

²As our ruling for this information is dispositive, we need not address your remaining arguments against disclosure.

Records Decision No. 474 at 2-3 (1987) (finding under predecessor statute, all information collected and compiled by investigators as well as reports made by investigators to the board are within the scope of the exception). However, you do not explain how the remaining information you seek to withhold, which relates to the investigator named in the request, constitutes information compiled or created by the board for purposes of investigation. Therefore, the remaining information at issue may not be withheld on that basis.

Section 552.108(b)(1) of the Government Code excepts from disclosure “[a]n internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution . . . if: (1) release of the internal record or notation would interfere with law enforcement or prosecution.” Gov’t Code § 552.108(b)(1). This office has determined the board is a law enforcement agency. *See* Occ. Code § 554.010 (board may commission peace officer to enforce pharmacy laws); *see also* Open Records Decision No. 493 at 3 (1988) (statutory predecessor to section 552.108 applies when board investigates violations of criminal law and release would interfere with law enforcement). Section 552.108(b)(1) is intended to protect “information which, if released, would permit private citizens to anticipate weaknesses in a police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate the laws of this State.” *City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 327 (Tex. App.—Austin 2002, no pet.). This office has concluded that this provision protects certain kinds of information, the disclosure of which might compromise the security or operations of a law enforcement agency. *See, e.g.*, Open Records Decision Nos. 531 (1989) (detailed guidelines regarding police department’s use of force policy), 508 (1988) (information relating to future transfers of prisoners), 413 (1984) (sketch showing security measures for forthcoming execution), 211 (1978) (information relating to undercover narcotics investigations), 143 (1977) (log revealing use of electronic eavesdropping equipment). To claim this aspect of section 552.108 protection, however, a governmental body must meet its burden of explaining how and why release of the requested information would interfere with law enforcement and crime prevention. Open Records Decision No. 562 at 10 (1990). To prevail on its claim that section 552.108(b)(1) excepts information from disclosure, a law-enforcement agency must do more than merely make a conclusory assertion that releasing the information would interfere with law enforcement; the determination of whether the release of particular records would interfere with law enforcement is made on a case-by-case basis. Open Records Decision No. 409 at 2 (1984).

The information at issue consists of information pertaining to the board’s undercover peace officers, as well as information reflecting firearms issued to a board investigator. You state the disclosure of this information would compromise the board’s law enforcement investigations and jeopardize the safety of its undercover investigators. Upon review, we find the information, which we have marked, may be withheld under section 552.108(b)(1).³ However, you have failed to explain how the release of the remaining information at issue, which pertains to a board investigator’s background information, would compromise the

³As our ruling for this information is dispositive, we need not address your remaining arguments against disclosure.

board's law enforcement investigation or jeopardize the safety of its undercover investigators. Therefore, the remaining information at issue may not be withheld on this basis.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which 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. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *Id.* at 681–82. This office has found that personal financial information not relating to a financial transaction between an individual and a governmental body is generally excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 600 (1992) (finding personal financial information to include designation of beneficiary of employee's retirement benefits and optional insurance coverage; choice of particular insurance carrier; direct deposit authorization; and forms allowing employee to allocate pretax compensation to group insurance, health care, or dependent care), 545 (1990) (deferred compensation information, participation in voluntary investment program, election of optional insurance coverage, mortgage payments, assets, bills, and credit history). Upon review, we find the personal financial information we have marked is not of legitimate public interest. Thus, the board must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy.

Next, you claim a portion of the remaining information is excepted from disclosure under section 552.102 of the Government Code. 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). You assert the privacy analysis under section 552.102(a) is the same as the common-law privacy test under section 552.101, which is discussed above. *See Indus. Found.*, 540 S.W.2d at 685. In *Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled the privacy test under section 552.102(a) is the same as the *Industrial Foundation* privacy test. However, the Texas Supreme Court recently expressly disagreed with *Hubert's* interpretation of section 552.102(a) and held its privacy standard differs from the *Industrial Foundation* test under section 552.101. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, No. 08-0172, 2010 WL 4910163, at *5 (Tex. Dec. 3, 2010). The supreme court then considered the applicability of section 552.102, and has held section 552.102(a) excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *Id.* at *10. Upon review, we have marked the information the board must withhold under section 552.102(a) of the Government Code. We find that none of the remaining information is excepted under section 552.102(a) and, therefore, none of it may be withheld on that basis.

You raise section 552.119 of the Government Code for a submitted photograph. Section 552.119 provides:

(a) A photograph that depicts a peace officer as defined by Article 2.12, Code of Criminal Procedure, the release of which would endanger the life or physical safety of the officer, is excepted from [required public disclosure] unless:

- (1) the officer is under indictment or charged with an offense by information;
- (2) the officer is a party in a civil service hearing or a case in arbitration; or
- (3) the photograph is introduced as evidence in a judicial proceeding.

(b) A photograph excepted from disclosure under Subsection (a) may be made public only if the peace officer gives written consent to the disclosure.

Gov't Code § 552.119. Under section 552.119, a governmental body must demonstrate, if the documents do not demonstrate on their face, that release of the photograph would endanger the life or physical safety of a peace officer.⁴ Furthermore, a photograph of a peace officer cannot be withheld under section 552.119 if (1) the officer is under indictment or charged with an offense by information; (2) the officer is a party in a civil service hearing or a case in arbitration; (3) the photograph is introduced as evidence in a judicial proceeding; or (4) the officer gives written consent to the disclosure. In this instance you have demonstrated that release of the peace officer's photograph would endanger the life or physical safety of the officer. Furthermore, none of the exceptions to section 552.119 appear to apply. Therefore, the board must withhold the submitted photograph depicting a peace officer under section 552.119.

We note that portions of the remaining information are subject to section 552.117 of the Government Code.⁵ Section 552.117(a)(2) excepts from public disclosure the home addresses and telephone numbers, emergency contact information, social security number, and family member information of a peace officer, regardless of whether the peace officer made an election under section 552.024 of the Government Code. Act of May 24, 2011, 82nd Leg., R.S., S.B. 1638, § 2 (to be codified as an amendment to Gov't Code § 552.117(a)). Section 552.117(a)(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure. You explain the board has the authority to commission peace officers under article 2.12. You inform us that the employee at issue is a licensed police as defined by article 2.12(21). Therefore, the board must withhold the information we have marked under section 552.117(a)(2) of the Government Code.

⁴"Peace officer" is defined by article 2.12 of the Code of Criminal Procedure.

⁵The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

In summary, the board must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 565.055 of the Occupations Code. The board may withhold the information we have marked under section 552.108(b)(1) of the Government Code. The board must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The board must withhold the information we have marked under section 552.102 of the Government Code. The board must withhold the information we have marked under section 552.117(a)(2) of the Government Code. The board must withhold the indicated information under section 552.119 of the Government Code. 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, 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,



Cynthia G. Tynan
Assistant Attorney General
Open Records Division

CGT/em

Ref: ID# 435974

Enc. Submitted documents

c: Requestor
(w/o enclosures)