



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 5, 2012

Ms. Suzanne Mitchell
Assistant General Counsel
Texas Medical Board
P.O. Box 2018
Austin, Texas 78768-2018

OR2012-08622

Dear Ms. Mitchell:

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# 455904 (TMB Reference No. 22349).

The Texas Medical Board (the "board") received a request for information pertaining to the Board Certification Advertising Application filed by or on behalf of the American Board of Facial Plastic Reconstructive Surgery ("ABFPS") that was approved on June 15, 2011. You state the board has provided the requestor with most of the responsive information. Although the board takes no position with respect to the public availability of the submitted information, you state its release may implicate the proprietary interests of ABFPS. Accordingly, the board notified ABFPS of the request and of ABFPS's right to submit arguments to this office explaining why its information should not be released. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in certain circumstances). We received comments from ABFPS. We have considered the submitted arguments and reviewed the submitted information.

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.

Section 552.301(b) requires that a governmental body ask for a decision from this office and state the exceptions that apply within ten business days of receiving the written request. *See* Gov't Code § 552.301(b). You state, and the submitted information reflects, the board received the present request on March 16, 2012. Thus, the board's ten-business-day deadline was March 30, 2012. You state the board deposited its request for a decision via interagency mail on April 2, 2012. *See id.* § 552.308(b) (describing rules for calculating submission dates of documents sent via first class United States mail, common or contract carrier, or interagency mail). Consequently, we find the board failed to comply with the 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 information is public and must be released unless the governmental body overcomes this presumption by demonstrating a compelling reason to withhold the information. *Id.* § 552.302; *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, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 630 (1994). Generally, a compelling reason exists when third-party interests are at stake or when information is confidential under other law. Open Records Decision No. 177 (1977). Because third-party interests can provide a compelling reason to withhold information, we will consider ABFPS's arguments against disclosure.

ABFPS raises section 552.110(b) of the Government Code for the submitted information, which consists of ABFPS's membership list and psychometric evaluation of ABFPS's required examination. Section 552.110(b) excepts from disclosure "[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained." Gov't Code § 552.110(b). Section 552.110(b) requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the requested information. Open Records Decision No. 661 at 5-6 (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm). ABFPS explains if another board certification entity obtained its membership list, it would be able to contact all ABFPS physician members with no expense to the entity. ABFPS states its competitors "could attempt to entice these physicians" to not only join the competitor, but leave ABFPS. Additionally, ABFPS explains the psychometric evaluation details its board certification testing procedures and its release would cause it significant harm because the value of ABFPS's investment in obtaining this evaluation would be lost. ABFPS asserts a competitor would gain a competitive economic advantage if it had access to the psychometric evaluation because, at no cost to the competitor, it would be able to modify and improve its own examination. Upon review, we find ABFPS has established release of the membership list and the psychometric evaluation would cause it substantial

competitive harm. Therefore, the board must withhold the submitted information under section 552.110(b). As our ruling is dispositive, we need not address ABFPS's remaining argument against disclosure of the submitted 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,



Ana Carolina Vieira
Assistant Attorney General
Open Records Division

ACV/ag

Ref: ID# 455904

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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