



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

July 19, 2013

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

OR2013-12455

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# 493782.

The Texas State Board of Pharmacy (the "board") received two requests from the same requestor for four categories of information pertaining to board investigators and eight categories of information pertaining to complaints against a named company, including the number, subject, status, and action taken regarding each complaint for a specified period, and information pertaining to complaints against student pharmacists. You state you have released information responsive to five of the eight categories of information pertaining to complaints against the named company. You claim the submitted information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted information. We have also received and considered comments from 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 you have not submitted information responsive to the request for information pertaining to board investigators or the request for information pertaining to student pharmacists. Therefore, to the extent any information responsive to these portions of the requests exist, we assume the board has released it to the requestor. If the board has not released any such information, it must do so at this time. *See id.* §§ 552.301(a), .302;

Open Records Decision No. 664 (2000) (noting that if governmental body concludes that no exceptions apply to requested information, it must be released as soon as possible under circumstances).

Next, we must address the board's obligations under the Act. Section 552.301 of the Government Code describes the procedural obligations placed on a governmental body that receives a written request for information it wishes to withhold. Pursuant to section 552.301(b), the governmental body must request a ruling from this office and state the exceptions to disclosure that apply within ten business days after receiving the request. *See* Gov't Code. § 552.301(b). Pursuant to section 552.301(e), within fifteen business days of receipt of the request the governmental body must submit to this office (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *See id.* § 552.301(e). You inform us the board received the requests for information on February 27, 2013. Thus, the ten- and fifteen-business-day deadlines were March 13, 2013, and March 20, 2013, respectively. However, you did not request a ruling from this office until May 14, 2013. *See id.* § 552.308 (prescribing 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 section 552.301.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of the Act results in the legal presumption the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See 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). The presumption information is public under section 552.302 can be overcome by demonstrating the information is confidential by law or third-party interests are at stake. *See* Open Records Decision No. 150 (1977). Section 552.101 of the Government Code can provide a compelling reason for non-disclosure. Accordingly, we will consider whether any of the submitted information must be withheld under section 552.101.

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 made confidential by other statutes. Section 564.001 of the Occupations Code provides, in part, "[a] committee of a professional society composed primarily of pharmacists, the staff of the committee, or a

district or local intervenor participating in a program established to aid pharmacists . . . impaired by chemical abuse or mental or physical illness may report in writing to the board the name of an impaired pharmacist . . . and the relevant information relating to the impairment.” Occ. Code § 564.001(b). Section 564.002 of the Occupations Code provides “[a]ll records and proceedings of the board, an authorized agent of the board, or a pharmaceutical organization committee relating to the administration of this chapter are confidential and are not considered public information for purposes of [the Act].” *Id.* § 564.002. Section 564.003 provides:

(a) The board may disclose information confidential under Section 564.002 only:

(1) during a proceeding conducted by the State Office of Administrative Hearings, the board, or a panel of the board, or in a subsequent trial or appeal of a board action or order;

(2) to a pharmacist licensing or disciplinary authority of another jurisdiction;

(3) under a court order;

(4) to a person providing a service to the board, including an expert witness, investigator, or employee of an entity that contracts with the board, related to a disciplinary proceeding against an applicant or license holder, if the information is necessary for preparation for, or presentation in, the proceeding; or

(5) as provided by Subsection (b).

...

(b) The board may disclose that the license of a pharmacist who is the subject of an order of the board that is confidential under Section 564.002 is suspended, revoked, canceled, restricted, or retired or that the pharmacist is in any other manner limited in the practice of pharmacy. The board may not disclose the nature of the impairment or other information that resulted in the board’s action.

*Id.* § 564.003(a), (b). You state the information in Attachment D was obtained in connection with proceedings of the board, in accordance with section 564.001(a). You state that none of the exceptions in section 564.003 apply in this instance. Based on your representations

and our review, we find the information in Attachment D is confidential pursuant to section 564.002 of the Occupations Code and must be withheld under section 552.101.

Section 552.101 of the Government Code also encompasses information made confidential by 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:

(1) during any proceeding conducted by the State Office of Administrative Hearings, to the board, or a panel of the board, or in a subsequent trial or appeal of a board action or order;

(2) to a person providing a service to the board, including an expert witness, investigator, or employee of an entity that contracts with the board, related to a disciplinary proceeding against an applicant or license holder, or a subsequent trial or appeal, if the information is necessary for preparation for, or a presentation in, the proceeding;

(3) to an entity in another jurisdiction that:

(A) licenses or disciplines pharmacists or pharmacies;

or

(B) registers or disciplines pharmacy technicians or pharmacy technician trainees;

- (4) to a pharmaceutical or pharmacy peer review committee as described under Chapter 564;
- (5) to a law enforcement agency;
- (6) to a person engaged in bona fide research, if all information identifying a specific individual has been deleted; or
- (7) to an entity that administers a board-approved pharmacy technician certification examination.

Act of May 26, 2013, 83rd Leg., R.S., S.B. 869, § 16 (to be codified as an amendment to Occ. Code § 565.055(c)). You state the information in Attachment C consists of information compiled by investigators in connection with an investigation. You do not inform us the requestor is entitled to this information pursuant to section 565.055(c). Thus, based on your representation and our review, we agree the information in Attachment C is confidential under section 565.055(b) and must be withheld under section 552.101 of the Government Code.<sup>1</sup> *See* Open Records Decision No. 474 at 2-3 (1987) (construing predecessor statute).

In summary, the board must withhold Attachment D under section 552.101 of the Government Code in conjunction with section 564.002 of the Occupations Code. The board must withhold Attachment C under section 552.101 of the Government Code in conjunction with section 565.055(b) of the Occupations Code.

Finally, you ask this office to issue a previous determination permitting the board to withhold “impairment orders” under section 552.101 of the Government Code in conjunction with section 564.002 of the Occupations Code and “investigative files ” under section 552.101 of the Government Code in conjunction with section 565.055(b) of the Occupations Code, without seeking a ruling from this office. *See id.* § 552.301(a) (allowing governmental body to withhold information subject to previous determination); Open Records Decision No. 673 (2001). We decline to issue such a previous determination at this time. Accordingly, this letter ruling is limited to the particular records 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 records 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.texasattorneygeneral.gov/open\\_orl\\_ruling\\_info.shtml](http://www.texasattorneygeneral.gov/open_orl_ruling_info.shtml), or call the Office of the Attorney General’s Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for

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<sup>1</sup>As our ruling is dispositive, we need not address your remaining argument against disclosure.

providing public information under the Act may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in cursive script, appearing to read "Kathleen J. Santos".

Kathleen J. Santos  
Assistant Attorney General  
Open Records Division

KJS/som

Ref: ID# 493782

Enc. Submitted documents

c: Requestor  
(w/o enclosures)