



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 3, 2014

Mr. Timothy E. Bray
Deputy General Counsel
Office of General Counsel
Texas Department of State Health Services
P.O. Box 149347
Austin, Texas 78714-9347

OR2014-11511

Dear Mr. Bray:

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# 527964 (DSHS OR File No. 22822/2014).

The Texas Department of State Health Services (the "department") received a request for (1) certain information pertaining to the most recent 100 complaints dismissed by the Texas Board of Examiners of Professional Counselors (the "board"), excluding individual-identifying information; (2) certain information pertaining to complaints filed against a named individual, excluding individual-identifying information; and (3) "[d]atabase of licensed professional counselor complaints," including certain information contained in the database, but excluding individual-identifying information for complaints that are pending or dismissed. You claim some of the submitted information is not subject to the Act. You also claim the submitted information is excepted from disclosure under

sections 552.101 and 552.139 of the Government Code.¹ We have considered your arguments and reviewed the submitted representative sample of information.²

Initially, we note the requestor specifically excludes certain individual-identifying information. Thus, that type of information is not responsive to the request. This ruling does not address the public availability of any information that is not responsive to the request, and the department need not release such information in response to this request.

Next, you assert the requested database information is not public information under the Act. The Act is applicable only to “public information.” *See* Gov’t Code §§ 552.002, 552.021. Section 552.002(a) defines “public information” as the following:

[I]nformation that is written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

- (1) by a governmental body;
- (2) for a governmental body and the governmental body:
 - (A) owns the information;
 - (B) has a right of access to the information; or
 - (C) spends or contributes public money for the purpose of writing, producing, collecting, assembling, or maintaining the information; or

¹The requestor asserts the department previously failed to comply with the procedural requirements of section 552.301 of the Government Code in requesting a decision from this office in response to a previous request from this requestor for some of the same information. *See* Gov’t Code § 552.301(b) (requiring governmental body to ask for ruling and state exceptions that apply within ten business days of receiving written request), (e) (requiring governmental body to submit within fifteen business days of receiving request for information comments explaining applicability of raised exceptions, copy of request for information, signed statement of date governmental body received request or evidence sufficient to establish date, and copy of information governmental body seeks to withhold or representative samples). Nonetheless, sections 552.101 and 552.139 are mandatory exceptions that can provide compelling reasons to overcome the presumption of openness caused by failure to comply with section 552.301. *See id.* §§ 552.007, .302. Thus, we will address the applicability of these exceptions, notwithstanding the requestor’s claim.

²This letter ruling assumes that the submitted representative sample of information is truly representative of the requested information as a whole. This ruling does not reach, and therefore does not authorize, the withholding of any other requested information to the extent that the other information is substantially different than that submitted to this office. *See* Gov’t Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

(3) by an individual officer or employee of a governmental body in the officer's or employee's official capacity and the information pertains to official business of the governmental body.

Id. § 552.002(a). Section 552.002(a-1) also provides the following:

Information is in connection with the transaction of official business if the information is created by, transmitted to, received by, or maintained by an officer or employee of the governmental body in the officer's or employee's official capacity, or a person or entity performing official business or a governmental function on behalf of a governmental body, and pertains to official business of the governmental body.

Id. § 552.002(a-1). Thus, virtually all the information in a governmental body's physical possession constitutes public information and is subject to the Act. *Id.* § 552.002(a)(1); *see* Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). In Open Records Decision No. 581 (1990), this office determined certain computer information, such as source codes, documentation information and other computer programming, that has no significance other than its use as a tool for the maintenance, manipulation, or protection of public property is not the kind of information made public under section 552.021 of the Government Code. *See* ORD 581 at 6 (construing predecessor statute). "Documentation" is defined in Open Records Decision No. 581 as

an English language text describing various aspects of a program, such as how the program was written and how it may be used and maintained. Such documentation may be used either as a guide for users of the program, as a guide for programmers maintaining the computer system, or as a guide for future programmers who wish to understand the logic used in writing the program that the documentation describes. The nature and extent of documentation may vary depending on the purpose for which it is prepared.

Id. at 3. You argue some of the information at issue consists of data schema that meet the definition of documentation information addressed in Open Records Decision No. 581. *See id.* Based on your representations and our review of the responsive information, we conclude some of the submitted information is not public information as defined by section 552.002 of the Government Code. *See* Gov't Code § 552.002. Therefore, the department is not required to release the information we have marked to the requestor.³ However, we find the remaining responsive information consists of complaint information compiled by the department that is maintained by the department in connection with the transaction of official

³As our ruling is dispositive, we do not address the submitted arguments to withhold this information under the Act.

department business and has significance other than as a tool for the maintenance, manipulation, or protection of public property. Accordingly, the remaining responsive information is subject to the Act and may be withheld only if it falls within the scope of an exception to disclosure. *See id.* §§ 552.301, .302.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” *Id.* § 552.101. This section encompasses confidentiality provisions such as section 503.2545 of the Occupations Code, which provides in pertinent part as follows:

(h) All information and materials subpoenaed or compiled by the board in connection with a complaint and investigation are confidential and not subject to disclosure under [the Act] and not subject to disclosure, discovery, subpoena, or other means of legal compulsion for their release to anyone other than the board or its employees or agents involved in discipline of the holder of a license, except that this information may be disclosed to:

(1) persons involved with the board in a disciplinary action against the holder of a license;

(2) professional counselor licensing or disciplinary boards in other jurisdictions;

(3) peer assistance programs approved by the board under Chapter 467, Health and Safety Code;

(4) law enforcement agencies; and

(5) persons engaged in bona fide research, if all individual-identifying information has been deleted.

(i) The filing of formal charges by the board against a holder of a license, 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 § 503.2545(h), (i). You state the information at issue is compiled and maintained by the department’s Professional Licensing and Certification Unit, which is the administrative agent for the board, in connection with investigations of licensed professional counselors. Thus, we agree the responsive information that is subject to the Act is subject to section 503.2545(h).

However, the requestor asserts a right of access to the information at issue under section 503.2545(h)(5). The requestor contends he is engaged in bona fide research regarding the requested information. In Open Records Decision No. 458 (1987), this office addressed a similar argument regarding a statute that also contained an exception to confidentiality based on bona fide research purposes. In that decision, we stated the language of the statute plainly establishes “it is within the [governmental body’s] discretion to decide whether and to what extent to release confidential information for research . . . purposes.” ORD 458 at 5. The decision explained the statute states the governmental body “‘may’ disclose confidential information for [research] purposes, not that it *must* or *shall* do so,” and “the word ‘may’ is generally regarded as permissive in character.” *Id.* (citing *Bloom v. State Bd. Exam’rs of Psychologists*, 492 S.W.2d 460, 462 (Tex. 1973); *San Angelo Nat’l Bank v. Fitzpatrick*, 30 S.W. 1053, 1054 (Tex. 1895)). In this instance, we believe the same rationale regarding the discretionary nature of the exceptions to confidentiality applies to section 503.2545(h)(5). The department states circumstances for release under section 503.2545(h) do not exist for this request for information. Thus, because releasing confidential information under section 503.2545(h) is discretionary and the department states none of the exceptions to confidentiality apply here, we conclude the requestor does not have a right of access to the information at issue under section 503.2545(h)(5). Accordingly, based on your representations and our review of information at issue, we conclude the department must generally withhold the responsive information that is subject to the Act under section 552.101 in conjunction with section 503.2545(h).⁴ We note, however, some of the information at issue indicates it may be subject to release under section 503.2545(i). Accordingly, if the department has filed formal charges against one of the license holders at issue, the nature of those charges, disciplinary proceedings of the board, and any final disciplinary actions are not confidential and may not be withheld under section 552.101 in conjunction with section 503.2545(h). *See* Occ. Code § 503.2545(i). As such, we will address your remaining argument under section 552.139 of the Government Code for such information.

Section 552.139 of the Government Code provides, in part:

(a) Information is excepted from [required public disclosure] if it is information that relates to computer network security, to restricted information under Section 2059.055 [of the Government Code], or to the design, operation, or defense of a computer network.

(b) The following information is confidential:

(1) a computer network vulnerability report; [and]

⁴As our ruling is dispositive, we do not address your remaining argument against disclosure of this information.

(2) any other assessment of the extent to which data processing operations, a computer, a computer program, network, system, or system interface, or software of a governmental body or of a contractor of a governmental body is vulnerable to unauthorized access or harm, including an assessment of the extent to which the governmental body's or contractor's electronically stored information containing sensitive or critical information is vulnerable to alteration, damage, erasure, or inappropriate use[.]

Gov't Code § 552.139(a), (b)(1)-(2). Section 2059.055 of the Government Code provides in part:

(b) Network security information is confidential under this section if the information is:

(1) related to passwords, personal identification numbers, access codes, encryption, or other components of the security system of a state agency;

(2) collected, assembled, or maintained by or for a governmental entity to prevent, detect, or investigate criminal activity; or

(3) related to an assessment, made by or for a governmental entity or maintained by a governmental entity, of the vulnerability of a network to criminal activity.

Id. § 2059.055(b). You state the information at issue relates to a computer network and, if released, could reveal the precise location of electronic documents stored in a computer database. You further explain the release of this information would “pose a security threat to computers, programs, and systems, as well as to highly-confidential client information maintained in the computer systems.” Upon our review, however, we find you have not demonstrated how the remaining responsive information that is subject to the Act relates to computer network security or to the design, operation, or defense of a computer network as contemplated by section 552.139(a), consists of a computer network vulnerability report or assessment as contemplated by section 552.139(b), or relates to computer network security or restricted information under section 2059.055. Thus, none of the information at issue is subject to section 552.139, and the department may not withhold it on this basis.

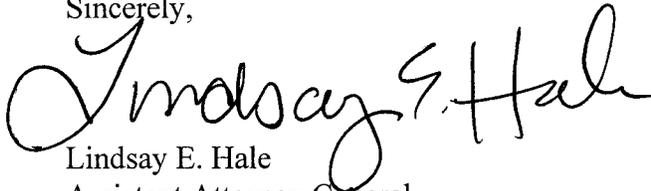
In summary, the data schema we have marked are not subject to the Act and need not be released to the requestor. The department must withhold the responsive information that is subject to the Act under section 552.101 of the Government Code in conjunction with section 503.2545(h) of the Occupations Code. However, if the department has filed formal

charges against one of the license holders at issue, the nature of those charges, disciplinary proceedings of the board, and any final disciplinary actions must be released to the requestor.

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.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 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 black ink that reads "Lindsay E. Hale". The signature is written in a cursive, flowing style.

Lindsay E. Hale
Assistant Attorney General
Open Records Division

LEH/akg

Ref: ID# 527964

Enc. Submitted documents

c: Requestor
(w/o enclosures)