



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

February 8, 2016

Ms. Wendy A. Pajak
Assistant General Counsel
Texas Medical Board
P.O. Box 2018
Austin, Texas 78768-2018

OR2016-03008

Dear Ms. Pajak:

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# 597781 (TMB Ref. No. 26151).

The Texas Medical Board (the "board") received a request for eleven categories of information pertaining two specified board docket numbers and a named individual. You state you have released some information to the requestor. You state the board is withholding some information pursuant to a previous determination issued by our office in Open Records Letter No. 2007-03117 (2007).¹ You claim the submitted information is excepted from disclosure under sections 552.101, 552.107, and 552.111 of the Government

¹Open Records Letter No. 2007-03117 authorizes the board to withhold investigative information that is in the possession of or was received or gathered by the board during the investigation of a license holder under section 552.101 of the Government Code in conjunction with section 164.007(c) of the Occupations Code.

Code and privileged under Texas Rule of Evidence 503.² We have considered the submitted arguments and reviewed the submitted information.

Initially, you acknowledge, and we agree, the board failed to request a ruling or submit the responsive information within the statutory time periods prescribed by section 552.301 of the Government Code. *See* Gov't Code § 552.301(b), (e). 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 requested information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *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 (Tex. App.—Austin 1990, no writ); *see also* Open Records Decision No. 630 (1994). Generally, a governmental body may demonstrate a compelling reason to withhold information by showing that the information is made confidential by another source of law or affects third party interests. *See* ORD 630. Although you claim some of the requested information is excepted from disclosure under sections 552.107 and 552.111 of the Government Code and privileged under Texas Rule of Evidence 503, sections 552.107 and 552.111 are discretionary exceptions that protects a governmental body's interests and may be waived, and Texas Rule of Evidence 503 is a privilege that may be waived also. *See* Open Records Decision Nos. 677 at 10 (attorney work-product privilege under section 552.111 is not compelling reason to withhold information under section 552.302), 676 at 12 (claim of attorney-client privilege under section 552.107 or rule 503 does not provide compelling reason to withhold information under section 552.302 if it does not implicate third-party rights), 665 at 2 n.5 (2000) (discretionary exceptions in general). Thus, in failing to comply with section 552.301, the board has waived its claims under sections 552.107 and 552.111 of the Government Code and Texas Rule of Evidence 503. However, because section 552.101 of the Government Code can provide a compelling reason against disclosure, we will address your claims under section 552.101 for the submitted information.

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 that is made confidential by statute. You claim Exhibit 2 is confidential under section 154.073 of the Civil Practice and Remedies Code and section 2009.054 of the Government Code. Section 154.073 provides in relevant part the following:

²Although you also raise section 552.101 of the Government Code in conjunction with the attorney-client privilege under Texas Rule of Evidence 503, this office has concluded section 552.101 does not encompass other exceptions found in the Act or discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990).

(a) Except as provided by Subsections (c), (d), (e), and (f), a communication relating to the subject matter of any civil or criminal dispute made by a participant in an alternative dispute resolution procedure, whether before or after the institution of formal judicial proceedings, is confidential, is not subject to disclosure, and may not be used as evidence against the participant in any judicial or administrative proceeding.

(b) Any record made at an alternative dispute resolution procedure is confidential, and the participants or the third party facilitating the procedure may not be required to testify in any proceedings relating to or arising out of the matter in dispute or be subject to process requiring disclosure of confidential information or data relating to or arising out of the matter in dispute.

Civ. Prac. & Rem. Code § 154.073(a), (b). Similarly, section 2009.054 provides as follows:

(a) Sections 154.053 and 154.073, Civil Practice and Remedies Code, apply to the communications, records, conduct, and demeanor of the impartial third party and the parties.

(b) Notwithstanding Section 154.073(e), Civil Practice and Remedies Code:

(1) a communication relevant to the dispute, and a record of the communication, made between an impartial third party and the parties to the dispute or between the parties to the dispute during the course of an alternative dispute resolution procedure are confidential and may not be disclosed unless all parties to the dispute consent to the disclosure; and

(2) the notes of an impartial third party are confidential except to the extent that the notes consist of a record of a communication with a party and all parties have consented to disclosure in accordance with Subdivision (1).

Gov't Code § 2009.054. Further, this office has found that communications during a formal settlement process were intended to be confidential. Open Records Decision No. 658 at 4 (1998); *see also* Gov't Code § 2009.054(c). Sections 154.073 and 2009.054 pertain only to communications made during an alternative dispute resolution ("ADR") procedure. You state Exhibit 2 consists of confidential communications from the board to the impartial administrative law judge mediator regarding the scheduled mediated settlement conferences relating to the complaints specified in the requests. You explain these communications set forth the facts and procedural background of the case, including the confidential settlement

recommendations from the informal settlement conference. Upon review, we find you have demonstrated the submitted information consists of communications from formal ADR procedures. Accordingly, the board must withhold Exhibit 2 pursuant to section 552.101 of the Government Code in conjunction with section 154.073 of the Civil Practice and Remedies Code and section 2009.054 of the Government Code.

Section 552.101 of the Government Code also encompasses section 164.007(c) of the Occupations Code, which provides:

Each complaint, adverse report, investigation file, other investigation report, and other investigative information in the possession of or received or gathered by the board or its employees or agents relating to a license holder, an application for license, or a criminal investigation or proceeding is privileged and confidential and is not subject to discovery, subpoena, or other means of legal compulsion for release to anyone other than the board or its employees or agents involved in discipline of a license holder. For purposes of this subsection, investigative information includes information relating to the identity of, and a report made by, a physician performing or supervising compliance monitoring for the board.

Occ. Code § 164.007(c). Section 164.007(c) is applicable to investigatory records compiled by the board during an investigation of a license holder. You explain Exhibit 3 consists of memoranda prepared by the board's staff attorney for the board's Disciplinary Process Review Committee. You state these memoranda are maintained as part of the investigative file for each investigation or legal case opened by the board. Based on your representations and our review of the information at issue, we agree Exhibit 3 is confidential under section 164.007(c). *See id.* § 164.007(c) ("Each complaint, adverse report, investigation file, other investigation report, and other investigative information . . . relating to . . . a license holder . . . or a criminal investigation or proceeding is privileged and confidential[.]"). We have no indication the disclosure provisions in section 164.007 apply to the requestor. *Id.* § 164.007(d), (f), (h). Therefore, the board must withhold Exhibit 3 under section 552.101 of the Government Code in conjunction with section 164.007(c) of the Occupations Code.

In summary, the board must withhold Exhibit 2 pursuant to section 552.101 of the Government Code in conjunction with section 154.073 of the Civil Practice and Remedies Code and section 2009.054 of the Government Code. The board must withhold Exhibit 3 under section 552.101 of the Government Code in conjunction with section 164.007(c) of the Occupations Code.

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 "Abigail T. Adams". The signature is written in a cursive, flowing style.

Abigail T. Adams
Assistant Attorney General
Open Records Division

ATA/akg

Ref: ID# 597781

Enc. Submitted documents

c: Requestor
(w/o enclosures)