



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

June 22, 1994

Ms. Tamara Armstrong
Assistant County Attorney
Travis County
P.O. Box 1748
Austin, Texas 78767

OR94-257

Dear Ms. Armstrong:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, Government Code chapter 552. We assigned your request ID# 25747.

The Travis County District Attorney's Office (the "district attorney") has received two requests for certain investigation materials relating to the Texas State Board of Dental Examiners (the "board"). The first requestor seeks "a copy of the Texas Ranger report that was . . . ordered by the Sunset Commission after testimony from various parties appearing before the Commission in late 1992." The second requestor seeks "any and all material, including investigative reports, in connection with any criminal investigation of any and all members of the Texas State Board of Dental Examiners or the Texas State Board of Dental Examiners." You have submitted representative samples of the requested information to us for review. Some of the investigative materials were either created or collected in the course of an investigation that the Texas Rangers conducted at the behest of the Sunset Advisory Commission under authority set forth in chapter 325 of the Government Code. The submitted documents include transcripts of certain telephone conversations; board investigations; correspondence to and from the board; statements submitted to the Sunset Advisory Commission concerning the board; board telephone and credit card billing information; various board orders and findings; law enforcement records, *e.g.*, offense reports; various internal board memorandums; information relating to the Travis County district attorney's criminal investigation of the board; and numerous other records relating to the Texas Ranger and Travis County district attorney's investigations. You claim that sections 552.101 and 552.111 of the Government Code except the requested information from required public disclosure.

At the outset, we address your contention that some of the requested information constitutes records of the judiciary and is thus not subject to the Open Records Act. *See* Gov't Code § 552.003(b) (excepting judiciary from scope of Open Records Act). You advise us that the district attorney obtained some of the requested information pursuant to grand jury subpoena and claim therefore that such information falls outside the scope of the Open Records Act. In support of this contention, you refer us to Open Records Decision No. 513 (1988), in which this office held that the Open Records Act does not apply to grand juries, nor to records within the constructive possession of grand juries. Information may not be withheld as information in the constructive possession of a grand jury merely because the information was submitted to the grand jury for review. *Id. at 4.* For the district attorney to withhold such information, the district attorney must have obtained the information pursuant to a grand jury subpoena issued in connection with the investigation. *Id.* Accordingly, any records in the possession of the district attorney and obtained by his office pursuant to a grand jury subpoena are not subject to the Open Records Act; you may therefore withhold these records from required public disclosure. On the other hand, you may not withhold the remaining investigation records merely because they were considered by the grand jury.

Next, we address your contention that section 552.101 of the Government Code excepts some of the requested information from required public disclosure. Section 552.101 excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." You claim that section 552.101 in conjunction with the attorney-client privilege excepts some of the requested information from required public disclosure. Although this office has frequently cited section 552.101 to except from disclosure information within the attorney-client privilege, the privilege is more specifically covered under section 552.107 of the Government Code. Open Records Decision No. 574 (1990). Section 552.107 excepts information if:

(1) it is information that . . . an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Rules of the State Bar of Texas.

The protection of section 552.107(1) is limited to privileged material under Rule 1.05 of the Texas State Bar Disciplinary Rules of Professional Conduct. *Id. at 5.* The state bar rules define "privileged information," in part, as information protected by the attorney-client privilege of Rule 503 of the Texas Rules of Evidence. Generally, the attorney-client privilege does not apply to communications that are not confidential, *i.e.*, that are intended to be disclosed to third parties. *See* 36 TEX. JUR. 3d *Evidence* § 523 (1984). In addition, the attorney-client privilege does not generally apply to communications when a client permits without objection the disclosure of a confidential communication to a third party. *See id.* § 533.

You assert that the attorney-client privilege excepts a transcript of a recorded telephone conversation between a dentist and an attorney (Exhibit A).¹ We understand that the attorney voluntarily provided this transcript to the Texas Rangers to assist them in their investigation. It is not clear whether the transcript of the conversation between the dentist and attorney constitutes a communication between an attorney and his client. Assuming, however, that the transcript constitutes a communication protected by the attorney-client communication, we conclude that the attorney-client privilege has been waived in this instance, inasmuch as the transcript was voluntarily made available to a third party, *i.e.*, the Texas Rangers. Accordingly, we conclude that section 552.107 of the Government Code does not protect the transcript from required public disclosure.

You also assert section 552.101 in conjunction with section 2 of article 4550, V.T.C.S., which provides:

All of the records and files of the Texas State Board of Dental Examiners shall be public records and open to inspection at reasonable times, except the investigation files and records which shall be confidential and shall be divulged only to persons so investigated upon completion of said investigation.

See also Open Records Decision No. 276 (1981). You have submitted to us for review records from completed board investigation files. However, the requestors do not appear to be the subject of any of the investigations. We conclude, therefore, that the district attorney must not make these records obtained from board investigation files available to the public.

We note, however, that one of the requestors seeks the records obtained from investigation files on behalf of the agency that created them. A state agency generally may transfer information to another state agency or any other governmental body subject to the Open Records Act without violating the confidentiality of the information or waiving any exceptions to disclosure. *See* Attorney General Opinions H-917 (1976) at 1; H-242 (1974) at 4; *but see* Attorney General Opinion JM-590 (1986) (holding that a governmental body may not transfer confidential information to another governmental body if a statute authorizes release of the information only to very specific entities). We believe that this rule is applicable in this instance, especially in consideration of the fact that the agency requesting the information created the information in the first place. We conclude, therefore, that the district attorney may return the information obtained from board investigation reports to the board without violating section 2 of article 4550, V.T.C.S.

¹Also included in Exhibit A is a transcript of a conversation between a dentist and a board employee. It is not clear whether you seek to withhold this information under section 552.107 of the Government Code. At any rate, the attorney-client privilege does not protect this transcript, because it does not involve a communication between an attorney and his or her client.

You have also included in Exhibit B, submitted with your letter dated April 8, 1994, a copy of the Texas Ranger investigation of the board. You appear to contend that this information is also confidential under section 2 of article 4550 as an investigation file or record of the board. The records of the Texas Ranger investigation are not records of the Texas State Board of Dental Examiners. Only those records obtained from completed board investigation files are excepted from disclosure by section 2 of article 4550, V.T.C.S. Therefore, you may not withhold any investigation records created by the Texas Rangers or Department of Public Safety pursuant to section 2 of article 4550, V.T.C.S.

You also claim that section 5(a) of article 1.10D of the Insurance Code makes some of the requested information confidential. Section 5(a) provides, in pertinent part:

Any information or material acquired by the department [of Insurance] that is relevant to an inquiry by the insurance fraud unit is not a public record for as long as the commissioner considers reasonably necessary to complete the investigation, protect the person under investigation from unwarranted injury, or serve the public interest. [Emphasis added.]

You have not demonstrated, nor are we otherwise aware, that any of the submitted information has been "acquired by the department" and "is relevant to an inquiry by the insurance fraud unit." We thus have no basis on which to conclude that the district attorney may withhold any of the requested information under section 1.10D, section 5(a) of the Insurance Code.

Next, we address your contention that section 611.002 of the Health and Safety Code makes some of the requested information confidential. Section 611.002 makes confidential the records prepared by persons authorized to practice medicine, among others, *see* Health & Safety Code § 611.001, and provides in pertinent part:

(a) Communications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.

The purpose of this provision is to protect the patient or client against an invasion of privacy. Open Records Decision No. 565 (1990) at 3 (construing section 611.002's predecessor, section 2(a), article 5561h, V.T.C.S). The document that you claim section 611.002 makes confidential was prepared by a licensed medical doctor and relates to the "identity, diagnosis, evaluation, or treatment of a patient." The document is therefore confidential under section 611.002.² Accordingly, the district attorney must withhold the

²We note that access to information made confidential by section 611.002 of the Health and Safety Code is governed by section 611.004, Health and Safety Code. A determination as to the application of this provision to the facts at issue here is beyond the scope of this ruling.

requested information from required public disclosure under section 552.101 of the Government Code in conjunction with section 611.002 of the Health and Safety Code.

We next address your contention that section 552.111 of the Government Code excepts some of the requested information from required public disclosure.³ Section 552.111 excepts an "interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office reexamined the section 552.111 exception and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body at issue. This office also held, however, that section 552.111 does not except purely factual information. Open Records Decision No. 615 at 5-6.

We have examined the information for which you seek section 552.111 protection. The records appear to be either purely factual in nature or do not consist of internal communications reflecting the policymaking processes of the district attorney and thus fall outside the scope of section 552.111. We conclude, therefore, that section 552.111 of the Government Code does not except the submitted information from required public disclosure.

You also assert section 552.101 of the Government Code in conjunction with the work product doctrine. Section 552.101 does not encompass work product, investigative, or other "discovery privileges." Open Records Decision No. 575 (1990). Such protection may only exist under section 552.103(a), if the situation meets the section 552.103(a) requirements. *Id.* You have not demonstrated that section 552.103(a) applies in this instance.

We note, however, that the issues you raise with respect to attorney work product are the subject of pending litigation in *Holmes v. Morales*, Cause No. 93-07978, 261st Judicial District, Travis County. The plaintiff in this litigation has filed an appeal of the district court ruling to the Third Court of Appeals. In light of the pendency of this litigation, it would be inappropriate for this office to rule on the claims you raise regarding attorney work product. At this point, it appears that the outcome of the *Holmes* case may determine the resolution of your claims and may moot any decision this office might reach on those claims. For these reasons, we are declining to rule on the issues you raised regarding attorney work product.

We remind you that the attorney work product aspect of section 552.103(a) is a discretionary exception under the act. See Gov't Code § 552.007; Open Records Decision No. 542 (1990). Section 552.007 provides as follows:

³You also assert section 552.111 in conjunction with the work product doctrine. The work product doctrine applies only upon a showing of the applicability of section 552.103(a) of the Government Code. See Open Records Decision No. 575 (1990).

(a) This chapter does not prohibit a governmental body or its officer for public records from voluntarily making part or all of its records available to the public, unless the disclosure is expressly prohibited by law or the records are confidential under law.

(b) *Records* made available under Subsection (a) must be made available to any person. [Emphasis added.]

The district attorney may therefore choose to release to the public some or all of the requested records, not otherwise made confidential by law, with impunity.⁴ Although a governmental body may choose to waive a discretionary exception such as section 552.103 for particular records, section 552.007 does not prevent a governmental body from subsequently raising the same exception when faced with a request for different records. On the other hand, once a governmental body has disclosed particular records to a member of the public, it may not ordinarily withhold the same records from public disclosure unless the information is confidential by law. See Gov't Code § 552.007; Open Records Decision Nos. 518 (1989); 454, 436, 435 (1986).

We have marked the document that you must withhold under section 552.101 in conjunction with section 611.002 of the Health and Safety Code. In addition, you must withhold from the citizen requestor any records obtained from completed board investigation files pursuant to section 2 of article 4550, V.T.C.S. However, you may release records obtained from completed board investigation files to the board. The remaining records, as discussed above, may be disclosed at your discretion.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact this office.

Yours very truly,



Loretta R. DeHay
Assistant Attorney General
Open Government Section

LRD/GCK/rho

⁴You explain in your letter to this office dated April 8, 1994, that "the Travis County District Attorney's Office is willing to release to the requestor all file records which are not made confidential by law." We further note that the Department of Public Safety (the "DPS") has received a similar request for "the Texas Ranger investigation of the Texas State Board of Dental Examiners." See enclosed letter from DPS dated June 2, 1994. Although the DPS is withholding the requested information pending the outcome of this ruling, its attorney states that DPS "has no objection to releasing this file." *Id.*

Ref.: ID# 25747

Enclosed: Marked documents
 Letter from Charles Karakashian, Jr., Department of Public Safety

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