



Office of the Attorney General
State of Texas

January 23, 1996

DAN MORALES
ATTORNEY GENERAL

Ms. Patte B. Kent
Executive Director
Texas Board of Chiropractic Examiners
333 Guadalupe Street
Tower III, Suite 825
Austin, Texas 78701

OR96-0065

Dear Ms. Kent:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 32514.

The Texas Board of Chiropractic Examiners (the "board") received two requests for information. Specifically, the requestors seek "a complete copy of the file your office maintains" and "all available professional and complaint information regarding" a particular licensee. You released all information regarding the licensee except an anonymous complaint and the licensee's written response to the complaint against him.

You inform us that you received the first request for information on March 8, 1995, and on March 10, 1995, you provided the requested information with the exception of the anonymous complaint and the licensee's response. You did not seek a determination from this office at that time as to withholding the anonymous complaint and the licensee's response.¹ You then received a separate request on March 13, 1995, for "all

¹Sections 552.301 and 552.302 of the Government Code require that unless the attorney general has previously determined that the requested information is excepted from disclosure, a governmental body must release requested information or request a decision from the attorney general within ten days of receiving a request for information the governmental body wishes to withhold. When a governmental body fails to request a decision within ten days of receiving a request for information and no previous determination applies, the information at issue is presumed public. *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex. App.--Austin 1990, no writ); *City of Houston v. Houston Chronicle Publishing Co.*, 673 S.W.2d 316, 323 (Tex. App.--Houston [1st Dist.] 1984, no writ); Open Records Decision No. 319 (1982). The governmental body must show a compelling interest to withhold the information to overcome this presumption. See Open Records Decision Nos. 473 (1987) (stating that city's failure to meet ten-day deadline waived protection of Gov't Code §§ 552.103 and 552.111 but not protection of Gov't Code §§ 552.101, 552.102, and 552.109, which protect privacy rights of third parties), 150 (1977) (failure to meet ten-day deadline and presumption of openness can be overcome only by compelling demonstration that

available professional and complaint information regarding" a particular licensee. In response to this request, the board received a letter on March 14, 1995, from the licensee's attorney asserting that the complaint and the licensee's response are excepted from required public disclosure under sections 552.101 and 552.108 of the Government Code. On March 21, 1995, you contacted this office requesting a decision as to whether the requested information was excepted from required public disclosure under section 552.101 as it incorporates common-law privacy. You state that the board does not agree with the licensee's counsel's assertion of section 552.108.

The licensee's attorney claims that the information should be excepted from disclosure pursuant to section 552.108² of the Government Code and Section 552.101 of the Government Code in conjunction with title 22, section 76.2 of the Texas Administrative Code. Section 552.108 promotes a purely governmental interest. Thus, it must be raised or waived by a governmental body. *See* Open Records Decision Nos. 177 (1977), 586 (1991). As the board does not seek to withhold the information under section 552.108, we need not address the applicability of this section.

Section 552.101 excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."

Title 22, section 76.2 of the Texas Administrative Code provides that

All complaints, adverse reports, investigation files, other investigation reports, and other investigative information in the possession of, received, or gathered by the board shall be *confidential subject to the Open Records Act, the Government Code, Chapter 552.* [Emphasis added.]

This is not an express confidentiality statute. It is simply a regulation enacted by the board stating that complaints and investigative materials will be held as confidential to

(Footnote continued)

information should not be released, in other words, that information is deemed confidential by some other source of law or that third-party interests are at stake). You do not state why the anonymous complaint and the licensee's response were withheld from the first requestor. However, as you have raised a question of common-law privacy, a compelling reason for excepting from disclosure public information, we will address your concerns despite the fact that the board did not make a timely request for a determination for the first request.

²Section 552.108 applies to records created by an agency, or a portion of an agency, whose primary function is to investigate crimes and enforce criminal laws. *See* Open Records Decision Nos. 493 (1988) at 2, 287 (1981) at 2. An agency involved primarily in licensing certain professionals or regulating a particular industry usually may not use section 552.108 to except its records from disclosure. *See id.* *But see* Attorney General Opinion MW-575 (1982). However, where an incident involving allegedly criminal conduct is still under active investigation or prosecution, any proper custodian of information which relates to the incident may invoke section 552.108. Open Records Decision Nos. 474 (1987), 372 (1983).

the extent allowed under chapter 552. A governmental body may not pass an ordinance or rule purporting to make certain information confidential unless the governmental body is statutorily authorized to do so. Open Records Decision No. 594 (1991) at 3. Article 4512b, V.T.C.S., which governs the practice of chiropractic care, does not have a provision that makes confidential the complaints and responses to complaints by the affected chiropractor.³ Moreover, we are not aware of any other law that prohibits disclosure of this information. Thus, you may not withhold the information pursuant to section 552.101 as information made confidential by law.

Additionally, counsel for the licensee argues that release of the complaint and response would implicate the licensee's privacy interests and are of no legitimate public interest. We assume that the licensee's representative claims the information is excepted from required public disclosure pursuant to the doctrine of common-law privacy as it is incorporated by section 552.101 of the Government Code.

For information to be protected from public disclosure under the common-law right of privacy, the information must meet the criteria set out in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The *Industrial Foundation* court stated that

information . . . is excepted from mandatory disclosure under Section 3(a)(1) as information deemed confidential by law if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public.

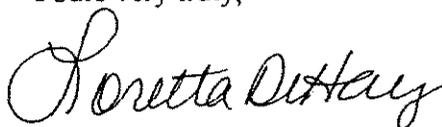
540 S.W.2d at 685; Open Records Decision No. 142 (1976) at 4 (construing former V.T.C.S. art. 6252-17a, § 3(a)(1)). In *Industrial Foundation*, the Texas Supreme Court considered intimate and embarrassing information such as that relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683. However, the public generally has a legitimate interest in complaints against individuals who are licensed or supervised by the state. Open Records Decision No. 525 (1989).

³We note, however, that there are confidentiality provisions concerning patient information. See V.T.C.S. art. 4512b, § 1b. Moreover, the board must protect the identity of any patient whose chiropractic records are examined during any disciplinary investigation or proceeding of a chiropractor. *Id.* § 1b(g)(5); see also *id.* § 1b(g)(6) (board shall protect identity of any patient in any criminal investigation of chiropractor). As the complaint was submitted anonymously to the board and the licensee does not name any patients in his response to the complaint, these confidentiality provisions are not implicated by the release of the requested information.

We have examined the documents submitted for our review and conclude that there is a legitimate public interest in them. Moreover, the documents do not contain highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person.⁴ Therefore, the doctrine of common-law privacy does not prohibit the disclosure of this information; the board must release the records in their entirety.⁵

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Loretta R. DeHay
Assistant Attorney General
Open Records Division

LRD/LBC/ch

Ref: ID# 32514

Enclosures: Submitted documents

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(w/o enclosures)

⁴We note that as the complaint was submitted anonymously, the release of the information can not invade the privacy of the complainant.

⁵Counsel for the licensee claims that the requested information puts the licensee in a "false light." False light privacy is not an actionable tort in Texas. See *Cain v. Hearst Corp.*, 878 S.W.2d 577, 579 (Tex. 1994). Therefore, a governmental body may not withhold information under section 552.101 of the Government Code merely because it might place a person in a false light. See Open Records Decision No. 579 (1990).

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