



April 16, 2002

Ms. Michele L. Shackelford
General Counsel
Texas State Board of Medical Examiners
P.O. Box 2018
Austin, Texas 78768-2018

OR2002-1921

Dear Ms. Shackelford:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 161361.

The Texas State Board of Medical Examiners (the "board") received a request for:

- The names of all physicians who received hospital suspensions for 30 days or longer, relating to the physician's competence, from 1997 to the present; the names of the hospitals making these suspensions; and the dates these suspensions occurred.
- All notices of claims or lawsuits against physicians as provided under subtitles 160.052 and 160.053 of the Texas Occupations Code, from 1997-present.

You claim that the requested information is excepted from disclosure under section 552.101 of the Government Code in conjunction with several provisions of the Medical Practice Act (the "MPA"), chapters 151-156, subtitle B, title 3 of the Occupations Code. We have considered the exception you claim and reviewed the submitted representative sample documents.¹ We have also considered written comments submitted on behalf of the

¹We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

requestor. *See* Gov't Code § 552.304 (providing that interested person may submit written comments stating why information at issue in request for attorney general decision should or should not be released).

We first address the timeliness of your request for a decision. Subsections 552.301(a) and (b) provide:

(a) A governmental body that receives a written request for information that it wishes to withhold from public disclosure and that it considers to be within one of the [act's] exceptions . . . must ask for a decision from the attorney general about whether the information is within that exception if there has not been a previous determination about whether the information falls within one of the exceptions.

(b) The governmental body must ask for the attorney general's decision and state the exceptions that apply within a reasonable time but not later than the 10th business day after the date of receiving the written request.

You state that the board received the instant request for information dated January 23, 2002. Based on our review of the request, we presume that you received the request on January 23, 2002. Accordingly, the board had until February 6, 2002 to submit its request for decision to this office. *See* Gov't Code § 552.301(b). The U. S. mail postmark date on the letter to this office requesting a decision is February 8, 2002. *See* Gov't Code § 552.308. (the requirement is met in a timely fashion if the document is sent by first class United States mail properly addressed with postage prepaid and it bears a post office cancellation mark indicating a time within that period). Consequently, you failed to request a decision within the ten business day period mandated by section 552.301(a) of the Government Code. Because the request for a decision was not timely received, the requested information is presumed to be public information. Gov't Code § 552.302.

In order to overcome the presumption that the requested information is public information, a governmental body must provide compelling reasons why the information should not be disclosed. *Id.*; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ); *see* Open Records Decision No. 630 (1994). A compelling reason to withhold the information from the public is demonstrated where information is made confidential by other law, or where third party interests are at issue. Open Record Decision No. 150 (1977). Since you claim that the information is excepted from disclosure under section 552.101, we address your claim.

You have submitted to this office as a representative sample of responsive information two sets of information. The first set, which you marked as Exhibit B and which is responsive to the first part of the request, includes copies of complaint inquiries, letters of suspension

from hospitals to the board, an adverse action report, and report status information. The second set, which you marked as Exhibit C and which is responsive to the second part of the request, includes medical professional liability claims reports, letters of notice of health care liability claims, and a petition in a medical professional liability lawsuit. We note that the documents in Exhibit B relate to physician suspensions of greater than thirty days. You assert that these exhibits are confidential under sections 160.005, 160.006 and 164.007 of the MPA, as well as under section 179.1 of title 22 of the Texas Administrative Code.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. You explain that the board obtained the information in Exhibit B pursuant to section 160.002 of the MPA. Section 160.002 requires hospitals to report to the board actions that adversely affect the clinical privileges of a physician for longer than 30 days. You explain that the board obtained the information in Exhibit C pursuant to section 160.052 of the MPA. Section 160.052 requires each insurer to submit information to the board not later than the 30th day after an insurer receives a notice of claim letter or complaint from an insured. *See also* Occ. Code § 160.053, 22 T.A.C. § 179.6. Section 160.006 of the Occupations Code provides:

(a) A record, report, or other information received and maintained by the board under this subchapter [A] or Subchapter B, including any material received or developed by the board during an investigation or hearing, is confidential. The board may disclose this information only:

(1) in a disciplinary hearing before the board or in a subsequent trial or appeal of a board action or order;

(2) to the physician licensing or disciplinary authority of another jurisdiction, to a local, state, or national professional medical society or association, or to a medical peer review committee located inside or outside this state that is concerned with granting, limiting, or denying a physician hospital privileges;

(3) under a court order; or

(4) to qualified personnel for bona fide research or educational purposes, if personally identifiable information relating to any physician or other individual is first deleted.

(b) Any known hospital suspension of a physician for a term of 30 days or longer relating to the physician's competence and a disciplinary order of the board against a physician are not confidential.

(c) A record or report disclosed by the board under this subchapter and a record or report received, maintained, or developed by the board, a medical peer review committee, a member of the committee, or a health care entity are not available for discovery or court subpoena and may not be introduced into evidence in any action for damages, including a medical professional liability action that arises out of the provision of or failure to provide a medical or health care service.

Occ. Code §160.006. Based on our review of Exhibits B and C and your arguments, we find that the information in those exhibits consists of records, reports, or other information received and maintained by the board under subchapters A and B of Chapter 160 of the Occupations Code. *See* Occ. Code §160.006(a). None of the conditions for release of this information under section 160.006 applies in this case. Accordingly, the board must withhold the information in the form it is submitted based on section 552.101 of the Government Code in conjunction with section 160.006(a) of the Occupations Code.² As we are able to make this determination, we need not address your other claimed exceptions.

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 example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the

²While we have determined that the board's submissions are confidential by law, we note that the information covered by section 160.006(a) can be distinguished from hospital suspensions of a physician for longer than 30 days that relate to the physician's competence and a disciplinary order of the board against a physician that are not confidential under section 160.006(b).

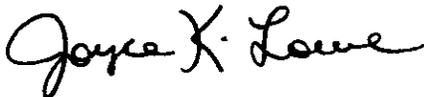
governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Joyce K. Lowe
Assistant Attorney General
Open Records Division

JKL/sdk

Ref: ID# 161361

Enc: Submitted documents

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