



November 8, 2002

Mr. Hemant Makan
Public Information Officer
Texas State Board of Podiatric Medical Examiners
P.O. Box 12216
Austin, Texas 78711-2216

OR2002-6382

Dear Mr. Makan:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 171937.

The Texas State Board of Podiatric Medical Examiners (the "board") received a request for a copy of a complaint. You ask whether the requested information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you raise and have reviewed the information you submitted.

We first address your comments with regard to the release of the requested information under section 202.203 of the Occupations Code. Chapter 202 of the Occupations Code is applicable to the board. Section 202.203 provides in part:

(b) If a written complaint is filed with the board, the board, at least quarterly and until final disposition of the complaint, shall notify the parties to the complaint of the status of the complaint unless the notification would jeopardize an undercover investigation. The board may provide a copy of the complaint to the license holder unless providing a copy would jeopardize an investigation.

Occ. Code § 202.203(b). You indicate that the requestor is the license holder. You state that the board has determined that release of the complaint to the requestor will not jeopardize

its investigation. Thus, the board is authorized to release the complaint to the requestor under section 202.203(b).

You also note that section 202.509 of the Occupations Code is applicable to a complaint filed with the board. Section 202.509 provides in part:

(a) A complaint, report, investigation file, or other investigative information in the possession of or received or gathered by the board or an employee or agent of the board that relates to a license holder, a license application, or a criminal investigation or proceeding is privileged, confidential, and not subject to discovery, subpoena, or any other legal method of compelling release.

Id. § 202.509(a). Section 202.509 also provides for the release of information relating to a complaint under specified circumstances and to certain persons. *See id.* § 202.509(b), (d), (e), (f). You do not indicate, however, that any of these provisions is applicable in this instance. Thus, section 202.509 appears to require the board to withhold the requested complaint.

You assert, however, that section 202.203(b), as a later-enacted statute, prevails over section 202.509(a). The portion of section 202.509 that makes a complaint confidential was enacted on May 13, 1999.¹ The portion of section 202.203 that allows the board to release a complaint was enacted on May 26, 1999.² Section 311.025 of the Code Construction Act provides that if statutes enacted at the same or different sessions of the legislature are irreconcilable, the statute latest in date of enactment prevails. *See Gov't Code* § 311.025(a). In this instance, the portion of section 202.203 that allows the board to release a complaint was enacted later in time than section 202.509. Therefore, we conclude that section 202.203 prevails over section 202.509.

¹*See Act of May 13, 1999, 76th Leg., R.S., ch. 388, § 1, 1999 Tex. Gen. Laws 1431, 1576-77.*

²*See Act of May 26, 1999, 76th Leg., R.S., ch. 788, § 1, 1999 Tex. Gen. Laws 3412, 3412-13.* This legislation amended article 4573 of the Revised Statutes, which the Seventy-sixth Legislature repealed in codifying sections 202.203 and 202.509 of the Occupations Code. *See Act of May 13, 1999, 76th Leg., R.S., ch. 388, § 6, 1999 Tex. Gen. Laws 1431, 2439-40.* Section 311.031 of the Code Construction Act provides, however, that the repeal of a statute by a code does not affect an amendment of that statute by the same legislature that enacted the code. *See Gov't Code* § 311.031(c). The amendment is preserved and given effect as part of the code provision that revised the statute so amended. *Id.* Thus, the legislature's amendment of article 4573 was given effect as part of section 202.203. The Seventy-seventh Legislature amended section 202.203(b) to conform to the Seventy-sixth Legislature's amendment of article 4573. *See Act of May 22, 2001, 77th Leg., R.S., ch. 1420, § 14.052, 2001 Tex. Gen. Laws 4210, 4366.*

You also ask whether the requested complaint is a confidential peer review document for purposes of section 552.101 of the Government Code.³ Section 160.007 of the Occupations Code provides that “each proceeding or record of a medical peer review committee is confidential, and any communication made to a medical peer review committee is privileged.” Occ. Code § 160.007(a). Likewise, section 161.032 of the Health and Safety Code provides in part that “[r]ecords, information, or reports of a medical committee [or] medical peer review committee . . . are not subject to disclosure under Chapter 552, Government Code.” Health & Safety Code § 161.032(c). Neither section 160.007 of the Occupations Code nor section 161.032 of the Health and Safety Code makes confidential “records made or maintained in the regular course of business by a hospital, health maintenance organization, medical organization, university medical center or health science center, hospital district, hospital authority, or extended care facility.” *See id.* § 161.032(f); *see also Memorial Hosp.-the Woodlands v. McCown*, 927 S.W.2d 1, 11 (Tex. 1996) (stating that reference to statutory predecessor of Occ. Code § 160.007 in section 161.032 is clear signal that records should be accorded same treatment under both statutes in determining if they were made in regular course of business). “Records made or maintained in the regular course of business” has been construed to mean records that are neither created nor obtained in connection with a medical committee’s deliberative proceedings. *See Memorial Hosp.-the Woodlands*, 927 S.W.2d at 9-10 (discussing *Barnes v. Whittington*, 751 S.W.2d 493 (Tex. 1988), and *Jordan v. Court of Appeals for Fourth Supreme Judicial Dist.*, 701 S.W.2d 644 (Tex. 1985)).⁴

You inform us that the board received the requested complaint from a hospital in Fort Worth, Texas. You state that the individual who submitted the complaint to the board identifies himself as a member of a medical peer review committee and asserts that the complaint is considered to be a confidential peer review communication. You contend that the complaint is merely a communication to the board of information relating to one of its licensees and is not a confidential peer review document. We conclude, however, that we need not resolve this issue. Assuming that the complaint is subject to section 160.007 of the Occupations Code or section 161.032 of the Health and Safety Code, both of these sections are generally applicable to peer review records. Section 202.203 of the Occupations Code is specifically applicable to a complaint held by the board. *See Mitchell v. City of Dallas*, 855 S.W.2d 741, 747 (Tex. App. – Dallas 1993), *aff’d*, 870 S.W.2d 21 (Tex. 1994) (when two statutes conflict, specific controls over general). Furthermore, of the three statutes in question here,

³Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” This exception encompasses information that other statutes make confidential.

⁴Both *Barnes* and *Jordan* relied on the statutory predecessor to section 161.032 of the Health and Safety Code, section 3 of article 4447d, Vernon’s Texas Civil Statutes, which provided in part that “records made or maintained in the regular course of business” were not confidential.

section 202.203 is the statute enacted latest in time.⁵ See Gov't Code § 311.025(a); Open Records Decision No. 643 at 2 (1996) (citing *Acker v. Texas Water Comm'n*, 790 S.W.2d 299 (Tex. 1990)) (legislature is presumed to have enacted a statute with complete knowledge of and reference to existing law). Thus, notwithstanding sections 160.007 and 161.032, we conclude that the board may release the complaint to the requestor under section 202.203 of the Occupations Code.

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 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).

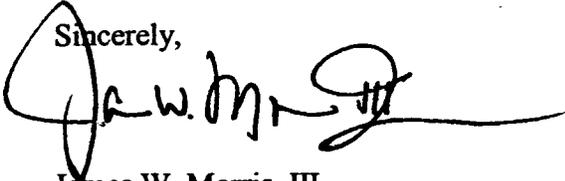
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

⁵The Seventy-sixth Legislature enacted section 160.007 of the Occupations Code on May 13, 1999. See Act of May 13, 1999, 76th Leg., R.S., ch. 388, § 1, 1999 Tex. Gen. Laws 1431, 1505-06. The Seventy-sixth Legislature also enacted the relevant language of section 161.032 of the Health and Safety Code on May 21, 1999. See Act of May 21, 1999, 76th Leg., R.S., ch. 908, § 4, 1999 Tex. Gen. Laws 3622, 3623.

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,

A handwritten signature in black ink, appearing to read "J.W. Morris, III". The signature is written in a cursive style with a large initial "J" and a long horizontal flourish extending to the right.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/seg

Ref: ID# 171937

Enc: Submitted document

c: Dr. Edward Singleton
5750 Rufe Snow Drive, Suite 108
North Richland Hills, Texas 76180
(w/o enclosure)