



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

June 10, 2003

Ms. Jennifer A. Soffer
Assistant General Counsel
Texas State Board of Medical Examiners
P. O. Box 2018
Austin, Texas 78768-2018

OR2003-3980

Dear Ms. Soffer:

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# 182533.

The Texas State Board of Medical Examiners (the "Board") received a request for the licensure application of a named physician. You assert the submitted information is excepted from disclosure under section 552.101 of the Government Code. We have reviewed the information you submitted and we have considered the exception you claim.

Initially, we address the Board's obligations under section 552.301 of the Government Code. Pursuant to section 552.301(e), a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. In this case, you acknowledge that the Board received the present request for information on April 2, 2003. Accordingly, the Board should have submitted the requested information or a representative sample no later than April 23, 2003. We received the requested information on May 2, 2003. Consequently, we conclude the Board failed to comply with the requirements of section 552.301(e) of the Government Code.

According to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301 results in the legal presumption that the 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 Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). Normally, a compelling interest is that some other source of law makes the information confidential or that third party interests are at stake. Open Records Decision No. 150 at 2 (1977). As section 552.101 of the Government Code can provide a compelling reason to overcome the presumption of openness, we will address your argument under this exception. *See Open Records Decision No. 150 (1977)* (presumption of openness overcome by a showing that the information is made confidential by another source of law or affects third party interests).

Section 552.101 of the Government Code excepts “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” This section encompasses information protected by other statutes. Section 164.007(c) of the Occupations Code provides the following:

(c) 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.

Occ. Code § 164.007(c). Section 164.007(c) applies to investigatory records gathered by the Board relating to an investigation of a license holder. In your letter dated April 3, 2003, you contend section 164.007(c) excepts the requested information from required public disclosure. However, the Board does not indicate that it has submitted information relating to an investigation by the Board as contemplated by section 164.007. Consequently, the Board may not withhold any of the submitted information pursuant to section 552.101 of the Government Code in conjunction with section 164.007(c) of the Occupations Code.

Next, you assert section 155.007(g) of the Occupations Code protects the requested licensure information from disclosure. Chapter 155 of the Occupations Code pertains to eligibility to obtain a license to practice medicine. Subchapter A enumerates the requirements to obtain such a license. Section 155.007 further describes the application process, and provides, in relevant part, as follows:

(a) The executive director [of the board] shall review each application for a license and shall:

(1) recommend to the board each applicant eligible for a license; and

(2) report to the board the name of each applicant determined to be *ineligible* for a license, together with the reasons for that determination.

(b) An applicant determined to be ineligible for a license by the executive director may request review of that determination by a committee of the board. . . .

(c) The executive director may refer an application to the board committee for a recommendation concerning eligibility. If the committee determines that the applicant is ineligible for a license, the committee shall submit that determination, together with the reasons for the determination, to the board unless the applicant requests a hearing

. . .

(e) A hearing requested under Subsection (c) shall be held before an administrative law judge of the State Office of Administrative hearings

(f) After receipt of the administrative law judge's proposed findings of fact and conclusions of law, the board shall determine the applicant's eligibility. The board shall provide an applicant who is denied a license a written statement containing the reasons for the board's action.

(g) Each *report* received or gathered by the board on a license applicant is confidential and is not subject to disclosure under Chapter 552, Government Code. The board may disclose a report to an appropriate licensing authority in another state. The board shall report all licensing actions to appropriate licensing authorities in other states and to the Federation of State Medical Boards of the United States.

Occ. Code § 155.007(a), (b), (c), (e), (f), (g) (emphasis added). This section only addresses the executive director's and board committee's determination of eligibility. The licensure information you submitted consists of various application documents, including the licensee's application, examination information, affidavits, transcripts, pleadings, and insurance statements. After reviewing the submitted materials and the relevant sections of the Occupations Code, we do not agree that the submitted licensure information is a "report" as contemplated by section 155.007(g). While the submitted material pertains to an application for a medical license, none of the submitted information is a report concerning the applicant's eligibility for a license. Therefore, the Board may not withhold the licensure information based on section 552.101 of the Government Code in conjunction with section 155.007 of the Occupations Code.

However, the submitted information contains a social security number governed by section 56.001 of the Occupations Code. This provision makes “[t]he social security number of an applicant for or holder of a license, certificate of registration, or other legal authorization issued by a licensing agency to practice in a specific occupation or profession that is provided to the licensing agency . . . confidential and not subject to disclosure under Chapter 552, Government Code.” Occ. Code § 56.001. Thus, the Board must withhold the social security number, which we have marked, pursuant to section 552.101 of the Government Code and section 56.001 of the Occupations Code.

Further, we note federal regulations prohibit the release of criminal history report information (“CHRI”) maintained in state and local CHRI systems to the general public. *See* 28 C.F.R. § 20.21(c)(1) (“Use of criminal history record information disseminated to noncriminal justice agencies shall be limited to the purpose for which it was given.”), (2) (“No agency or individual shall confirm the existence or nonexistence of criminal history record information to any person or agency that would not be eligible to receive the information itself.”). Section 411.083 provides that any CHRI maintained by the Department of Public Safety (“DPS”) is confidential. Gov’t Code § 411.083(a). Similarly, CHRI obtained from the DPS pursuant to statute is also confidential and may only be disclosed in very limited instances. *Id.* § 411.084; *see also id.* § 411.087 (restrictions on disclosure of CHRI obtained from DPS also apply to CHRI obtained from other criminal justice agencies). Therefore, assuming the Board possesses CHRI, it must withhold the CHRI from the requestor.

Also, we note federal law governs the releasability of some of the submitted information. Section 60.13 of title 45 of the Code of Federal Regulations states the following:

(a) Limitations on disclosure. Information reported to the [National Practitioner] Data Bank is considered confidential and shall not be disclosed outside the Department of Health and Human Services, except as specified in § 60.10, § 60.11 and § 60.14. Persons and entities which received information from the Data Bank either directly or from another party must use it solely with respect to the purpose for which it was provided. Nothing in this paragraph shall prevent the disclosure of information by a party which is authorized under applicable State law to make such disclosure.

45 C.F.R. § 60.13. The submitted information contains documents from the National Practitioner Data Bank. Therefore, we conclude the Board must release this information only in accordance with federal law.

Next, we note the applicability of the doctrine of common-law privacy, as encompassed by section 552.101 of the Government Code. For information to be protected from public disclosure under common-law 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). Common-law privacy protects information when (1) it contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) the public has no legitimate interest in the disclosure of the information. *Id.* at 685; Open Records Decision No. 611 at 1 (1992). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information 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. *Indus. Found.*, 540 S.W.2d at 683. However, because “the right of privacy is purely personal,” that right “terminates upon the death of the person whose privacy is invaded.” *Moore v. Charles B. Pierce Film Enters., Inc.*, 589 S.W.2d 489, 491 (Tex. App.—Texarkana 1979, writ ref’d n.r.e.); *see also Justice v. Belo Broad. Corp.*, 472 F. Supp. 145, 146-47 (N.D. Tex. 1979) (“action for invasion of privacy can be maintained only by a living individual whose privacy is invaded”) (quoting Restatement of Torts 2d); *Cordell v. Detective Publ’ns, Inc.*, 419 F.2d 989, 990 (6th Cir. 1969) (under Tennessee common law, action for public disclosure of private matters lapses with the death of the person whose privacy is invaded); *Swickard v. Wayne County Med. Exam’r*, 475 N.W.2d 304, 309 (Mich. 1991) (“action for the invasion of privacy cannot be maintained after the death of the person whose privacy is invaded”) (quoting Restatement of Torts 2d). In this instance, the TSBME Licensure Application contains questions, the answers to which are highly intimate or embarrassing. Further, we do not believe the public has a legitimate interest in this information. *See Indus. Found.*, 540 S.W.2d at 685. Additionally, the submitted information contains patient information pertaining to certain medical information, which we believe is highly intimate or embarrassing. Previously, this office found some kinds of medical information and information indicating specific illnesses are private. Open Records Decision Nos. 470 (1987) (illness from emotional and job-related stress), 455 (1987) (illnesses, operations, and physical handicaps). Though the public has a legitimate interest in information that concerns complaints against physicians, we believe the public has no legitimate interest in the identities of some of the patients. *See Indus. Found.*, 540 S.W.2d at 685. Therefore, the Board must withhold the information we have marked based on section 552.101 of the Government Code and common-law privacy.

However, we note patient-identifying information contained in a public court record is not subject to protection under common-law privacy. *See Gov’t Code* § 522.022(a)(17) (providing that information contained in a public court record is public information); *Star-Telegram, Inc. v. Walker*, 834 S.W.2d 54, 57-58 (Tex. 1992). In *Star-Telegram, Inc.*, the sexual assault victim’s name became part of the public record because it was used in the indictment, motion in limine, and the charge to the jury. *Star-Telegram, Inc.*, 834 S.W.2d at 57. Thus, the Texas Supreme Court held that a trial court may not prohibit a newspaper from disclosing the victim’s true identity when the information was obtained from the public record. *Id.* at 58. Similarly, the Board may not withhold the patient-identifying information from the submitted documents that are on file with a court because such information is part of the public record.

Last, we note the applicability of section 552.137 of the Government Code, which states the following:

- (a) An e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.
- (b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

Gov't Code § 552.137. This provision makes certain e-mail addresses confidential.¹ See Gov't Code § 552.137. You explain that no member of the public has affirmatively consented to the release of any e-mail address contained in the submitted materials. Therefore, the Board must withhold the e-mail addresses of the members of the public, which we have marked, under section 552.137 of the Government Code.

You ask this office to issue a previous determination authorizing the Board to withhold similar information if requested in the future. We decline to issue a previous determination at this time which would allow the Board to withhold the general category of information at issue in this case in the future. See Open Records Decision No. 673 (2001).

In summary, the Board must withhold the following information under section 552.101 of the Government Code in conjunction with the specified law: 1) the social security number, which we have marked, under section 56.001 of the Occupations Code, 2) to the extent it exists, any criminal history record information under federal and state statutes, and 3) the information we have marked under common-law privacy. The Board must withhold the e-mail addresses we have marked pursuant to section 552.137 of the Government Code. The Board must release the information from the National Practitioner Data Bank only in accordance with federal law. The Board must release the remainder of the submitted information.

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

¹ Section 552.137 does not apply to a general business e-mail address.

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 Dep't of Pub. 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,



Christen Sorrell
Assistant Attorney General
Open Records Division

CHS/seg

Ref: ID# 182533

Enc. Submitted documents

c: Ms. Amy B. Merklen
Assistant Counsel
Bureau of Professional Medical Conduct
State of New York Department of Health
The Empire State Plaza
Corning Tower, Room 2512
Albany, New York 12237
(w/o enclosures)