CAUSE NO. GN302640

TEXAS STATE BOARD OF MEDICAL EXAMINERS, Plaintiff,	§	IN THE DISTRICT COURT OF
BAYLOR COLLEGE OF MEDICINE, Plaintiff Intervenor,	§	TRAVIS COUNTY, TEXAS
V.	§	
GREG ABBOTT, ATTORNEY GENERAL OF TEXAS, Defendant.	§	98th JUDICIAL DISTRICT

FILED
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DISTRICT CLERK
TRAVIS COUNTY, TEXAS

AGREED FINAL JUDGMENT

On this date, the Court heard the parties' motion for entry of an agreed final judgment. By their motion, Plaintiff, Texas State Board of Medical Examiners (TSBME), Plaintiff Intervenor, Baylor College of Medicine, and Defendant, Greg Abbott, Attorney General of Texas, announced to the Court that all matters of fact and things in controversy between them had been fully and finally compromised and settled. This cause is an action under the Public Information Act (PIA), Tex. Gov't Code ch. 552. The parties represent to the Court that, in compliance with Tex. Gov't Code § 552.325(c), the three requestors, L.T. "Butch" Bradt, Deanna Inman, and Margaret Henning, were sent reasonable notice of this setting and of the parties' agreement that TSBME may withhold some of the information at issue; that the requestors were each individually informed of his or her right to intervene in the suit to contest the withholding of this information; and that the requestors have not informed the parties of their intention to intervene. Neither has any requestor filed a motion to intervene or appeared today. After considering the agreement of the parties and the law, the Court is

of the opinion that entry of an agreed final judgment is appropriate, disposing of all claims between these parties.

IT IS THEREFORE ADJUDGED, ORDERED AND DECLARED that:

1. Some of the information at issue in the named doctors' licensure files, specifically, Bates numbered pages, A3, A5-6, A9, A13, A16-18, A21-23, B2-4, B7-8, B19, B23, B25, B27, B29, B31, B38, B40, B44, B47-48, B51-52, B58, B62-B64, B66-67, C2-3, C8, C14-15, is confidential under Tex. Occ. Code § 164.007(c), and, thus, excepted from disclosure by Tex. Gov't Code § 552.101.

2. Some of the information at issue in the named doctors' licensure files, specifically, Bates numbered pages, A3, A5-6, A13, A16-18, A21-23, B2-4, B7-8, B19, B23, B25, B27, B29, B31, B38, B40, B44, B47-48, B51-52, B58, B62-64, B66-67, C2-3, C8, C14-15, as marked by the Office of the Attorney General, is also confidential under Tex. Occ. Code § 155.007(g), and, thus, excepted from disclosure under Tex. Gov't Code § 552.101.

3. Some of the information at issue in the named doctors' licensure files, specifically, Bates numbered pages, A9, A13, A16-18, A21-23, B2, B19, B23, B25, B27, B29, B31, B38, B40, B47-48, B52, B58, B62-63, B66-67, C2-3, C8, C14-15, as marked by the Office of the Attorney General, is also confidential under Tex. Occ. Code § 155.058(a)(3), and, thus, excepted from disclosure by Tex. Gov't Code § 552.101.

4. The TSBME shall withhold the information in the doctors' licensure files enumerated in ¶¶ 1-3 of this Agreed Final Judgment, along with any other information in the files that the Attorney General determined was excepted from disclosure in Letter Rulings OR2003-4934, OR2003-4899, and OR2003-4912, including social security numbers and fingerprints, to be redacted from otherwise disclosable documents.

5. If it has not already done so, the TSBME shall release the remaining information in the doctors' licensure files, specifically Bates numbered pages, A1-2, A4, A7-8, A10-12, A14-15, A19-20, A24-25, B1, B5-6, B9-18, B20-22, B24, B26, B28, B30, B32-37, B39, B41-43, B45-46, B49-50, B53-57, B59-61, B65, B68-69, C1, C4-7, C9-13, C16-18, to the respective requestor promptly upon receipt by the TSBME of an agreed final judgment signed by the Court.

6. All costs of court are taxed against the parties incurring the same;

7. All relief not expressly granted is denied; and

8. This Agreed Final Judgment finally disposes of all claims between Plaintiff, Intervenor, and Defendant and is a final judgment.

SIGNED this the 14 day of July, 2005.

Margaret A. C

PRESIDING JUDGE

APPROVED:

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OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

July 15, 2003

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

OR2003-4899

Dear Ms. Soffer:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 184260.

The Texas State Board of Medical Examiners (the "board") received a request for the complete file on a named physician. You state that you have provided the requested disciplinary orders, address history, and licensure status to the requestor pursuant to the Medical Practice Act. You claim that all investigative and licensure information pertaining to the licensee is excepted from disclosure under section 552.101 of the Government Code in conjunction with section 164.007(c) of the Occupations Code. We have considered the exception you claim and reviewed the submitted information.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This exception encompasses information that another statute makes confidential. Section 164.007(c) 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. For purposes of this subsection, investigative information includes information relating to the identity of, and a report made by, a physician performing or supervising compliance monitoring for the board.

Occupations Code § 164.007(c). Section 164.007(c) applies to investigatory records gathered by the board during an investigation of a license holder. Based upon our review of your arguments and the submitted information, we find that some of the submitted records constitute investigative information possessed by the board relating to a license holder. Accordingly, you must withhold this information under section 552.101 in conjunction with section 164.007(c) of the Occupations Code. However, you fail to explain how the submitted licensure information relates to an investigation of a license holder as contemplated by section 164.007. Thus, the licensure information is not confidential and may not be withheld under section 552.101 of the Government Code in conjunction with section 164.007(c) of the Occupations Code.

We note, however, that certain information within the submitted licensure materials is confidential and must be withheld from public disclosure.[1] Section 56.001 of the Occupations Code 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." The board must withhold the physician's social security number pursuant to section 552.101 of the Government Code.

The submitted licensure materials also contain fingerprint information that is subject to sections 559.001, 559.002, and 559.003 of the Government Code. They provide as follows:

> Sec. 559.001. DEFINITIONS. In this chapter
>
> > (1) "Biometric identifier" means a retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry.
> >
> > (2) "Governmental body" has the meaning assigned by Section 552.003 [of the Government Code], except that the term includes each entity within or created by the judicial branch of state government.

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[1]The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

> Sec. 559.002. DISCLOSURE OF BIOMETRIC IDENTIFIER. A governmental body that possesses a biometric identifier of an individual:
>
> (1) may not sell, lease, or otherwise disclose the biometric identifier to another person unless:
>
> (A) the individual consents to the disclosure;
>
> (B) the disclosure is required or permitted by a federal statute or by a state statute other than Chapter 552 [of the Government Code]; or
>
> (C) the disclosure is made by or to a law enforcement agency for a law enforcement purpose; and
>
> (2) shall store, transmit, and protect from disclosure the biometric identifier using reasonable care and in a manner that is the same as or more protective than the manner in which the governmental body stores, transmits, and protects its other confidential information.
>
> Sec. 559.003. APPLICATION OF CHAPTER 552. A biometric identifier in the possession of a governmental body is exempt from disclosure under Chapter 552.

It does not appear to this office that section 559.002 permits the disclosure of the submitted fingerprint information. Therefore, the board must withhold the fingerprints under section 552.101 in conjunction with section 559.003 of the Government Code.

Criminal history record information ("CHRI") generated by the National Crime Information Center ("NCIC") or by the Texas Crime Information Center ("TCIC") is confidential. Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that states obtain from the federal government or other states. Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* Section 411.083 of the Government Code deems confidential CHRI that the Department of Public Safety ("DPS") maintains, except that the DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. *See* Gov't Code § 411.083.

Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *Id.* § 411.089(b)(1). Other entities specified in chapter 411 of the Government Code are entitled to obtain CHRI from DPS or another criminal justice agency; however, those entities may not release CHRI except as provided

by chapter 411. *See generally id.* §§ 411.090 - .127. Thus, any CHRI generated by the federal government or another state may not be made available to the requestor except in accordance with federal regulations. *See* Open Records Decision No. 565 (1990). Furthermore, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 of the Government Code in conjunction with Government Code chapter 411, subchapter F. Therefore, assuming that the board has CHRI about the licensee in its possession and it falls within the ambit of these state and federal regulations, the board must withhold the CHRI from the requestor.

Finally, although the attorney general will not ordinarily raise an exception that might apply but that the governmental body has failed to claim, *see* Open Records Decision No. 325 at 1 (1982), we will raise section 552.101 of the Government Code, which protects "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," because the release of confidential information could impair the rights of third parties and because the improper release of confidential information constitutes a misdemeanor. *See* Government Code § 552.352.

Section 552.101 protects information coming within the common-law right to privacy. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Common-law privacy protects information if it is highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, *and* it is of no legitimate concern to the public. *Id.* at 683-85. In *Industrial Foundation*, the Texas Supreme Court considered intimate and embarrassing information that relates 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. This office has also determined that common-law privacy protects the following information: the kinds of prescription drugs a person is taking, Open Records Decision No. 455 (1987); the results of mandatory urine testing, *id.*; illnesses, operations, and physical handicaps of applicants, *id.*; the fact that a person attempted suicide, Open Records Decision No. 422 (1984); the names of parents of victims of sudden infant death syndrome, Attorney General Opinion JM-81; and information regarding drug overdoses, acute alcohol intoxication, obstetrical/gynecological illnesses, convulsions/seizures, or emotional/ mental distress. Open Records Decision No. 343 (1982).

Upon review, we conclude that the some of the information submitted to this office is both highly intimate or embarrassing and of no legitimate public interest. The board must withhold the information we have marked as coming within the common-law right of privacy.

To summarize, we conclude that: (1) the board must withhold the investigative information under section 552.101 of the Government Code in conjunction with section 164.007(c) of the Occupations Code; (2) the board must withhold the social security number under section 552.101 in conjunction with section 56.001 of the Occupations Code; (3) the board

must withhold the submitted fingerprints under section 552.101 in conjunction with section 559.003 of the Government Code; and (4) to the extent the board has CHRI about the licensee in its possession, the board must withhold the CHRI from the requestor. The board must also withhold the information we have marked as coming within the common-law right of privacy. The remaining submitted information must be released.

You request that this office issue a previous determination to categorically encompass the types of investigative records that were requested. You also request that the board be allowed to apply such previous determination retroactively. We decline to issue such a determination at this time. Accordingly, 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 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,

David R. Saldivar
Assistant Attorney General
Open Records Division

DRS/RWP/seg

Ref: ID# 184260

Enc. Submitted documents

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