

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.

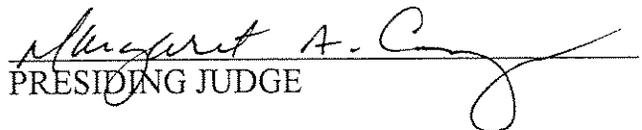
5. If it has not already done so, the TSBME shall release the remaining information in the doctors' licensure files, specifically Bates numbered pages, A1-2, A4, A7-8, A10-12, A14-15, A19-20, A24-25, B1, B5-6, B9-18, B20-22, B24, B26, B28, B30, B32-37, B39, B41-43, B45-46, B49-50, B53-57, B59-61, B65, 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.


PRESIDING JUDGE

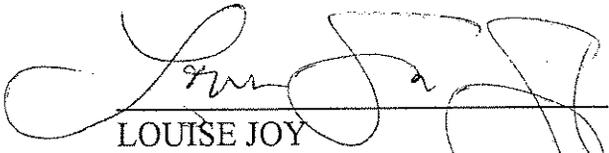
APPROVED:



ANN HARTLEY
Assistant Attorney General
Financial Litigation Division
300 West 15th Street, 8th Floor
Austin, Texas 78701
Telephone: 936-1313
Fax: 477-2348
State Bar No. 09157700
ATTORNEY FOR PLAINTIFF



JASON RAY
Assistant Attorney General
Open Records Litigation Section
Administrative Law Division
P. O. Box 12548, Capitol Station
Austin, Texas 78711-2548
Telephone: 475-4300
Fax: 320-0167
State Bar No. 24000511
ATTORNEY FOR DEFENDANT



LOUISE JOY
Joy & Young, L.L.P.
1801 South MoPac Expressway
Suite 300
Austin, Texas 78746
Telephone: (512) 330-0228
Fax: (512) 330-9880
State Bar No. 11034900
ATTORNEY FOR PLAINTIFF
INTERVENOR, BAYLOR COLLEGE
OF MEDICINE



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

July 16, 2003

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

OR2003-4934

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# 184276.

The Texas State Board of Medical Examiners (the "board") received a request for access to or copies of any and all records pertaining to a named individual, including educational records and transcripts. You claim that the requested information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Initially, we note, and you acknowledge, that the board has not complied with the procedural requirements of section 552.301 of the Government Code. Pursuant to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply not later than the tenth business day after the date of receiving the written request. You state that the board received the present request for information on April 10, 2003. The board did not request a decision from this office until May 12, 2003. Consequently, the board failed to request a decision within the ten-business-day period mandated by section 552.301(b) of the Government Code.

Additionally, 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. You did not, however, submit to this office any of the required information within fifteen business days of receiving the request.

Pursuant 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 requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See* Gov't Code § 552.302; *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). As section 552.101 of the Government Code may provide a compelling reason to overcome the presumption of openness, we will address your argument under that 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. You state that the requested information is protected under section 155.007(g) of the Occupations Code. You state that "all licensure information pertaining to the licensee is confidential and therefore not subject to public 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:

(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. 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 information pertains to an application for a medical license, none of the submitted information is a report concerning the applicant's eligibility for a license. This information, therefore, is not confidential and may not be withheld under section 552.101 of the Government 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 social security number, which we have marked, pursuant to section 552.101 of the Government Code.

¹The 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).

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.

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.

We note that the submitted information contains information that is confidential under section 552.101 and common-law privacy. Common-law privacy protects information 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. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). 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. 540 S.W.2d at 683.

This office has found that the following types of information are excepted from required public disclosure under common-law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps), personal financial information not relating to the financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990), identities of victims of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982), and references in emergency medical records to a drug overdose, acute alcohol intoxication, obstetrical/gynecological illness, convulsions/seizures, or emotional/mental

distress, *see* Open Records Decision No. 343 at 1-2 (1982). Upon review of the submitted information, we conclude that a portion of it is highly intimate and embarrassing and of no legitimate public concern. Therefore, the board must withhold the information we have marked under section 552.101 and common-law privacy.

To summarize, we conclude that the board must withhold the social security number we have marked under section 552.101 in conjunction with section 56.001 of the Occupations Code. The board must withhold the submitted fingerprints under section 552.101 in conjunction with section 559.003 of the Government Code. 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 withhold the information we have marked under section 552.101 and common-law 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,



Jennifer E. Berry
Assistant Attorney General
Open Records Division

JEB/seg

Ref: ID# 184276

Enc: Submitted documents

c: Mr. L. T. Bradt
Law Offices of L. T. Bradt, P.C.
5718 Westheimer, Suite 700
Houston, Texas 77057-5745
(w/o enclosures)