ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 24, 2005

Mr. Dan Meador
Assistant General Counsel
Texas Department of Health
1100 West 49th Street
Austin, Texas 78756-3199

OR2005-09620

Dear Mr. Meador

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code, the Public Information Act (the "Act"). Your request was assigned ID# 234697.

The Texas Department of State Health Services (the "department") received a request for all complaint reviews, investigative notes and reports, hearing notes and minutes, and disciplinary recommendations pertaining to a named counselor. You state that you have released some of the responsive information. You claim that the submitted 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 department has not complied with section 552.301 of the Government Code in seeking an open records decision from this office. When a governmental body fails to comply with the procedural requirements of section 552.301, the information at issue is presumed public and must be released unless there is a compelling reason to withhold it. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ); *City of Houston v. Houston Chronicle Publ'g Co.*, 673 S.W.2d 316, 323 (Tex. App.–Houston [1st Dist.] 1984, no writ); Open Records Decision No. 319 (1982). Generally, a governmental body may demonstrate a compelling reason to withhold information by a showing that the information is made confidential by another source of law or affects third party interests. *See* Open Records

Decision No. 630 (1994). Because section 552.101 can provide a compelling reason to withhold information, we will consider your argument under this section.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses confidentiality provisions such as section 503.2545 of the Occupations Code, which provides in pertinent part:

> (h) All information and materials subpoenaed or compiled by the [Texas State Board of Examiners of Professional Counselors] in connection with a complaint and investigation are confidential and not subject to disclosure under Chapter 552, Government Code, and not subject to disclosure, discovery, subpoena, or other means of legal compulsion for their release to anyone other than the board or its employees or agents involved in discipline of the holder of a license, except that this information may be disclosed to:
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> > (1) persons involved with the board in a disciplinary action against the holder of a license;
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> > (2) professional counselor licensing or disciplinary boards in other jurisdictions;
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> > (3) peer assistance programs approved by the board under Chapter 467, Health and Safety Code;
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> > (4) law enforcement agencies; and
> >
> > (5) persons engaged in bona fide research, if all individual-identifying information has been deleted.
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> (i) The filing of formal charges by the board against a holder of a license, the nature of those charges, disciplinary proceedings of the board, and final disciplinary actions, including warnings and reprimands, by the board are not confidential and are subject to disclosure in accordance with [the Act].

Occ. Code § 505.2545(h), (i). You indicate, and the submitted information reflects, that the submitted information was compiled by the Texas State Board of Examiners of Professional Counselors (the "board"), which is a part of the department's Professional Licensing and Certification Unit, in connection with the board's investigation of the named counselor. You further state that none of the exceptions to confidentiality under section 503.2545(h) are applicable in this instance. On the basis of your representations and our review of the submitted information, we conclude that the submitted information is made confidential in its entirety pursuant to section 503.2545(h) of the Occupations Code. The department

therefore must withhold the submitted information pursuant to section 552.101 of the Government Code. However, if the department has filed formal charges against this person, the nature of those charges, disciplinary proceedings of the board, and any final disciplinary actions are not confidential and must be released to the requestor. *See id.* § 503.2545(I).

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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 Office of the Attorney General 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. 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,

Tamara L. Harswick

Tamara L. Harswick
Assistant Attorney General
Open Records Division

TLH/sdk

Ref: ID# 234697

Enc. Submitted documents

c: Ms. Kimberly Rainikar Taylor
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(w/o enclosures)