



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 4, 2007

Ms. Barbara S. Jordan
SBDE Attorney
State Board of Dental Examiners
333 Guadalupe, Tower 3, Suite 800
Austin, Texas 78701-3942

OR2007-06932

Dear Ms. Jordan:

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# 280107.

The State Board of Dental Examiners (the "board") received a request for an electronic copy of the enforcement, legal, and compliance databases. You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.108, 552.111, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.¹

You claim that the submitted information from the enforcement, legal, and compliance databases is excepted from disclosure under section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information made confidential by other statutes. Section 254.006 of the Occupations Code states as follows:

¹We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

(a) Except as provided by this section, the investigation files and other records of the board are public records and open to public inspection at reasonable times.

(b) Investigation files and other records are confidential and shall be divulged only to the persons investigated at the completion of the investigation. The board may share investigation files and other records with another state regulatory agency or a local, state, or federal law enforcement agency.

(c) The exception from public disclosure of investigation files and records provided by this section does not apply to the disclosure of disciplinary action of the board, including:

- (1) the revocation or suspension of a license;
- (2) the imposition of a fine on a license holder;
- (3) the placement on probation with conditions of a license holder whose license was suspended;
- (4) the reprimand of a license holder; or
- (5) the issuance of a warning letter to a license holder.

Occ. Code § 254.006. You explain that the enforcement database “tracks and maintains data collected on files that have been or are being investigated.” You further explain that “[i]f an investigation reveals that a [dentist] may have violated the Dental Practice Act, the investigative file is forwarded to the legal department. The legal database uses the confidential investigative files as the basis of its entries[.]” Accordingly, we understand you to assert that the information from the enforcement and legal databases consists of investigation records of the board compiled in response to complaints filed against dentists licensed by the board. Furthermore, we find that section 254.006(c) does not apply in this instance. Accordingly, we conclude that the submitted information from the enforcement and legal databases is made confidential in its entirety pursuant to section 254.006(b) of the Occupations Code and is therefore excepted from disclosure under section 552.101 of the Government Code. You also explain that the compliance database tracks an “individual licensee’s compliance with, or non-compliance with, disciplinary actions issued by the [board].” Based upon your representations and our review, we find that the board has failed to establish that the information at issue consists of investigation records or other records for purposes of section 254.006(b) of the Occupations Code. Accordingly, the information from the compliance database may not be withheld under section 552.101 on this basis.

Next, we understand the board to claim that the submitted information from the compliance database pertaining to consulting experts is excepted from disclosure under rule 192.3 of the Texas Rules of Civil Procedure in conjunction with section 552.101 of the Government Code. As noted previously, section 552.101 excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This office has expressly determined that civil discovery privileges do not fall under section 552.101 because they are not constitutional law, statutory law, or judicial decisions. *See* Open Records Decision No. 647 at 2 (1996). Accordingly, you may not withhold any of the submitted information from the compliance database under rule 192.3 of the Texas Rules of Civil Procedure in conjunction with section 552.101. Further, this office generally will not address the applicability of discovery rules to information submitted to our office by a governmental body. *See* Open Records Decision No. 416 (1984) (finding that even if evidentiary rule specified that certain information may not be publicly released during trial, it would have no effect on disclosability under Act). However, in *In re City of Georgetown* the Texas Supreme Court ruled that the Texas Rules of Civil Procedure and the Texas Rules of Evidence make confidential information that falls within one of the categories of information that are made expressly public under section 552.022 of the Government Code. *See In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001); *see also* Gov't Code § 552.022 (enumerating eighteen categories of information not excepted from required disclosure unless expressly confidential under other law). Thus, in accordance with *In re Georgetown*, this office will only address the applicability the Texas Rules of Civil Procedure and the Texas Rules of Evidence to information that falls under one of the categories of information in section 552.022. The information at issue does not fall under section 552.022. Accordingly, the board may not withhold any of the submitted information from the compliance database under rule 192.3 of the Texas Rules of Civil Procedure.

You claim that the information from the compliance database is excepted from public disclosure under section 552.103 of the Government Code. Section 552.103 provides in part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). A governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date the governmental body receives the request for information, and (2) the information at issue is related to that litigation. See *Thomas v. Cornyn*, 71 S.W.3d 473, 487 (Tex. App.—Austin 2002, no pet.); *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

In order to establish that litigation is reasonably anticipated, a governmental body must provide this office “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” Open Records Decision No. 452 at 4 (1986). The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. See Open Records Decision No. 452 at 4 (1986). To demonstrate that litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body’s receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party.² Open Records Decision No. 555 (1990); see Open Records Decision No. 518 at 5 (1989) (litigation must be “realistically contemplated”).

You state that the information at issue concerns “behavior, omissions, acts and circumstances that could give rise to civil litigation and/or criminal prosecution.” After review of your arguments and the information at issue, we conclude that the board has not provided concrete evidence that litigation was reasonably anticipated when the board received the request for information. Accordingly, the board may not withhold the information at issue under section 552.103 of the Government Code.

You claim that the submitted information from the compliance database is excepted from public disclosure under section 552.108 of the Government Code. Section 552.108 provides in relevant part the following:

²In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, see Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, see Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, see Open Records Decision No. 288 (1981).

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure] if:

(1) release of the information would interfere with the detection, investigation, or prosecution of crime;

(2) it is information that the deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication; [or]

...

(4) it is information that:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) reflects the mental impressions or legal reasoning of an attorney representing the state.

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from [required public disclosure] if:

(1) release of the internal record or notation would interfere with law enforcement or prosecution;

(2) the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication; or

(3) the internal record or notation:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) reflects the mental impressions or legal reasoning of an attorney representing the state.

Gov't Code § 552.108(a)(1), (2), (4); (b). Section 552.108 protects certain specific types of law enforcement information. Section 552.108(a)(1) is applicable if the release of the information would interfere with a pending criminal investigation or prosecution. *See Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases). Section 552.108(b)(1) protects internal records of a law enforcement agency, the release of which would interfere with law enforcement and crime prevention. *See City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 327 (Tex. App.—Austin 2002, no pet.) (Gov't Code § 552.108(b)(1) protects information that, if released, would permit private citizens to anticipate weaknesses in police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate state laws). Sections 552.108(a)(2) and 552.108(b)(2) are applicable only if the information at issue relates to a concluded case that did not result in a conviction or a deferred adjudication. Sections 552.108(a)(4) and 552.108(b)(3) are applicable to information that was prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation or that reflects the mental impressions or legal reasoning of an attorney representing the state.

Section 552.108 applies only to records created by an agency, or a portion of an agency, whose primary function is to investigate crimes and enforce criminal laws. *See* Open Records Decision Nos. 493 (1988), 287 (1981). Section 552.108 generally does not apply to records created by an agency whose chief function is essentially regulatory in nature. Open Records Decision No. 199 (1978). An agency that does not qualify as a law enforcement agency may, under certain limited circumstances, claim that section 552.108 protects records in its possession. *See, e.g.,* Attorney General Opinion MW-575 (1982); Open Records Decision Nos. 493, 272 (1981). If an administrative agency's investigation reveals possible criminal conduct that the administrative agency intends to report or has already reported to the appropriate law enforcement agency, section 552.108 will apply to information gathered by the administrative agency if its release would interfere with law enforcement. *See* Gov't Code 552.108(a)(1); Attorney General Opinion MW-575 (1982); Open Records Decision Nos. 493, 272. In this instance, you have not explained to this office how the board is a law enforcement agency for purposes of section 552.108. Furthermore, although you state that information from the compliance database is frequently shared with law enforcement agencies or prosecutors, you have not demonstrated that the information at issue has been forwarded to an appropriate law enforcement agency. Therefore, we have no basis for ruling that the information at issue may be withheld under section 552.108.

You claim that the information from the compliance database is excepted from disclosure under section 552.111 of the Government Code. Section 552.111 excepts from disclosure “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” Gov't Code § 552.111. This exception encompasses the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil

Procedure. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); Open Records Decision No. 677 at 4-8 (2002). Rule 192.5 defines work product as

- (1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or
- (2) a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

TEX. R. CIV. P. 192.5. A governmental body seeking to withhold information under this exception bears the burden of demonstrating that the information was created or developed for trial or in anticipation of litigation by or for a party or a party's representative. *Id.*; ORD 677 at 6-8. In order for this office to conclude that the information was made or developed in anticipation of litigation, we must be satisfied that: (1) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue; and (2) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and [created or obtained the information] for the purpose of preparing for such litigation. *Nat'l Tank Co. v. Brotherton*, 851 S.W.2d 193, 207 (Tex. 1993). A "substantial chance" of litigation does not mean a statistical probability, but rather "that litigation is more than merely an abstract possibility or unwarranted fear." *Id.* at 204; ORD 677 at 7.

Upon review, we find that you have failed to demonstrate that the information at issue was made or developed in anticipation of litigation. Accordingly, the board may not withhold from disclosure the information from the compliance database under section 552.111 of the Government Code.

You assert that some of the submitted information from the compliance database is excepted from disclosure under section 552.137 of the Government Code. This section excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body" unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov't Code § 552.137(a)-(c). Section 552.137 does not apply to a government employee's work e-mail address because such an address is not that of the employee as a "member of the public," but is instead the address of the individual as a government employee. Upon review, we find that there are no e-mail addresses in the information at issue. Accordingly, the board may not withhold any of this information under section 552.137 of the Government Code.

Finally, you argue that the information from the compliance database may not be released in an electronic format as requested. Section 552.228 of the Government Code governs requests for information in an electronic medium. Section 552.228 provides in pertinent part as follows:

(b) If public information exists in an electronic or magnetic medium, the requestor may request a copy either on paper or in an electronic medium, such as a diskette or on magnetic tape. A governmental body shall provide a copy in the requested medium if:

- (1) the governmental body has the technological ability to produce a copy of the requested information in the requested medium;
- (2) the governmental body is not required to purchase any software or hardware to accommodate the request; and
- (3) provision of a copy of the information in the requested medium will not violate the terms of any copyright agreement between the governmental body and a third party.

Gov't Code § 552.228(b). Here, the requested information constitutes information that exists in an electronic medium and the requestor has requested copies in that medium. Accordingly, the above provision requires the board to provide a copy in the requested medium if the board "has the technological ability" to produce such a copy, the board "is not required to purchase any software or hardware to accommodate the request," and if by providing such a copy, the board "will not violate the terms of any copyright agreement" between the board and a third party. We have no information to indicate that the first two of these three conditions are not met. Accordingly, we find that the board "shall provide a copy in the requested medium" if doing so will not violate a copyright agreement between the board and a third party. We find that the board has not shown how the release of the information in an electronic format would violate the terms of a copyright agreement. You state that the software used by the board to create the compliance database is proprietary and the board would violate a licensing agreement if the board were to share this software with the requestor. You do not state that the computerized data is copyrighted. Therefore, as the board has not shown how the release of the requested information in the requested electronic medium will violate the terms of any copyright agreement, the requirement of subsection (b)(3) of section 552.228 is met. Therefore, the board must release the submitted information from the compliance database in an electronic format.

In summary, the board must withhold the submitted information from the enforcement and legal databases under section 552.101 of the Government Code in conjunction with

section 254.006(b) of the Occupations Code.³ The submitted information from the compliance database must be released to the requestor in an electronic format.

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

³As our ruling is dispositive, we need not address your other claims.

contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Jennifer Luttrall
Assistant Attorney General
Open Records Division

JL/sdk

Ref: ID# 280107

Enc. Submitted documents

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