



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

October 3, 2007

Ms. Elizabeth A. Iles  
Secretary  
Board of Pilot Commissioners for the Ports of Galveston County  
1118 19<sup>th</sup> Avenue North  
Texas City, Texas 77590

OR2007-12895

Dear Ms. Iles:

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# 290884.

The Board of Pilot Commissioners for the Ports of Galveston County (the "board") received two requests from the same requestor for a list of information relating to applications for branch pilots' licenses. You ask whether the board must respond to these requests for information. We also received correspondence from an attorney for the Galveston-Texas City Pilots ("Gal-Tex") and from the requestor.<sup>1</sup> We have considered all of the submitted arguments and have reviewed the information you submitted.<sup>2</sup>

Initially, we acknowledge the requestor's statement that he does not seek access to any personal or family information. Therefore, the personal and family information that we have marked is not responsive to these requests for information. This decision does not address

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<sup>1</sup>See Gov't Code § 552.304 (any person may submit written comments stating why information at issue in request for attorney general decision should or should not be released).

<sup>2</sup>This letter ruling assumes that the submitted sample of responsive information is truly representative of the requested information as a whole. This ruling neither reaches nor authorizes the board to withhold any information that is substantially different from the submitted information. See Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

the public availability of the non-responsive information, and that information need not be released.

Next, we must determine whether the rest of the submitted information is subject to the Act. The Act is applicable to “public information,” as defined by section 552.002 of the Government Code. Section 552.002 provides that “public information” consists of

information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

(1) by a governmental body; or

(2) for a governmental body and the governmental body owns the information or has a right of access to it.

Gov’t Code § 552.002(a)(1)-(2). Thus, virtually all of the information that is in a governmental body’s physical possession constitutes public information and thus is subject to the Act. *Id.* § 552.002(a)(1); *see also* Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). The Act also is applicable to information that a governmental body does not physically possess, if the information is collected, assembled, or maintained for the governmental body and the governmental body owns the information or has a right of access to it. Gov’t Code § 552.002(a)(2); *see also* Open Records Decision Nos. 518 at 2-3 (1989), 462 at 4 (1987).

We note that the board is a governmental body that is subject to the Act. *See* Gov’t Code 552.003(1)(A)(i) (“governmental body” means, among other things, board created by legislature and directed by one or more elected or appointed members). The board is responsible, among other things, for accepting applications for pilot licenses and certificates, determining whether an applicant meets the qualifications for a pilot, and submitting to the governor the names of persons who have qualified to be appointed as branch pilots under the Galveston County Pilots Licensing and Regulatory Act, chapter 67 of the Transportation Code. *See* Transp. Code §§ 67.001, 67.002, 67.017.

The board informs us that it considered the remaining submitted information in the course of taking action on two applications for pilots’ licenses. *See id.* §§ 67.035, 67.036 (providing for submission and consideration of applications for pilots’ licenses and certificates). The board explains that it ordinarily has physical possession of information relating to an application only on the day that it meets to consider the application. The board states that its standard procedure is to receive the related information from Gal-Tex on the day of the meeting. The board explains that after acting on the application, it customarily returns the related information to Gal-Tex, which is responsible for seeking final licensure or certification from the Office of the Governor. *See id.* § 67.037 (providing for appointment of branch pilots by governor). The board also states that information relating to license

applications is retained in Gal-Tex's files. Gal-Tex's attorney confirms that the board's practice is to return each pilot's personnel file and related material to Gal-Tex, which files the required bond with the county clerk and forwards the related material to the governor. *See id.* § 67.039 (providing that pilot must execute, and board must approve, \$25,000.00 bond).

We note that the remaining submitted information is related to the applicants' qualifications to be licensed as pilots and as such is the type of information that the board itself would ordinarily maintain in the course of discharging its statutory responsibilities. The board informs us, however, that it has neither a budget nor a staff. Having considered the board's representations and Gal-Tex's arguments, we find that Gal-Tex maintains the information in question for the board, and the board has a right of access to the information.<sup>3</sup> *See* Gov't Code § 552.002(a)(2); ORD 518 at 3 (if governmental entity employs agent to carry out task that otherwise would have been performed by entity itself, information relating to that task that has been assembled or maintained by agent is subject to Act); *see also* Open Records Decision Nos. 585 at 3 (1991) (overruling Open Records Decision No. 437 (1986) to extent it suggests that governmental body can waive its right of access to information gathered on its behalf), 437 at 2-3 (1986) (in collecting information at issue, attorney and contractor were in effect carrying out task that otherwise would have been left to governmental bodies themselves). We therefore conclude that the remaining submitted information is public information for the purposes of section 552.002. Therefore, the information in question is subject to the Act and must be released, unless it falls within an exception to public disclosure. *See* Gov't Code § 552.021.

Although the board claims no exceptions to disclosure, Gal-Tex raises sections 552.101, 552.117, and 552.147 of the Government Code. Accordingly, we will consider Gal-Tex's arguments. 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 exception encompasses information made confidential by statute. Gal-Tex raises section 552.101 in conjunction with the federal Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), 42 U.S.C. §§ 1320d-1320d-8. At the direction of Congress, the Secretary of Health and Human Services ("HHS") promulgated regulations setting privacy standards for medical records, which HHS issued as the Federal Standards for Privacy of Individually Identifiable Health Information. *See* Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. § 1320d-2 (Supp. IV 1998) (historical

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<sup>3</sup>Both the board and Gal-Tex also inform us that the board was not in possession of the requested information when it received the first request. The board also indicates that it was not in possession of the requested information when it received the second request. The board may not decline to comply with these requests on that basis, however, because Gal-Tex maintains the information in question for the board, and the board has a right of access to it. *See* Open Records Decision No. 534 at 2 (1989) (Act does not require governmental body to obtain information that is not in its possession so long as no other entity holds information on its behalf).

& statutory note); Standards for Privacy of Individually Identifiable Health Information, 45 C.F.R. Pts. 160, 164 (“Privacy Rule”); *see also* Attorney General Opinion JC-0508 at 2 (2002). These standards govern the releasability of protected health information by a covered entity. *See* 45 C.F.R. pts. 160, 164. Under these standards, a covered entity may not use or disclose protected health information, excepted as provided by parts 160 and 164 of the Code of Federal Regulations. *See* 45 C.F.R. § 164.502(a).

This office has addressed the interplay of the Privacy Rule and the Act. In Open Records Decision No. 681 (2004), we noted that section 164.512 of title 45 of the Code of Federal Regulations provides that a covered entity may use or disclose protected health information to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law. *See* 45 C.F.R. § 164.512(a)(1). We further noted that the Act “is a mandate in Texas law that compels Texas governmental bodies to disclose information to the public.” *See* Open Records Decision No. 681 at 8; *see also* Gov’t Code §§ 552.002, .003, .021. We therefore held that the disclosures under the Act come within section 164.512(a). Consequently, the Privacy Rule does not make information confidential for the purpose of section 552.101 of the Government Code. *See Abbott v. Tex. Dep’t of Mental Health & Mental Retardation*, 212 S.W.3d 648 (Tex. App. — Austin 2006, no pet.); ORD 681 at 9; *see also* Open Records Decision No. 478 (1987) (as general rule, statutory confidentiality requires express language making information confidential). Thus, because the Privacy Rule does not make confidential information that is subject to disclosure under the Act, the board may withhold protected health information from the public only if the information is confidential under other law or an exception in subchapter C of the Act applies.

We note that medical records are confidential under the Medical Practice Act (the “MPA”), subtitle B of title 3 of the Occupations Code. Section 159.002 of the MPA provides in part:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient’s behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Occ. Code § 159.002(b)-(c). This office has determined that in governing access to a specific subset of information, the MPA prevails over the more general provisions of the Act. *See* Open Records Decision No. 598 (1991). Medical records must be released on the patient’s signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the

information is to be released. *See* Occ. Code §§ 159.004, .005. Any subsequent release of medical records must be consistent with the purposes for which the governmental body obtained the records. *See id.* § 159.002(c); Open Records Decision No. 565 at 7 (1990). We conclude that some of the remaining information consists of medical records that are confidential under the MPA. The board must withhold that information, which we have marked, unless it receives written consent for release that complies with sections 159.004 and 159.005 of the MPA.<sup>4</sup>

We next note that section 552.130 is applicable to some of the information at issue.<sup>5</sup> This section excepts from disclosure information that is related to a motor vehicle operator's or driver's license or permit issued by an agency of this state or a personal identification document issued by an agency of this state or a local agency authorized to issue an identification document. *See* Gov't Code § 552.130(a)(1), (3). We have marked Texas driver's license or personal identification information that the board must withhold under section 552.130.

The remaining information also includes an e-mail address. Section 552.137 of the Government Code provides that "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 [the Act]," unless the owner of the e-mail address has affirmatively consented to its public disclosure.<sup>6</sup> *See id.* § 552.137(a)-(b). We have marked an e-mail address that the board must withhold under section 552.137 unless the owner of the e-mail address has consented to its disclosure.

Lastly, we address section 552.147 of the Government Code, which provides that "[t]he social security number of a living person is excepted from" required public disclosure under the Act.<sup>7</sup> Gov't Code § 552.147(a). The board may withhold the social security numbers contained in the remaining information under section 552.147.<sup>8</sup>

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<sup>4</sup>As we are able to make this determination, we need not address Gal-Tex's other arguments against disclosure of the marked information.

<sup>5</sup>Unlike other exceptions to disclosure under the Act, this office will raise section 552.130 on behalf of a governmental body, as this exception is mandatory and may not be waived. *See* Gov't Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions).

<sup>6</sup>Section 552.137 also is a mandatory exception and may not be waived. Gov't Code §§ 552.007, .352; ORD 674 at 3 n.4.

<sup>7</sup>We note that section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act.

<sup>8</sup>As we are able to make this determination, we need not consider Gal-Tex's claim under section 552.117 of the Government Code.

In summary: (1) the board must withhold the marked medical records under the MPA unless it receives written consent for the release of those records that complies with sections 159.004 and 159.005 of the MPA; (2) the board must withhold the marked Texas driver's license or personal identification information under section 552.130 of the Government Code; (3) the board must withhold the marked e-mail address under section 552.137 of the Government Code unless the owner of the e-mail address has consented to its disclosure; and (4) the board may withhold the social security numbers contained in the remaining information under section 552.147 of the Government Code. The rest of the information must be released.

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).

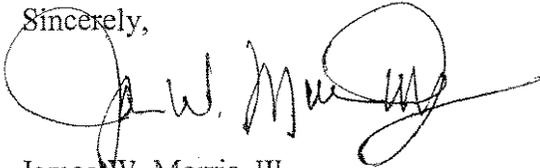
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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,

A handwritten signature in black ink, appearing to read "J.W. Morris, III". The signature is stylized with a large loop at the beginning and a long horizontal stroke at the end.

James W. Morris, III  
Assistant Attorney General  
Open Records Division

JWM/ma

Ref: ID# 290884

Enc: Submitted documents

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