



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

May 1, 2009

Mr. Robert D. Simpson
General Counsel
Texas Medical Board
MC-251, P.O. Box 2018
Austin, Texas 78768-2018

OR2009-05818

Dear Mr. Simpson:

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# 340107 (Texas Medical Board reference no. 18430).

The Texas Medical Board (the "board") received a request for information pertaining to expert investigation reports submitted to the board in 2006, 2007, and 2008. You claim 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 representative sample of information.¹ We have also considered comments submitted by the requestor. *See Gov't Code § 552.304* (interested party may submit comments stating why information should or should not be released).

Initially, you inform us that investigative log numbers 06-0548 and 07-0255 were submitted to this office in error and are not responsive to the instant request for information. This ruling does not address the public availability of any information that is not responsive to the

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.

request, and the board is not required to release this information, which we have marked, in response to this request.

Next, we note that investigative log number 06-3172 involves the same type of information that was at issue in Open Records Letter No. 2007-03117 (2007), which serves as a previous determination under section 552.301(a) of the Government Code for the board with respect to investigative information that is in the possession of or was received or gathered by the board during the investigation of a license holder under chapter 164 of the Occupations Code. Therefore, pursuant to that previous determination, the board must withhold investigative log number 06-3172 under section 552.101 of the Government Code in conjunction with section 164.007 of the Occupations Code. *See* Open Records Decision No. 673 (2001) (governmental body may rely on previous determination when elements of law, fact, and circumstances have not changed, decision concludes specific, clearly delineated category of information is excepted, and governmental body is explicitly informed it need not seek a decision from this office to withhold information in response to future requests).

However, you inform this office that investigative log numbers 07-6265 and 06-2972 pertain to investigations that arose from reports made to the board pursuant to subsection A of chapter 160 of the Occupations Code. In addition, the requestor claims a statutory right of access to these investigative logs pursuant to section 160.006(a)(4). Thus, we determine that the facts and circumstances on which our prior ruling was based have changed. Accordingly, the board may not rely on Open Records Letter No. 2007-03117 to withhold investigative log numbers 07-6265 and 06-2972, *id.*, and we will address your arguments against the release of this remaining information.

Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses information that other statutes make confidential. Although you indicate that section 164.007 of the Occupations Code is applicable to all of the submitted information, you have informed our office that chapter 160 is specifically applicable to investigative log numbers 07-6265 and 06-2972. Because chapter 160 more specifically applies to these records, we will address their public availability under its provisions. *See* Gov't Code § 311.026(a) (if a general provision conflicts with a special provision, they shall be construed, if possible, to give effect to both). Section 160.006 of the Occupations Code provides as follows:

(a) A record, report, or other information received and maintained by the board under [Subchapter A] or Subchapter B, including any material received or developed by the board during an investigation or hearing, and the identity of, and reports made by, a physician performing or supervising compliance monitoring for the board, is confidential. The board may disclose this information only:

...

(4) to qualified personnel for bona fide research or educational purposes, if personally identifiable information relating to any physician or other individual is first deleted[.]

Occ. Code § 160.006. Section 160.006 of the Occupations Code applies to information received and maintained by the board under subchapter A or B of chapter 160. Section 160.002 provides that reports resulting from a medical peer review which adversely affects a physician must be provided to the board. *Id.* § 160.002. Section 160.003 provides that any relevant information observed by, among other things, a physician or peer review committee relating to the acts of a physician who poses a continuing threat to the public welfare through the practice of medicine must be submitted to the board. *Id.* § 160.003. You have informed this office that investigative log number 07-6265 pertains to an investigation that arose from a report submitted to the board pursuant to Occupations Code section 160.002. You further inform this office that investigative log number 06-2972 pertains to an investigation that arose from a report submitted to the board pursuant to section 160.003. Based on your representations and our review of the information at issue, we agree that investigative logs numbers 07-6265 and 06-2972 are subject to subchapter A of chapter 160. Thus, we conclude that the confidentiality provision of section 160.006(a) generally applies to these investigative logs. However, as previously noted, the requestor asserts a right of access to the information at issue under section 160.006(a)(4) of the Occupations Code. Thus, we will consider whether the requestor in this case constitutes "qualified personnel" seeking the requested information "for bona fide research or educational purposes" pursuant to section 160.006(a)(4).

In Open Records Decision No. 458 (1987), this office addressed a similar situation regarding the statutory predecessor to section 160.006. In that decision, we stated the agency charged with implementing the statute "should be accorded leeway in formulating its own interpretations" of the statute. Open Records Decision No. 458 at 4 (1987). We also stated the language of the statute plainly establishes that regardless of how the term is construed, "it is within the board's discretion to decide whether and to what extent to release confidential information for educational or research purposes." *Id.* The decision further explained the statute states the board "'may' disclose confidential information for [research] purposes, not that it must or shall do so," and "the word 'may' is generally regarded as permissive in character." *Id.* In this instance, we believe the board has discretion to decide whether to grant the requestor a special right of access pursuant to section 160.006(a)(4). We therefore conclude that if the board determines that section 160.006(a)(4) applies to this requestor, it may release investigative log numbers 07-6265 and 06-2972 with personally identifiable information relating to any physician or other individual redacted. If, however, the board concludes the requestor is not entitled to a special right of access, investigative log numbers 07-6265 and 06-2972 must be withheld pursuant to section 552.101 in conjunction with section 160.006(a) of the Occupations Code.

In summary, the board must withhold investigative log number 06-3172 pursuant to our previous determination in Open Records Letter No. 2007-03117. If the board determines that section 160.006(a)(4) applies to this requestor, it may release investigative log numbers 07-6265 and 06-2972, with personally identifiable information relating to any physician or other individual redacted. If the board determines that section 160.006(a)(4) does not apply to this requestor, it must withhold these investigative logs under section 552.101 in conjunction with section 160.006(a).

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Bob Davis
Assistant Attorney General
Open Records Division

RSD/dls

Ref: ID# 340107

Enc. Submitted documents

c: Requestor
(w/o enclosures)