



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 14, 2009

Mr. Dan Meador
Assistant General Counsel
Texas Department of State Health Services
P. O. Box 149347
Austin, Texas 78714-9347

OR2009-17656

Dear Mr. Meador:

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# 364375 (DSHS File No. O16603-N/A-2010).

The Texas Department of State Health Services (the "department") received a request for information related to nine specified complaint files. 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.

You acknowledge, and we agree, that the department failed to comply with section 552.301 of the Government Code in seeking an open records decision from this office. Gov't Code § 552.301(b), (e). A governmental body's failure to comply with the procedural requirements of the Act 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 id.* § 552.302; *City of Dallas v. Abbott*, 279 S.W.3d 806, 811 (Tex. App.—2007, pet. granted); *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *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 section 552.302); *see also* Open Records Decision No. 630 (1994). The presumption that information is public under section 552.302 can be overcome by demonstrating that the information is confidential by law or third-party interests are at stake.

See Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982). Section 552.101 of the Government Code can provide a compelling reason to overcome this presumption; therefore, we will consider your arguments under this exception.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses chapter 605 of the Occupations Code. This chapter provides for the investigation of complaints filed with the Texas Board of Orthotics and Prosthetics by the Commissioner of Public Health, which we understand are both part of the department. Section 605.2021 provides in relevant part the following:

(h) All information and materials subpoenaed or compiled by the [Texas Board of Orthotics and Prosthetics] 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:

- (1) persons involved with the [Texas Board of Orthotics and Prosthetics] in a disciplinary action against the holder of a license;
- (2) professional orthotist or prosthetist disciplinary boards in other jurisdictions;
- (3) peer assistance programs approved by the board under Chapter 467, Health and Safety Code;
- (4) law enforcement agencies; and
- (5) persons engaged in bona fide research, if all individual-identifying information has been deleted.

(i) The filing of formal charges by the [Texas Board of Orthotics and Prosthetics] 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 [Texas Board of Orthotics and Prosthetics] are not confidential and are subject to disclosure in accordance with Chapter 552, Government Code.

Occ. Code § 605.2021(h), (i). You state that the submitted information was "gathered [or] created in response to a complaint and an investigation occurred." You also state that the exceptions to confidentiality under section 605.2021(h) are not applicable in this instance,

and you do not indicate that the submitted information is subject to release under section 605.2021(i). Based on your representations and our review, we agree you have established that the submitted information was subpoenaed or compiled by the Texas Board of Orthotics and Prosthetics in connection with a complaint and investigation. Therefore, we find that the submitted information is confidential under section 605.2021 of the Occupations Code and must be withheld under section 552.101 of the Government Code.

Finally, you ask this office to issue the department a previous determination regarding the type of information at issue in the instant case. *See* Gov't Code § 552.301(a) (allowing governmental body to withhold information subject to previous determination); Open Records Decision No. 673 (2001). We decline to issue a previous determination for this type of information at this time.

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, toll free, at (888) 672-6787.

Sincerely,



Tamara Wilcox
Assistant Attorney General
Open Records Division

TW/dls

Ref: ID# 364375

Enc. Submitted documents

c: Requestor
(w/o enclosures)