



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 13, 2011

Ms. Jena R. Abel
Assistant General Counsel
Texas Board of Nursing
333 Guadalupe Street, Suite 3-460
Austin, Texas 78701

OR2011-05114

Dear Ms. Abel:

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# 414536.

The Texas Board of Nursing (the "board") received a request for the board's complete file on a named nurse. You state you have released some of the requested information to the requestor. You state that the board has redacted the nurse's social security number from the responsive records pursuant to section 552.147 of the Government Code.¹ You also state that her Texas driver's license number and e-mail address have been redacted under sections 552.130 and 552.137 of the Government Code pursuant to Open Records Decision No. 684 (2009).² You claim that the submitted information is excepted from disclosure

¹We 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.

²We note that this office issued Open Records Decision No. 684, a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including a Texas driver's license number under section 552.130 and an e-mail address of a member of the public under section 552.137, without the necessity of requesting an attorney general decision.

under sections 552.101 and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.³

Initially, we must address the board's obligations under the Act. Pursuant to section 552.301(e) of the Government Code, the governmental body is required to submit to this office within fifteen business days of receiving the request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *See* Gov't Code § 552.301(e). You state the board received the request for information at issue on January 27, 2011. Although you state the board was closed for business on February 4, 2011, you do not inform us the board was closed for any other business days between January 27, 2011 and February 18, 2011. Therefore, the board's fifteen-business-day deadline was February 18, 2011. However, your arguments explaining why the stated exceptions apply and the representative sample of the information at issue were sent to this office on February 22, 2011. *See id.* § 552.308 (describing rules for calculating submission dates of documents sent via first class United States mail, common or contract carrier, or interagency mail). Thus, the board failed to comply with the requirements mandated by section 552.301(e).

Pursuant to section 552.302 of the Government Code, a governmental body's failure to submit to this office the information required in section 552.301(e) results in the legal presumption the requested information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See id.* § 552.302; *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). Normally, a compelling reason to withhold information exists where some other source of law makes the information confidential or where third-party interests are at stake. *See* Open Records Decision No. 150 at 2 (1977). Although you raise section 552.111 of the Government Code as an exception to disclosure of the information at issue, this exception is discretionary in nature. *See* Open Records Decisions Nos. 677 at 10 (2002) (attorney work-product privilege under section 552.111 is not compelling reason to

³We 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.

withhold information under section 552.302), 665 at 2 n.5 (2000) (discretionary exceptions in general), 663 at 5 (1999) (waiver of discretionary exceptions), 470 at 7 (1987) (deliberative process privilege under statutory predecessor to section 552.111 subject to waiver). This exception serves only to protect a governmental body's interests and may be waived; as such, it does not constitute a compelling reason to withhold information for purposes of section 552.302. Accordingly, the board may not withhold the information at issue pursuant to section 552.111 of the Government Code. However, as section 552.101 of the Government Code can provide a compelling reason to overcome the presumption of openness, we will consider the applicability of this exception to the submitted information.

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. This exception encompasses information other statutes make confidential, such as section 301.466 of the Occupations Code, which provides:

(a) A complaint and investigation concerning a nurse under this subchapter and all information and material compiled by the board in connection with the complaint and investigation are:

(1) confidential and not subject to disclosure under Chapter 552, Government Code; and

(2) not subject to disclosure, discovery, subpoena, or other means of legal compulsion for release to anyone other than the board or board employee or agent involved in license holder discipline.

(b) Notwithstanding Subsection (a), information regarding a complaint and an investigation may be disclosed to:

(1) a person involved with the board in a disciplinary action against the nurse;

(2) a nursing licensing or disciplinary board in another jurisdiction;

(3) a peer assistance program approved by the board under Chapter 467, Health and Safety Code;

(4) a law enforcement agency; or

(5) a person engaged in bona fide research, if all information identifying a specific individual has been deleted.

(c) The filing of formal charges against a nurse by the board, 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 Chapter 552, Government Code.

Occ. Code § 301.466. You state the information you have marked in Exhibit A and the entirety of Exhibit B were compiled by the board in connection with its investigation of the named individual. Based on your representations and our review, we agree the information at issue is confidential under section 301.466(a). We find that the requestor is not entitled to receive this information under section 301.466(b) and that the information at issue does not fall under section 301.466(c). Therefore, we conclude the board must withhold the marked information in Exhibit A and the entirety of Exhibit B under section 552.101 of the Government Code in conjunction with section 301.466(a)(1) of the Occupations Code.⁴

You state portions of the remaining information are subject to section 301.207 of the Occupations Code, which is also encompassed by section 552.101. Section 301.207 provides:

Information regarding a person's diagnosis or treatment for a physical condition, mental condition, or chemical dependency that the person submits to the board for a petition for a declaratory order of eligibility for a license or for an application for an initial license or a license renewal under this chapter is confidential to the same extent information collected on a nurse as part of an investigation of a complaint is confidential under Section 301.466.

Id. § 301.207. You have marked information in Exhibit A regarding the named individual's diagnosis or treatment for a physical condition, mental condition, or chemical dependency that the named individual submitted to the board in a license application. Upon review, we find the information you have marked is confidential under section 301.207. We agree the requestor is not entitled to receive this information under section 301.466(b), and the information at issue does not fall under section 301.466(c). Therefore, we conclude the board must withhold the information you have marked in Exhibit A under section 552.101 of the Government Code in conjunction with section 301.207 of the Occupations Code.

Section 552.101 of the Government Code also encompasses section 301.206 of the Occupations Code, which provides:

(a) In this section, "emergency relief program" means a program operated or sponsored by the federal government, the state, or a nonprofit organization

⁴As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

to provide nurses to assist in providing health care to victims or potential victims of a disaster or state or local emergency.

(b) A nurse's personal contact information, including e-mail addresses, telephone numbers, and fax numbers, collected by the board for use by an emergency relief program is:

(1) confidential and not subject to disclosure under Chapter 552, Government Code; and

(2) not subject to disclosure, discovery, subpoena, or other means of legal compulsion for release to anyone other than for the purpose of contacting the nurse to assist in an emergency relief program.

Id. § 301.206. You contend the business fax number you have marked in Exhibit A is confidential under section 301.206. Pursuant to section 552.303 of the Government Code, we requested additional information from you as to how the business fax number was collected by the board for use by an emergency relief program under section 301.206.⁵ In response to our inquiry, you inform us that the Work Group on Health and Bioterrorism (the "group"), a subcommittee of the Governor's Task Force on Homeland Security, was charged with "assessing medical and public health preparedness and adequacy of response mechanisms in Texas and recommending resources or activities." You state that, pursuant to a recommendation from the group, the board began requesting business fax numbers on its applications and renewal forms. You inform us that these fax numbers are transferred into the board's licensing database. Although you state the board collected the business fax number pursuant to the recommendation of the group, you do not inform us that the group recommended the board collect fax numbers for the purpose of providing their use by an emergency relief program. You further have not shown how the board's collection and maintenance of the fax numbers in its licensing database are for use by an emergency relief program only as required by section 301.206(a), nor have you explained how a business fax number is personal contact information. Accordingly, we conclude the board may not withhold the business fax number you have marked in Exhibit A under section 552.101 of the Government Code in conjunction with section 301.206 of the Occupations Code.

In summary, the board must withhold the marked information in Exhibit A and the entirety of Exhibit B under section 552.101 of the Government Code in conjunction with section 301.466(a)(1) of the Occupations Code. The board must withhold the information

⁵See Gov't Code § 552.303(c)-(d) (if attorney general determines that information in addition to that required by section 552.301 is necessary to render decision, written notice of that fact shall be given to governmental body and requestor, and governmental body shall submit necessary additional information to attorney general not later than seventh calendar day after date of receipt of notice).

you have marked in Exhibit A under section 552.101 of the Government Code in conjunction with section 301.207 of the Occupations Code. The remaining information must be released.

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

Sincerely,



Sarah Casterline
Assistant Attorney General
Open Records Division

SEC/tf

Ref: ID# 414536

Enc. Submitted documents

c: Requestor
(w/o enclosures)