



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 31, 2012

Ms. Sarah Tuthill
Assistant General Counsel
Texas Medical Board
P.O. Box 2018
Austin, Texas 78768-2018

OR2012-13853

Dear Ms. Tuthill:

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# 463656 (TMB Reference No. 22552).

The Texas Medical Board (the "board") received a request for information pertaining to a specified hearing, including a witness list and complaints filed with the board against a named individual.¹ You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, and 552.108 of the Government Code. You state, and provide documentation showing, that you have notified the Department of Public Safety, Texas Department of State Health Services, the Office of Attorney General, and the United States District Court, Eastern District of Louisiana of the instant request for information. *See Gov't Code § 552.304* (interested party may submit comments stating why information should or should not be released). We have considered the exceptions you claim and reviewed the submitted information.

¹We note the board sought and received clarification of the request. *See Gov't Code § 552.222(b)* (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information). *See also City of Dallas v. Abbott*, 304 S.W.3d 380 (Tex. 2010) (holding when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or overbroad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

Initially, you state a portion of the submitted information, which you have labeled as Exhibit 3, is not responsive to the instant request because it does not pertain to complaints submitted directly to the board. Upon review, we agree the information you have labeled as Exhibit 3 is not responsive to the instant request. This ruling does not address the availability of non-responsive information, and the board need not release this information to the requestor.

Next, we must address the obligations of the board under the Act. Section 552.301 of the Government Code prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. *Id.* § 552.301. Section 552.301(b) requires that a governmental body ask for a decision from this office and state which exceptions apply to the requested information by the tenth business day after receiving the request. *Id.* § 552.301(b). You state the board received the request for information on June 12, 2012. Accordingly, the tenth business day after the receipt of the request was June 26, 2012. Although you timely raised section 552.101 of the Government Code in conjunction with section 164.007 of the Occupations Code and sections 552.103 and 552.108 of the Government Code in your initial request for a decision to this office, you did not raise the common-law informer's privilege until July 2, 2012. Thus, with respect to the common-law informer's privilege, the board failed to comply with the procedural requirements mandated by section 552.301(b).

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 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; *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 (Tex. App.—Austin 1990, no writ); *see also* Open Records Decision No. 630 (1994). A compelling reason exists when third-party interests are at stake or when information is confidential under other law. Open Records Decision No. 150 (1977). The common-law informer's privilege is a discretionary exception to disclosure that protects a governmental body's interests. *See* Open Records Decision Nos. 522 (1989) (discretionary exceptions in general), 549 at 6 (1990) (purpose of the informer's privilege is to protect the flow of information to a governmental body, rather than to protect third party). Thus, the board's claim under the common-law informer's privilege is not a compelling reason to overcome the presumption of openness. Therefore, the board may not withhold any of the submitted information pursuant to the informer's privilege.

Section 552.103 of the Government Code provides, in part, the following:

- (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). The board has the burden of providing relevant facts and documents to show the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date of the receipt of the request for information and (2) the information at issue is related to the pending or anticipated litigation. *See 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 board must meet both prongs of this test for information to be excepted under section 552.103(a).

This office has held for purposes of section 552.103, "litigation" includes "contested cases" conducted in a quasi-judicial forum. *See* Open Records Decision Nos. 474 (1987), 368 (1983), 336 (1982), 301 (1982). In determining whether an administrative proceeding is conducted in a quasi-judicial forum, some of the factors this office considers are whether the administrative proceeding provides for discovery, evidence to be heard, factual questions to be resolved, the making of a record, and whether the proceeding is an adjudicative forum of first jurisdiction with appellate review of the resulting decision without a re-adjudication of fact questions. *See* Open Records Decision No. 588 (1991). We note contested cases conducted under the Administrative Procedure Act, chapter 2001 of the Government Code (the "APA"), are considered litigation under section 552.103.

You state, and provide documentation showing, that on the date the board received the instant request for information, it was a party in a pending Cease and Desist proceeding, Case No. 11-0806. You explain the Cease and Desist hearing is a full evidentiary hearing that is to be transcribed by a court reporter. You state the hearing provides for discovery. You further explain that the admissibility of evidence at this hearing is governed by the APA. *See* 22 T.A.C. § 187.83(e)(5)(A). Based on your argument and our review, we find the Cease and Desist hearing is conducted in a quasi-judicial forum and therefore constitutes litigation for purposes of section 552.103 of the Government Code. Thus, we agree litigation was pending when the board received the request for information. Upon review, we agree the responsive information at issue relates to the pending litigation. Therefore, we conclude the

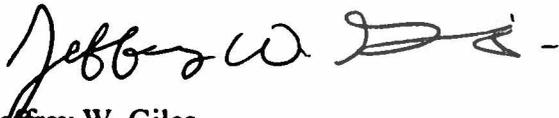
board may withhold the responsive information under section 552.103 of the Government Code.²

We note, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the pending litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, the applicability of section 552.103(a) ends once the related litigation concludes. *See* Attorney General Opinion MW-575 at 2; Open Records Decision Nos. 350 at 3 (1982), 349 at 2.

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,



Jeffrey W. Giles
Assistant Attorney General
Open Records Division

JWG/tch

Ref: ID# 463656

Enc. Submitted documents

c: Requestor
(w/o enclosures)

²As our ruling is dispositive for this information, we need not address the remaining arguments against its disclosure.