



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

May 10, 2016

Mr. Scott A. Merchant
General Counsel
Texas State Board of Examiners of Psychologists
333 Guadalupe, Suite 2-450
Austin, Texas 78701

OR2016-10608

Dear Mr. Merchant:

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# 609308.

The Texas State Board of Examiners of Psychologists (the "board") received a request for information pertaining to complaint numbers 2015-00212-1952 and 2015-00211-6935. You state you will make some information available to the requestor. You claim the submitted information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, the requestor asserts the board failed to comply with section 552.301 of the Government Code, which prescribes the procedures a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. *See id.* § 552.301. Pursuant to section 552.301(d), within ten business days of receiving the request for information the governmental body wishes to withhold, a governmental body must provide the requestor with (1) a written statement that the governmental body wishes to withhold the requested information and has asked for a decision from the attorney general, and (2) a copy of the governmental body's written communication to the attorney general. *Id.* § 552.301(d). The board states it received the

request for information on February 19, 2016.¹ You do not inform us the board was closed for any business days between February 19, 2016, and March 4, 2016. Accordingly, you were required to provide information to the requestor as required by section 552.301(d) by March 4, 2016. However, the requestor has provided documentation demonstrating the envelope in which the board provided the information required by section 552.301(d) was postmarked March 7, 2016. *See id.* § 552.308(a)(1) (describing rules for calculating submission dates of documents sent via first class United States mail, common or contract carrier, or interagency mail). Accordingly, we conclude the board failed to comply with the procedural requirements mandated by section 552.301 of the Government Code.

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 there is a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342 (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); *see also* Open Records Decision No. 630 (1994). Generally, a governmental body may demonstrate a compelling reason to withhold information by showing that the information is made confidential by another source of law or affects third-party interests. *See* ORD 630. The board claims section 552.103 of the Government Code for the submitted information. However, this exception is discretionary in nature. It serves to protect a governmental body's interests and may be waived; as such, it does not constitute a compelling reason to withhold information. *See* Gov't Code § 552.007; *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive Gov't Code § 552.103); *see also* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Accordingly, the board may not withhold the submitted information under section 552.103 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 address the applicability of section 552.101 to the submitted information.

Section 552.101 of the Government Code excepts from required public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information made confidential by statutes, such as section 501.205 of the Occupations Code. Chapter 501 of the Occupations Code codifies the Psychologists' Licensing Act. *See* Occ. Code §§ 501.001,

¹The requestor also alleges she first submitted the request for information to the board on January 6, 2016. However, the board asserts it has no record of receiving a prior request for the information at issue. Whether the board received the request by facsimile on that date is a question of fact. This office is unable to resolve disputes of fact in the open records ruling process. Accordingly, we must rely upon the facts alleged to us by the governmental body requesting our opinion, or upon those facts that are discernable from the documents submitted for our inspection. *See* Open Records Decision No. 522 at 4 (1990).

et seq. Section 501.205(a) provides, in relevant part, “[e]xcept as provided by Subsection (b), a complaint and investigation concerning a license holder and all information and materials compiled by the board in connection with the complaint and investigation are not subject to . . . disclosure under Chapter 552, Government Code[.]” *Id.* § 501.205(a). Subsection (b) of section 501.205 provides as follows:

(b) A complaint or investigation subject to Subsection (a) and all information and materials compiled by the board in connection with the complaint may be disclosed to:

(1) the board and board employees or agents involved in license holder discipline;

(2) a party to a disciplinary action against the license holder or that party’s designated representative;

(3) a law enforcement agency if required by law;

(4) a governmental agency, if:

(A) the disclosure is required or permitted by law; and

(B) the agency obtaining the disclosure protects the identity of any patient whose records are examined; or

(5) a legislative committee or committee staff directed to make an inquiry regarding state hospitals or schools, by either house of the legislature, the presiding officer of either house of the legislature, or the chairman of the legislative committee if the information or records that identify a patient or client are not released for any purpose unless the patient consents and the records are created by the state hospital or school or its employees.

Id. § 501.205(b). You argue the submitted information is subject to section 501.205 because it consists of information related to the board’s investigations and monitoring of licensee compliance with board disciplinary or eligibility orders. Further, you state the requestor does not fall into any of the five exceptions to confidentiality in subsection 501.205(b). We note the confidentiality provisions of section 501.205(a) pertain only to complaints and investigations that involve license holders. *See id.* §§ 501.251 (person may not engage in practice of psychology unless licensed under chapter 251), .252 (board shall issue license to applicant who meets certain criteria). Based upon your representations and our review, we conclude the submitted information is confidential pursuant to section 501.205(a) of the Occupations Code. Accordingly, the board must withhold the submitted information under

section 552.101 of the Government Code in conjunction with section 501.205(a) of the Occupations Code.

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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in black ink, appearing to read 'Meredith L. Coffman', with a long horizontal flourish extending to the right.

Meredith L. Coffman
Assistant Attorney General
Open Records Division

MLC/bw

Ref: ID# 609308

Enc. Submitted documents

c: Requestor
(w/o enclosures)