



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

July 1, 2019

Ms. Yvette T. Yarbrough
Assistant General Counsel
Texas Medical Board
P.O. Box 2018
Austin, Texas 78768-2018

OR2019-18115

Dear Ms. Yarbrough:

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# 773060 (TMB Reference No. #29885).

The Texas Medical Board (the "board") received a request for several categories of information regarding a named individual, including specified communications of the named individual. You state you have released some information to the requestor. You state the board does not have information pertaining to portions of the request.¹ You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

In Open Records Letter No. 2007-03117 (2007), this office issued a previous determination authorizing the board to withhold investigative information that is in the possession of or was received or gathered by the board during the investigation of a license holder under section 552.101 of the Government Code in conjunction with section 164.007 of the Occupations Code without the necessity of again requesting an attorney general decision with regard to the applicability of this exception. *See* Gov't Code § 552.301(a); Open Records Decision No. 673 at 7-8 (2001) (delineating elements of second type of previous determination under Gov't Code § 552.301(a)). The board represents Exhibit 4 is confidential under section 164.007 and is subject to that previous determination. Upon review, we agree Exhibit 4 is

¹ We note the Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Attorney General Opinion H-90 (1973); Open Records Decision Nos. 452 at 2-3 (1986), 342 at 3 (1982), 87 (1975); *see also* Open Records Decision Nos. 572 at 1 (1990), 555 at 1-2 (1990), 416 at 5 (1984).

confidential under section 164.007. Thus, pursuant to Open Records Letter No. 2007-03117, the board must withhold Exhibit 4 under section 552.101 of the Government Code in conjunction with section 164.007 of the Occupations Code.

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

(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). A governmental body has the burden of providing relevant facts and documents to show section 552.103(a) applies in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the requested information is related to that litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, orig. proceeding); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a). *See* ORD 551 at 4. We note contested cases conducted under the Administrative Procedure Act (the "APA"), chapter 2001 of the Government Code, are considered litigation for the purposes of section 552.103. *See* Open Records Decision No. 588 at 7 (1991). We further note a contested case before the State Office of Administrative Hearings ("SOAH") is considered litigation for the purposes of the APA. *See id.*

You state, and provide documentation showing, that on the date the board received the instant request for information, the board was a party to a pending hearing before SOAH, SOAH Docket No. 503-17-5887.MD. You state the information at issue is related to the pending litigation. Based on your representations, the submitted documentation, and our review of the information at issue, we find litigation was pending when the board received the request for information, and the information at issue is related to the pending litigation for the purposes of section 552.103. Therefore, the board may withhold the remaining information under section 552.103 of the Government Code.²

² As our ruling is dispositive, we need not address the board's remaining arguments against disclosure.

We note 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 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 litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, pursuant to Open Records Letter No. 2007-03117, the board must withhold Exhibit 4 under section 552.101 of the Government Code in conjunction with section 164.007 of the Occupations Code. The board may withhold the remaining information under section 552.103 of the Government 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,



Kimbell Kesling
Attorney
Open Records Division

KK/gw

Ref: ID# 773060

Enc. Submitted documents

c: Requestor
(w/o enclosures)