



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

April 14, 2020

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

OR2020-10905

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# 822308 (BON Ref# 20-14).

The Texas Board of Nursing (the "board") received a request for information pertaining to specified nurses who have been fired and received a complaint during a certain time period.<sup>1</sup> You state the board will release some information. You state the board will redact social security numbers pursuant to section 552.147(b) of the Government Code.<sup>2</sup> You claim

---

<sup>1</sup> We note the board sought and received clarification of the information requested. *See* Gov't Code § 552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify request); *see also City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding when governmental entity, acting in good faith, requests clarification of unclear or overbroad request for public information, ten-business-day period to request attorney general opinion is measured from date request is clarified or narrowed).

<sup>2</sup> 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. *See* Gov't Code § 552.147(b).

some of the submitted information is excepted from disclosure under sections 552.101 and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>3</sup>

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 section 301.466 of the Occupations Code, which provides, in part, the following:

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

(1) confidential and not subject to disclosure under [the Act]; and

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

...

(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 [the Act].

Occ. Code § 301.466(a), (c). You explain the information at issue was compiled by the board as part of the board’s investigations of the nurses at issue. You state none of the submitted information is a type of information contemplated by section 301.466(c). Further, you state the requestor is not entitled to receive this information under section 301.466(b). Accordingly, we conclude the board must withhold the information you marked under section 552.101 of the Government Code in conjunction with section 301.466(a) of the Occupations Code.<sup>4</sup>

Section 552.101 of the Government Code also encompasses section 301.207 of the Occupations Code. Section 301.207 provides as follows:

---

<sup>3</sup> We assume 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 those records contain substantially different types of information than that submitted to this office.

<sup>4</sup> As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

The following information that a 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:

- (1) information, including diagnosis and treatment, regarding a person's physical or mental condition, intemperate use of drugs or alcohol, or chemical dependency;
- (2) information regarding a person's criminal history; and
- (3) any other information in the petition for declaratory order of eligibility.

*Id.* § 301.207. You state the information you marked is confidential under section 301.207. Upon review, we agree the information you marked is confidential under section 301.207 of the Occupations Code. Further, we find 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 marked under section 552.101 of the Government Code in conjunction with section 301.207 of the Occupations Code.<sup>5</sup>

Section 552.101 of the Government Code also encompasses chapter 411 of the Government Code. Criminal history record information ("CHRI") maintained by the Texas Department of Public Safety ("DPS") is deemed confidential under section 411.083 of the Government Code. Gov't Code § 411.083. However, DPS may disseminate this information as provided by chapter 411, subchapter F of the Government Code. *See id.* Section 411.084 governs use of CHRI obtained from DPS and provides, in pertinent part:

(a) Criminal history record information obtained from [DPS] under this subchapter, including any identification information that could reveal the identity of a person about whom [CHRI] is requested and information that directly or indirectly indicates or implies involvement of a person in the criminal justice system:

- (1) is for the exclusive use of the authorized recipient of the information; and
- (2) may be disclosed or used by the recipient only if, and only to the extent that, disclosure or use is authorized or directed by:

---

<sup>5</sup> As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

- (A) this subchapter;
- (B) another statute;
- (C) a rule adopted under a statute; or
- (D) an order of a court of competent jurisdiction.

...

(b) Notwithstanding Subsection (a) or any other provision in this subchapter, [CHRI] obtained from the Federal Bureau of Investigation may be released or disclosed only to a governmental entity or as authorized by federal law and regulations, federal executive orders, and federal policy.

*Id.* § 411.084. Section 411.125, which is a part of subchapter F of chapter 411, authorizes the board to obtain from DPS CHRI related to an applicant for or holder of a license issued by the board, a person who has requested a determination of eligibility for a license from the board, or the subject of an investigation by the board. *Id.* § 411.125. We note the information at issue was obtained pursuant to section 411.125. The board may only disclose CHRI as authorized or directed by subchapter F of chapter 411, another state or federal statute, a rule adopted under a statute, or federal regulations. *Id.* § 411.084; *see also* Occ. Code § 301.1615 (CHRI the board obtains pursuant to section 411.125 and from the Federal Bureau of Investigation may be used by the board only and may not be disclosed). Based on your representations and our review, we find the board must withhold the information you marked under section 552.101 of the Government Code in conjunction with chapter 411 of the Government Code.<sup>6</sup>

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). Under the common-law right of privacy, an individual has a right to be free from the publicizing of private affairs in which the public has no legitimate concern. *Id.* at 682. The Third Court of Appeals has concluded public citizens' dates of birth are protected by common-law privacy pursuant to section 552.101. *Paxton v. City of Dallas*, No. 03-13-00546-CV, 2015 WL 3394061, at \*3 (Tex. App.—Austin May 22, 2015, pet. denied) (mem. op.). Thus, the board must withhold all public citizens' dates of birth under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at

---

<sup>6</sup> As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made “to facilitate the rendition of professional legal services” to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a *confidential* communication, *Id.*, meaning it was “not intended to be disclosed to third persons other than those: (A) to whom disclosure is made to further the rendition of professional legal services to the client; or (B) reasonably necessary to transmit the communication.” *Id.* 503(a)(5). Whether a communication meets this definition depends on the *intent* of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, orig. proceeding). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You state the information you marked consists of communications between board attorneys and board employees. You state the communications were made for the purpose of facilitating the rendition of professional legal services to the board. You further state these communications were intended to be confidential and have remained confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue. Thus, the board may withhold the information you marked under section 552.107(1) of the Government Code.

In summary, the board must withhold the information you marked under section 552.101 of the Government Code in conjunction with section 301.466(a) of the Occupations Code. The board must withhold the information you marked under section 552.101 of the Government Code in conjunction with section 301.207 of the Occupations Code. The board must withhold the information you marked under section 552.101 of the Government Code in conjunction with chapter 411 of the Government Code. The board must withhold all public citizens’ dates of birth under section 552.101 of the Government Code in conjunction with common-law privacy. The board may withhold the information you marked under

section 552.107(1) of the Government Code. The board must release the remaining information.

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 <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,

Kelly McWethy  
Assistant Attorney General  
Open Records Division

KM/gw

Ref: ID# 822308

Enc. Submitted documents

c: Requestor  
(w/o enclosures)