



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

September 4, 2020

Ms. Mia Settle Vinson
Open Records Attorney
Texas Department of Licensing and Regulation
P.O. Box 12157
Austin, Texas 78711

OR2020-22492

Dear Ms. Vinson:

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# 842058 (TDLR# 202003038).

The Texas Department of Licensing and Regulation (the "department") received a request for information pertaining to a specified investigation, as well as any other investigations pertaining to the requestor.¹ You state the department released some of the requested information. You claim 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 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. Section 552.101 encompasses information made confidential by other statutes, such as section 51.254 of the Occupations Code, which provides, in part:

(c) Except as otherwise provided by this section, a complaint and investigation concerning a person to whom this section applies and all

¹ The department sought and received clarification of the information requested. See Gov't Code § 552.222 (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) (if governmental entity, acting in good faith, requests clarification of unclear or over-broad request, ten-day period to request attorney general ruling is measured from date request is clarified).

information and materials subpoenaed or compiled by the department in connection with the complaint and investigation are confidential and not subject to:

(1) disclosure under [the Act.]

...

(d) A complaint or investigation subject to this section and all information and materials subpoenaed or compiled by the department in connection with the complaint and investigation may be disclosed to:

...

(2) a respondent or the respondent's authorized representative[.]

...

(i) Notices of alleged violation issued by the department against respondents, disciplinary proceedings of the department, . . . and final disciplinary actions, including warnings and reprimands, by the department . . . are not confidential and are subject to disclosure in accordance with [the Act].

Occ. Code § 51.254(c)(1), (d)(2), (i). Section 51.254(b) lists the professions to which section 51.254 applies and provides, in part:

(b) This section applies to health-related professions regulated by this state the administration of which is assigned to the department by law, including the following professions:

...

(6) massage therapists regulated under Chapter 455[.]

Id. § 51.254(b)(6). You state the submitted information consists of documentation and information compiled by the department's Enforcement Division (the "division") during its investigation into alleged violations of law and rules by the respondent massage therapist. Further, you explain the submitted information includes the analysis and mental impressions of the division's prosecutors, including determinations regarding the sufficiency of evidence and recommendations concerning enforcement action. Further, we note none of the submitted information is a type of information contemplated by section 51.254(i). *See id.* § 51.254(i).

We note, and you acknowledge, the requestor is the respondent in the case numbers at issue, and therefore, one of the parties to whom the information at issue may be disclosed. *See id.* § 51.254(d)(2). In Open Records Decision No. 458 (1987), this office addressed a

similar statute that contained an exception to confidentiality based on bona fide research purposes. In that decision, we stated the language of the statute plainly establishes “it is within the [governmental body’s] discretion to decide whether and to what extent to release confidential information[.]” ORD 458 at 5. The decision explained the statute states the governmental body “‘may’ disclose confidential information . . . not that it *must* or *shall* do so,” and “the word ‘may’ is generally regarded as permissive in character.” *Id.* (citing *Bloom v. State Bd. Exam’rs of Psychologists*, 492 S.W.2d 460, 462 (Tex. 1973); *San Angelo Nat’l Bank v. Fitzpatrick*, 30 S.W. 1053, 1054 (Tex. 1895)). In this instance, we believe the same rationale regarding the discretionary nature of the exceptions to confidentiality applies to section 51.254(d)(2). Thus, because releasing confidential information under section 51.254(d) is discretionary and we understand the department does not wish to exercise its discretion to release the information at issue, we conclude the requestor does not have a right of access to the information at issue under section 51.254(d)(2). Accordingly, based on your representations and our review of the information at issue, we find the department must withhold the submitted information under section 552.101 of the Government Code in conjunction with section 51.254(c) of the Occupations Code.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 <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,

Emily Kunst
Assistant Attorney General
Open Records Division

EK/gw

Ref: ID# 842058

Enc. Submitted documents

c: Requestor
(w/o enclosures)

²As our ruling is dispositive, we need not address the remaining arguments against disclosure of the submitted information.