



## TEXAS STATE BOARD OF PHARMACY

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November 1, 2024

Tamara Smith  
Division Chief  
Open Records Division  
Office of the Attorney General  
P.O. Box 12548  
Austin, Texas 78711-2548

Re: Requests from Alejandra Caraballo for specified information related to testosterone prescriptions, gender dysphoria, and Senate Bill 14 (TSBP Request No. C.10.21.24)

Dear Tamara Smith:

On October 21, 2024, the Texas State Board of Pharmacy ("TSBP") received two requests under the Texas Public Information Act (the "Act") from Alejandra Caraballo for specified categories of information related to testosterone prescriptions for minors, gender dysphoria, and compliance with Senate Bill 14. Copies of the requests for information are attached as Exhibit A. TSBP does not maintain information responsive to a portion of the requests.

We have released some of the responsive information. A copy of the release letter is attached as Exhibit B. A representative sample of the remaining responsive information is attached as Exhibit C. TSBP asserts the information indicated is privileged under Texas Rule of Evidence 503 and excepted from disclosure under sections 552.101, 552.107, 552.111, and 552.11765 of the Government Code.

### **Attorney-Client Privileged Communication** (TRE 503 + 552.107)

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. When seeking to withhold information not subject to section 552.022 of the Government Code based on the attorney-client privilege, a governmental body should assert section 552.107(1). In Open Records Decision No. 676 (2002), the attorney general interpreted section 552.107 to protect the same information as protected under Texas Rule of Evidence 503. Thus, the standard for demonstrating the attorney-client privilege under the Act is the same as the standard used in discovery under rule 503. Rule 503 privileges confidential communications made to facilitate the rendition of legal services to the client between privileged parties. *See* Tex. R. Evid. 503(b)(1). A communication is confidential if it is not intended to be disclosed to third persons other than those to whom disclosure is made

to further the rendition of professional legal services to the client or reasonably necessary to transmit the communication. *Id.* 503(a)(5).

The information we have indicated is not subject to section 552.022 and consists of confidential communications between TSBP's Board President, General Counsel, and Deputy General Counsel. Specifically, the communications concern: (1) legal advice prepared by the General Counsel and Deputy General Counsel for the Board President, construing the meaning of certain pending bills filed during the 88th Legislative Session and recommending actions for TSBP to take if each bill became law, and (2) legal advice provided by the General Counsel to the Board President concerning how to respond to certain questions at a legislative hearing. These communications were made for the purpose of facilitating the rendition of legal services to TSBP. The communications were intended to be and have remained confidential. Accordingly, the information we have indicated is privileged under Texas Rule of Evidence 503 and excepted from disclosure under section 552.107(1) of the Government Code.

### **Section 552.101 of the Government Code**

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory or by judicial decision." Gov't Code § 552.101.

### **Section 565.055 of the Occupations Code**

Section 552.101 encompasses information made confidential by other statutes, such as section 565.055 of the Occupations Code. Section 565.055 provides:

- (a) The board or the board's authorized representative may investigate and gather evidence concerning any alleged violation of this subtitle or a board rule.
- (b) Information or material compiled by the board in connection with an investigation, including an investigative file of the board, is confidential and not subject to:
  - (1) disclosure under Chapter 552, Government Code; or
  - (2) any means of legal compulsion for release, including disclosure, discovery, or subpoena, to anyone other than the board or a board employee or board agent involved in discipline of a license holder.
- (c) Notwithstanding Subsection (b), information or material compiled by the board in connection with an investigation may be disclosed:
  - (1) during any proceeding conducted by the State Office of Administrative Hearings, to the board, or a panel of the board, or in a subsequent trial or appeal of a board action or order;
  - (2) to a person providing a service to the board, including an expert witness, investigator, or employee of an entity that contracts with the board, related to a disciplinary proceeding against an applicant or license holder, or a

subsequent trial or appeal, if the information is necessary for preparation for, or a presentation in, the proceeding;

(3) to an entity in another jurisdiction that:

(A) licenses or disciplines pharmacists or pharmacies; or

(B) registers or disciplines pharmacy technicians or pharmacy technician trainees;

(4) to a pharmaceutical or pharmacy peer review committee as described under Chapter 564;

(5) to a law enforcement agency;

(6) to a person engaged in bona fide research, if all information identifying a specific individual has been deleted; or

(7) to an entity that administers a board-approved pharmacy technician certification examination.

Occ. Code § 565.055. Further, in construing the predecessor statute, Open Records Decision No. 474 previously determined that reports made by investigators to TSBP are excepted from disclosure.

We agree that information collected and compiled by investigators as well as reports made by investigators to the board are within the scope of the exception... We think that an 'investigative file' for purposes of [this] section includes documents relating to the gathering of facts and the assessment of the validity of the complaints against the licensees.

ORD-474 at 2. The information indicated consists of compilations of evidence created in the course of investigating and gathering evidence concerning alleged violations of the Texas Pharmacy Act or a Board Rule. The documents at issue are part of TSBP's investigative files. The requestor is not entitled to this information pursuant to section 565.055(c). Accordingly, the information at issue is confidential under section 565.055(b) in conjunction with section 552.101 of the Government Code and is not subject to disclosure under the Act.

Section 555.010 of the Occupations Code

Section 552.101 encompasses section 555.010 of the Occupations Code, which provides:

The identity of a person who reports to or assists the board under Section 552.002(c) and a document that could disclose the identity of that person are confidential and are not considered public information for the purposes of Chapter 552, Government Code.

Occ. Code § 555.010. Section 552.002 of the Occupations Code states, in relevant part:

(c) Any person who has knowledge relating to an action or omission of a pharmacist or pharmacy licensed by the board that constitutes a ground for disciplinary action under Section 565.001 or 565.002, or a rule adopted under one of those sections, may provide relevant records, report relevant information, or provide assistance to the board.

Occ. Code § 555.002(c). The information indicated could disclose the identity of a complainant or a person who assisted the Board. This information is confidential under section 555.010 of the Occupations Code and excepted from disclosure under section 552.101 of the Government Code.

### **Section 552.111 of the Government Code**

Section 552.111 provides:

An interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency is excepted from the requirements of Section 552.021.

Gov't Code § 552.111. This exception encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). The purpose of section 552.111 is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, writ ref'd n.r.e.); Open Records Decision No. 538 at 1-2 (1990).

Section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See* ORD 615 at 5. A preliminary draft of a document intended for public release in its final form necessarily represents the drafter's advice, opinion, and recommendation with regard to the form and content of the final document, so as to be excepted from disclosure under section 552.111. *See* Open Records Decision No. 559 at 2 (1990) (applying statutory predecessor). Section 552.111 protects factual information in the draft that also will be included in the final version of the document. *See id.* at 2-3. Thus, section 552.111 encompasses the entire contents, including comments, underlining, deletions, and proofreading marks, of a preliminary draft of a policymaking document that will be released to the public in its final form. *See id.* at 2.

The information indicated consists of: (1) advice provided by TSBP's General Counsel to the Board President concerning how to respond to certain questions at a legislative hearing, (2) a Telicon Tracking Report concerning bills the TSBP General Counsel and Deputy General Counsel chose to track during the 88th Legislative Session, including their notes and "tracks" for each bill that session, and (3) the TSBP Deputy General Counsel's draft notes, summations, and recommended actions in regards specific bills filed that session. Portions of the information at issue consist of draft documents that are intended to be released in their final forms. Accordingly, the information indicated is excepted from disclosure under section 552.111 of the Government Code.

**Section 552.11765 of the Government Code**

Section 552.11765 provides:

(a) In this section, "license" means a license, certificate, registration, permit, or other authorization that:

(1) is issued by a governmental body described by Section 552.003(1)(A)(i); and

(2) an individual must obtain to practice or engage in a particular business, occupation, or profession.

(b) Except as provided by Subsections (c) and (d), information maintained by a governmental body described by Section 552.003(1)(A)(i) is confidential and excepted from the requirements of Section 552.021 if the information:

(1) is a license application; or

(2) relates to the home address, home telephone number, electronic mail address, social security number, date of birth, driver's license number, state identification number, passport number, emergency contact information, or payment information of:

(A) an applicant for a license issued by the governmental body;

(B) an individual who holds a license issued by the governmental body; or

(C) an individual who previously held a license issued by the governmental body.

Gov't Code § 552.11765(a), (b). Section 552.11765 encompasses a personal cellular telephone number, provided a governmental body does not pay for the cellular telephone service. *Cf.* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). The information at issue consists of an email address and personal cellular telephone number of an individual who hold a license to engage in the practice of pharmacy. A license issued by TSBP is required to engage in the practice of pharmacy. *See* Occ. Code § 558.001(a) (“[a] person may not practice pharmacy unless the person holds a license to practice pharmacy under this subtitle”). TSBP is a governmental body (*i.e.*, “board”) described by section 552.003(1)(A)(i) of the Government Code. Sections 552.11765(c) and 552.11765(d) are not applicable to the information at issue. Therefore, this information is excepted from disclosure under section 552.11765 of the Government Code.

TSBP respectfully requests a decision from the Open Records Division regarding the applicability of the argued exceptions as provided by the Act.

***Request for Previous Determination***

Additionally, TSBP requests a previous determination that the home telephone number of an applicant for a license, a license holder, or an individual who previously held a license may be withheld under section 552.11765 of the Government Code. *See* Gov't Code § 552.310(a) (allowing a governmental body to withhold information subject to a previous determination); Open Records Decision No. 673 (2001). TSBP notes that the home telephone number of a TSBP licensee or registrant has been confidential under Texas law since September 1, 2005. *See* Tex. Occ. Code § 555.001(d) (“[i]nformation regarding the home address or home telephone number of a person licensed or registered under this subtitle, including a pharmacy owner, is confidential and not subject to disclosure under Chapter 552, Government Code[.]”). Accordingly, TSBP staff is well versed in redacting the home telephone number of its licensees and registrants can do so consistently without the necessity of seeking a letter ruling. Granting a previous determination would avert repetitious referrals to the Open Records Division solely to confirm that the home telephone address of an applicant for a license, a license holder, or an individual who previously held a license must be withheld under section 552.11765 of the Government Code.

If you have any questions or require additional information, please contact me at (512) 305-8060. Thank you for your consideration.

Sincerely,



Eamon D. Briggs  
Deputy General Counsel

Cc: Alejandra Caraballo  
[REDACTED]  
(w/o enclosures)