



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

December 30, 1998

Ms. Linda Wiegman
Supervising Attorney
Office of General Counsel
Texas Department of Health
1100 West 49th Street
Austin, Texas 78756-3199

OR98-3259

Dear Ms. Wiegman:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 120725.

The Texas Department of Health (the "department") received a request for information relating to Home Care Service, Inc. You contend that portions of the requested information are excepted from disclosure under section 552.101 of the Government Code in conjunction with Health and Safety Code section 81.103, 42 U.S.C. § 405 (c)(2)(C)(viii)(I), rights of privacy, and the "informer's privilege." You indicate that you have released all of the information that you do not consider confidential and you have submitted the remaining responsive documents, indicating the information you seek to withhold. We have considered the exceptions you claim and have reviewed the information at issue.

You contend that section 81.103 of the Health and Safety Code excepts certain responsive information. This provision makes certain test result information confidential; section 81.103(a) provides:

A test result is confidential. A person that possesses or has knowledge of a test result may not release or disclose the test result or allow the test result to become known except as provided by this section.

"Test results" are defined by Health & Safety Code § 81.101(5) as:

any statement that indicates that an identifiable individual has or has not been tested for AIDS or HIV infection, antibodies to HIV, or infection with any other probable causative agent of AIDS, including a statement or assertion that the individual is positive, negative, at risk, or has or does not have a certain level of antigen or antibody.

Our review of the submitted documents did not reveal any such "test results" information.

You also seek to withhold certain social security numbers. Social security numbers may be withheld in some circumstances under section 552.101 of the Government Code. A social security number or "related record" may be excepted from disclosure under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* We have no basis for concluding that any of the social security numbers in the records here are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure on the basis of that federal provision. We caution, however, that section 552.353 of the Open Records Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, you should ensure that no such information was obtained or is maintained pursuant to any provision of law, enacted on or after October 1, 1990.

Although you have not urged section 12.003(a) of the Human Resources Code, the submitted documents include information subject to this statute. Section 12.003(a) of the Human Resources Code forbids the public disclosure of "any information" about the department's clients of assistance programs (including Medicaid), except for purposes directly connected with the administration of those programs. Open Records Decision No. 584 (1991). Responses to Open Records requests are not connected to the administration of those programs, therefore, this identifying information must not be released.

You argue that portions of the responsive information are protected by a right of privacy. Section 552.101 of the Government Code excepts from required public disclosure information that is made confidential by a constitutional or common-law right to privacy. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). As protections under common-law right of privacy are broader than those afforded constitutionally, we look to the common-law test as articulated by the Texas supreme court in the context of requests for disclosure of public information. Information may be withheld under section 552.101 in conjunction with the common-law right to privacy if the information contains highly intimate or embarrassing facts about a person's private affairs such that its release would be highly objectionable to a reasonable person and if the information is of no legitimate concern to the public. *Id.* Our inspection of the submitted information did not reveal any information excepted by a right of privacy.

You also seek to withhold portions of the responsive information as protected by "the informer's privilege." Texas courts long have recognized the informer's privilege, *see Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969); *Hawthorne v. State*, 10 S.W.2d 724, 725 (Tex. Crim. App. 1928). It is a well-established confidentiality application of the Open Records Act. Open Records Decision No. 549 at 4 (1990). In *Roviaro v. United States*, 353 U.S. 53, 59 (1957), the United States Supreme Court explained the rationale that underlies the informer's privilege:

What is usually referred to as the informer's privilege is in reality the Government's privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law. [Citations omitted.] The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law enforcement officials and, by preserving their anonymity, encourages them to perform that obligation.

Although the informer's privilege aspect of section 552.101 ordinarily applies to the efforts of law enforcement agencies, it can apply to administrative officials with a duty of enforcing particular laws. Attorney General Opinion MW-575 (1982) at 2; Open Records Decision Nos. 285 at 1 (1981), 279 at 1-2 (1981); *see also* Open Records Decision No. 208 at 1-2 (1978). This may include enforcement of quasi-criminal civil laws. *See* Open Records Decision Nos. 515 at 3 (1988), 391 at 3 (1983). The privilege excepts the informer's statement itself only to the extent necessary to protect the informer's identity. Open Records Decision No. 549 at 5 (1990). However, once the identity of the informer is known to the subject of the communication, the exception is no longer applicable. Open Records Decision No. 202 at 2 (1978). For information to come under the protection of the informer's privilege, the information must relate to a violation of a civil or criminal statute. *See* Open Records Decision Nos. 515 at 2-5 (1988), 391 (1983). You have stated that to the best of your knowledge the informers' identities are unknown to the requestor. We conclude that the informer's privilege as incorporated into section 552.101 of the Government Code excepts portions of the responsive information from disclosure.

In conformity with the above discussion, we have highlighted the information to be withheld from the responsive documents, and noted the respective exceptions. The remaining information must be released.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Michael J. Burns
Assistant Attorney General
Open Records Division

MJB/nc

Ref: ID# 120725

Enclosures: Submitted documents

cc: Ms. Shirley E. Germanos
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(w/o enclosures)