



February 14, 2000

Mr. Alan J. Bojorquez
Bickerstaff, Heath, Smiley, Pollan, Kever & McDonald L.L.P.
1700 Frost Bank Plaza
816 Congress Avenue
Austin, Texas 78701-2443

OR2000-0522

Dear Mr. Bojorquez:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 132134.

The Collin County Sheriff's Office (the "county"), which you represent, received a request for information from the personnel files of former narcotics Investigator Bruce Keffer and his supervisor, Rex Redden. You state that the county has released some of the requested information to the requestor. However, you claim that certain portions of the remaining requested information are excepted from disclosure under sections 552.101, 552.108 and 552.117 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." Section 552.101 also encompasses confidentiality provisions such as section 611.002 of the Health and Safety Code. Chapter 611 of the Health and Safety Code provides for the confidentiality of records created or maintained by a mental health professional. Section 611.002(a) reads as follows:

Communications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.

Health & Safety Code § 611.002. Section 611.001 defines a “professional” as (1) a person authorized to practice medicine, (2) a person licensed or certified by the state to diagnose, evaluate or treat mental or emotional conditions or disorders, or (3) a person the patient reasonably believes is authorized, licensed, or certified. Sections 611.004 and 611.0045 provide for access to mental health records only by certain individuals. *See* Open Records Decision No. 565 (1990). We find that some of the submitted documents are mental health records that are confidential under section 611.002. We have marked these confidential documents. The county may release them only as provided by sections 611.004 and 611.0045.

Section 552.101 also encompasses section 1703.306 of the Occupations Code. Section 1703.306 provides:

A polygraph examiner, trainee, or employee of a polygraph examiner, or a person for whom a polygraph examination is conducted or an employee of the person may not disclose information acquired from a polygraph examination to another person other than . . .

- (1) the examinee or any other person specifically designated in writing by the examinee;
- (2) the person that requested the examination;
- (3) a member, or the member’s agent, of a governmental agency that licenses a polygraph examiner or supervises or control a polygraph examiner’s activities;
- (4) another polygraph examiner in private consultation; or
- (5) any other person required by due process of law.

(b) The board or any other governmental agency that acquires information from a polygraph examination under this section shall maintain the confidentiality of the information.

Texas Occupations Code § 1703.306 (formerly section 19A of article 4413(29cc) of the Texas Civil Statutes).

Because the requestor is not one of the authorized listed recipients, the polygraph report must be withheld under section 1703.306 as encompassed by section 552.101 of the Government Code. We have marked the information to be withheld.

Information must also be withheld from required public disclosure under common law privacy if it meets the criteria articulated for section 552.101 by the Texas Supreme Court in *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Information must be withheld on the basis of common law privacy, if:

- (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public.

540 S.W.2d at 685. In *Industrial Foundation*, the Texas Supreme Court considered intimate and embarrassing information as that relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683; *see also*, Open Records Decision Nos. 470 (concluding that fact that a person broke out in hives as a result of severe emotional distress is excepted by common law privacy), 455 (1987) (concluding that kinds of prescription drugs a person is taking are protected by common law privacy), 343 (1982) (concluding that information regarding drug overdoses, acute alcohol intoxication, obstetrical/gynecological illnesses, convulsions/seizures, or emotional/mental distress is protected by common law privacy). We conclude that the information you have marked and the additional information we have marked must be withheld under section 552.101 in conjunction with common law privacy.

The Texas courts 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). The informer's privilege is also a well-established exception under the Public Information Act. *See* Open Records Decision No. 549 (1990) at 4. It protects from disclosure the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law-enforcement authority, provided that the subject of the information does not already know the informer's identity. Open Records Decision Nos. 515 at 3 (1988), 208 at 1-2 (1978). The informer's privilege protects the identities of individuals who report violations of statutes to the police or similar law-enforcement agencies, as well as those who report violations of statutes with civil or criminal penalties to "administrative officials having a duty of inspection or of law enforcement within their particular spheres." Open Records Decision No. 279 at 2 (1981)(citing Wigmore, Evidence, § 2374, at 767 (McNaughton rev. ed. 1961)). The report must be of a violation of a criminal or civil statute. *See* Open Records Decision Nos. 582 at 2 (1990), 515 at 4-5 (1988). The privilege excepts the informer's statement only to the extent necessary to protect that informer's identity. Open Records Decision No. 549 at 5 (1990). In addition, the informer's privilege protects the content of the communication only to the extent that it identifies the informant. *Rovario v. United States*, 353 U.S. 53, 60 (1957). Therefore, you may withhold from disclosure names and other identifying information of the individuals

you represent to be confidential police informants under section 552.101 in conjunction with the informer's privilege.

You rely upon section 552.108 to withhold the identity of undercover officers and the location of undercover activity. Section 552.108 provides in pertinent part:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure] if:

(1) release of the information would interfere with the detection, investigation, or prosecution of crime;

...

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from the requirements of Section 552.021 if:

(1) release of the internal record or notation would interfere with law enforcement or prosecution[.]

You argue that disclosure of the identity of undercover officers would unduly interfere with law enforcement by rendering the undercover officers ineffective in future undercover operations. Further, you argue that release of the information of the location of undercover activity would interfere with the detection, investigation, or prosecution of crime. After review of your arguments and the information at issue, we conclude that pursuant to section 552.108 you may withhold the information that identifies the individual you represent to be undercover officers. However, you must release the information regarding the location of the undercover activity.

Next, you assert that many of the submitted documents contain information that is confidential under subsection 552.117(2) of the Government Code. Subsection 552.117(2) provides for the confidentiality of current and former peace officers' home addresses, home telephone numbers, social security numbers, and family member information. The county must withhold this type of information pertaining to all officers of the Collin County Sheriff's Office. We have marked additional information in your redacted submissions that is the type of information that must be withheld.

In summary, under section 552.101, you may only release the mental health information as provided by sections 611.004 and 611.0045 of the Health and Safety Code and you may not

release the polygraph report or any polygraph result information under section 1703.306 of the Occupations Code. In addition, you must not release the information that has been marked as protected by common law privacy. You may also withhold the names and other identifying information of the individuals you represent to be confidential police informants under the informer's privilege. Under section 552.108, you may withhold the identity of the undercover officers but you must release the location of the undercover activity. Finally, under section 552.117, you must withhold all current and former Collin County Sheriff's office peace officers' home addresses, home telephone numbers, social security numbers, and family member information.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Rose-Michel Munguía
Assistant Attorney General
Open Records Division

RMM/jc

Ref: ID# 132134

Encl: Submitted documents

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(w/o enclosures)