



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 28, 2009

Ms. Robin Chapman
Assistant General Counsel
Texas Department of State Health Services
P.O. Box 149347
Austin, Texas 78714-9347

OR2009-06485A

Dear Ms. Chapman:

This office issued Open Records Letter No. 2009-06485 (2009) on May 13, 2009. We have examined this ruling and determined that an error was made. Where this office determines that an error was made in the decision process under sections 552.301 and 552.306, and that error resulted in an incorrect decision, we will correct the previously issued ruling. Consequently, this decision serves as the correct ruling and is a substitute for the decision issued on May 13, 2009. *See generally* Gov't Code § 552.011 (providing that Office of Attorney General may issue decision to maintain uniformity in application, operation, and interpretation of Public Information Act (the "Act")).

The Texas Department of State Health Services (the "department") received a request for all 2008 complaints filed against a named chemical dependency treatment center. You state you have released some of the requested information to the requestor. You claim that portions of the submitted information are excepted from disclosure under section 552.101 of the Government Code. We have considered the exception 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. This section encompasses information protected by other statutes. Section 261.201(a) of the Family Code provides as follows:

- (a) The following information is confidential, is not subject to public release under Chapter 552, Government Code, and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

- (1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and
- (2) except as otherwise provided in this section, the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

Fam. Code § 261.201(a). You inform us that a portion of the submitted information relates to the report and investigation by the department of a complaint of alleged child abuse or neglect in a facility licensed by the department. We therefore conclude that the documents, which you have marked under section 261.201, constitute “files, reports, records, communications, and working papers used or developed” by the department in conducting an investigation under chapter 261 or in providing services as a result of such an investigation. *See id.* § 261.103(a)(3) (requiring that report of suspected abuse or neglect be made to state agency that operates, licenses, certifies, or registers facility in which alleged abuse or neglect occurred). Therefore, the information at issue is confidential under section 261.201 of the Family Code and may be disclosed only for purposes consistent with the Family Code and applicable federal or state law or under rules adopted by the department.¹

Section 552.101 of the Government Code also encompasses the common-law informer’s privilege, which has long been recognized by Texas courts. *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 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).

You state that the remaining information contains identifying information of a person who reported a possible violation of section 448.207 of title 25 of the Texas Administrative Code

¹As our ruling is dispositive, we need not address your remaining arguments against disclosure for this information.

to the department. *See* 25 T.A.C. § 448.207. You inform us that the department has inspection and administrative enforcement authority within its jurisdiction. You also inform us that a violation of this provision is punishable by civil penalties. Based on your representations, we conclude that the department may withhold the information we have marked under section 552.101 of the Government Code in conjunction with the common-law informer's privilege. However, the remaining information the department has marked does not consist of the identifying information of an informer; therefore, the department may not withhold the remaining information it has marked under section 552.101 in conjunction with the informer's privilege.

Finally, you raise common-law privacy for portions of the remaining information. Section 552.101 also encompasses the doctrine of common-law privacy, which protects information that (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The types of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information 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. *Id.* at 683. In addition, this office has found that some kinds of medical information or information indicating disabilities or specific illnesses is protected by common-law privacy. *See* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). Upon review, we conclude that the information we have marked is intimate or embarrassing and of no legitimate public interest. Thus, this information must be withheld under section 552.101 of the Government Code in conjunction with common-law privacy. However, we find that none of the remaining information is highly intimate or embarrassing. Therefore, no portion of the remaining information you have marked is confidential under common-law privacy.

In summary, the department must withhold the information you marked under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code. The department must withhold the information we have marked under section 552.101 of the Government code in conjunction with the informer's privilege and common-law privacy. The remaining information must be released.

Sincerely,



Christina Alvarado
Assistant Attorney General
Open Records Division

CA/rl

Ref: ID# 342972

c: Requestor
(w/o enclosures)

Ms. Ann Hartley
Office of the Attorney General
Financial Litigation Division
(w/o enclosures)