



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 9, 2010

Mr. Dan Meador
Assistant General Counsel
Texas Department of State Health Services
P.O. Box 149347
Austin, Texas 78714-9347

OR2010-08441

Dear Mr. Meador:

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# 382108 (DSHS File 017184-2010).

The Texas Department of State Health Services (the "department") received a request for documents regarding any complaints made against a named massage therapist. You state the department will release some of the requested information to the requestor. You indicate the department will redact an e-mail address under section 552.137 of the Government Code pursuant to Open Records Decision No. 684 (2009).¹ You claim that the information you have marked in the submitted information is excepted from disclosure under sections 552.101 and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

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. This section encompasses information protected by other statutes. Criminal history record information ("CHRI") generated by the National Crime Information Center or by the Texas Crime

¹This office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies, which authorizes withholding of ten categories of information, including e-mail addresses under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

Information Center is confidential. *Id.* § 411.083(a); Open Records Decision No. 565 (1990). Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that states obtain from the federal government or other states. ORD 565. The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* Section 411.083 of the Government Code deems confidential CHRI that the Department of Public Safety ("DPS") maintains, except that DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. *See* Gov't Code § 411.083.

Section 411.122 of the Government Code authorizes the department's professional licensing boards to obtain CHRI from DPS; however, the department may not release CHRI except as provided by chapter 411. *See id.* §§ 411.083, .084, .122. Thus, any CHRI generated by the federal government or another state may not be made available to the requestor except in accordance with federal regulations. *See* ORD 565. Furthermore, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 of the Government Code in conjunction with chapter 411 of the Government Code. Upon review, we find that the department must withhold the CHRI we have marked under section 552.101 of the Government Code in conjunction with chapter 411 of the Government Code. None of the remaining information at issue may be withheld on this basis.

Section 552.101 also encompasses information protected by the 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). The informer's privilege 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); *see* 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).

You assert that the information you have marked contains identifying information of a complainant who reported possible violations of sections 455.251(a)(3) and (4) of the Occupations Code. However, in this instance, the submitted information reveals the subject of the complaint knows the identity of the informer. Accordingly, we conclude that you have failed to demonstrate the applicability of the common-law informer's privilege with regard to the informer's identifying information. Therefore, the information at issue may not be withheld under section 552.101 in conjunction with the common-law informer's privilege.

You also claim the identity of the complainant is confidential under section 552.101 in conjunction with section 155.413 of title 1 of the Texas Administrative Code. Section 155.413 provides in part:

(a) Redaction of personal identifiers. A person who files documents at [the State Office of Administrative Hearings (“SOAH”)], including exhibits offered at hearing, shall redact from the documents all personal identifiers that are:

(1) protected by law from disclosure; or

(2) unnecessary for the resolution of the case. At the time of the filing, SOAH personnel will not be responsible for screening documents for compliance with this rule.

1 T.A.C. § 155.413(a). We note that section 155.413(a) applies to documents that are filed with SOAH. The requestor seeks documents in the possession of the commission. Accordingly, we find section 155.413(a) is not applicable to the submitted documents, and none of the information at issue may be withheld under section 552.101 on that basis. *See* Open Records Decision No. 649 at 3 (1996) (language of confidentiality provision controls scope of its protection).

Next, you claim the two submitted incident reports, which you have marked, are subject to section 552.108 of the Government Code, which excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]” Gov’t Code § 552.108(a)(1). A governmental body must reasonably explain how and why section 552.108 is applicable to the information at issue. *See id.* § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). Section 552.108 may be invoked by the proper custodian of information relating to a pending investigation or prosecution of criminal conduct. *See* Open Records Decision No. 474 at 4-5 (1987). Where a non-law enforcement agency has custody of information that would otherwise qualify for exception under section 552.108 as information relating to the pending case of a law enforcement agency, the custodian of the records may withhold the information if it provides this office with a demonstration that the information relates to the pending case and a representation from the law enforcement agency that it wishes to have the information withheld.

You state, and provide documentation showing, the Houston Police Department (the “HPD”) objects to release of the incident reports obtained from the HPD because these reports relate to pending criminal investigations. The submitted information, however, reflects that the suspect in incident report 175980904 received deferred adjudication. We find the HPD has not adequately demonstrated that this incident report relates to a pending investigation or

prosecution or that the release of this incident report would otherwise interfere with law enforcement. The department, therefore, may not withhold incident report number 175980904 under section 552.108(a)(1). Based on the HPD's representation and our review, however, we conclude the release of incident report 186997408 would interfere with the detection, investigation, or prosecution of crime. See *Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), writ ref'd n.r.e. per curiam, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases). Accordingly, incident report 186997408 is generally subject to section 552.108(a)(1).

Section 552.108 does not except from disclosure "basic information about an arrested person, an arrest, or a crime." Gov't Code § 552.108(c). Section 552.108(c) refers to the basic front-page information held to be public in *Houston Chronicle*. See 531 S.W.2d at 186-7; see also Open Records Decision No. 127 (1976) (summarizing types of information deemed public by *Houston Chronicle*). Although you seek to withhold the entirety of incident report 186997408 under section 552.108, the department must release a sufficient portion of this incident report to encompass basic information. A complainant's home address and telephone number, however, are generally not considered basic information unless the address is the location of the crime, the place of arrest, or the premises involved. ORD 127 at 4 (stating only identity and description of the complainant are available to the public). Accordingly, with the exception basic information, which must be released, the department may withhold incident report 186997408 under section 552.108(a)(1) of the Government Code.²

You also claim portions of the remaining information, including the identifying information of the complainant, are excepted from disclosure under section 552.101 in conjunction with the doctrines of common-law privacy and constitutional privacy. The doctrine of common-law privacy excepts from public disclosure private information about an individual if the information (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. Generally, only highly intimate information that implicates the privacy of an individual is withheld. See Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982) (sexual assault victim has common-law privacy interest that prevents disclosure of information that would identify the victim).

²We note that basic information includes an arrestee's social security number. Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office. See Gov't Code § 552.147.

Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. *See Whalen v. Roe*, 429 U.S. 589, 599-600 (1977); Open Records Decision Nos. 600 at 3-5 (1992), 478 at 4 (1987), 455 at 3-7 (1987). The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. ORD 455 at 4. The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* at 7. The scope of information protected is narrower than that under the common-law doctrine of privacy; constitutional privacy under section 552.101 is reserved for "the most intimate aspects of human affairs." *Id.* at 5 (quoting *Ramie v. City of Hedwig Village, Tex.*, 765 F.2d 490 (5th Cir. 1985)).

Upon review, we conclude the alleged sexual assault victim's identifying information, which we have marked in the basic information and in the other submitted information, is highly intimate or embarrassing and not of legitimate public concern. Therefore, the department must withhold the information we marked in the submitted documents under section 552.101 of the Government Code in conjunction with common-law privacy. We find, however, none of the remaining information at issue may be withheld under section 552.101 on the basis of common-law or constitutional privacy.

Finally, we note a portion of the information in incident report 175980904 is subject to section 552.130 of the Government Code.³ Section 552.130 provides information relating to a motor vehicle operator's license or driver's license issued by a Texas agency is excepted from public release. Gov't Code § 552.130(a)(1). Thus, the department must withhold the Texas driver's license number we have marked under section 552.130.⁴

In summary, the department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with chapter 411 of the Government Code. With the exception of basic information, the department may withhold incident report 186997408 under section 552.108 of the Government Code. The department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The department must withhold the Texas driver's license number we have marked under section 552.130 of the Government Code. The remaining submitted information must be released.

³The Office of the Attorney General will raise a mandatory exception like section 552.130 of the Government Code on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

⁴We note Open Records Decision No. 684 also authorizes governmental bodies to withhold Texas driver's license numbers under section 552.130 of the Government Code without the necessity of requesting an attorney general decision.

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 http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free at (888) 672-6787.

Sincerely,



Tamara H. Holland
Assistant Attorney General
Open Records Division

THH/jb

Ref: ID# 382108

Enc. Submitted documents

c: Requestor
(w/o enclosures)