



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 7, 2011

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

OR2011-09661

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# 423029 (DSHS OR/CMS File No. 18864).

The Texas Department of State Health Services (the "department") received a request for copies of all complaints against massage establishments located in Harris County that were filed with the department between January 1, 2011 and March 30, 2011. You state the department has released some of the requested information. You claim that some of the remaining requested information is excepted from disclosure under sections 552.101, 552.108, 552.130, 552.137, and 552.147 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

We first address your argument under section 552.108 of the Government Code, as it is potentially the most encompassing exception you raise. You claim the information you marked is 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*

¹We note that, although you raise section 552.122 of the Government Code, you make no argument to support this exception. Therefore, we presume you no longer assert this argument. *See* Gov't Code §§ 552.301, .302.

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 demonstrating, the Harris County Constable for Precinct 4, the Harris County Sheriff's Office, and the Houston Police Department object to release of the information you have marked because it relates to pending criminal investigations. Based on your representation and documentation, we conclude the release of the information you have marked 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) (court delineates law enforcement interests that are present in active cases), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). Accordingly, section 552.108(a)(1) is applicable to the information you have marked.

We note, however, 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). Basic information refers to the information held to be public in *Houston Chronicle* and includes, among other things, an arrestee's social security number. See 531 S.W.2d at 186-88. Thus, with the exception of the basic front page offense and arrest information, the department may withhold the information you have marked based on section 552.108(a)(1) of the Government Code.²

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, such as section 560.003 of the Government Code. Section 560.003 provides that “[a] biometric identifier in the possession of a governmental body is exempt from disclosure under [the Act].” Gov't Code § 560.003; see also *id.* §§ 560.001(1) (defining “biometric identifier” to include fingerprints), .002(1)(A) (governmental body may not sell, lease, or otherwise disclose individual's biometric identifier to another person unless individual consents to disclosure). Therefore, the department must withhold the fingerprint you have marked under section 552.101 in conjunction with section 560.003 of the Government Code.

You raise the informer's privilege for portions of the remaining information. Section 552.101 of the Government Code also encompasses information protected by 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

²As our ruling is dispositive, we need not address your remaining arguments for the information that is subject to section 552.108, except to note that basic information described in *Houston Chronicle* does not include information subject to section 552.130 of the Government Code.

S.W.2d 724, 725 (Tex. Crim. App. 1928). The 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 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 8 John H. Wigmore, *Evidence in Trials at Common Law* § 2374, at 767 (J. 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.

You have marked the information you claim is protected by the informer's privilege. We understand the marked information identifies individuals who reported possible violations under chapter 455 of the Occupations Code. See Occ. Code §§ 455.001-455.353 (regulating the health profession of massage therapy). You also state the information you have marked "relates specifically to enforcement by [the department] of criminal or civil statutes." We understand the violations at issue are punishable by civil or criminal penalties. See *id.* §§ 455.301-455.353. You state the subjects of the complaints do not know the identities of the complainants. Therefore, based on your representations and our review, we conclude the department may withhold the identifying information we have marked under section 552.101 of the Government Code in conjunction with the common-law informer's privilege.³ However, we find some of the remaining information either does not identify an individual who made a report to the department or identifies peace officers. The purpose of the informer's privilege is to encourage "citizens" to report wrongful behavior to the appropriate officials. See *Roviaro v. United States*, 353 U.S. 53, 59 (1957). The privilege is not intended to protect the identities of public officials and employees who have a duty to report violations of the law. Because a public employee acts within the scope of his employment when filing a complaint, the informer's privilege does not protect the public employee's identity. Cf. *United States v. St. Regis Paper Co.*, 328 F. Supp. 660, 665 (W.D. Wis. 1971) (concluding that public officer may not claim informer's reward for service it is his or her official duty to perform). Therefore, the remaining information does not identify an informer for the purposes of the informer's privilege, and the department may not withhold any of the remaining information on this basis.

Section 552.101 also encompasses the common-law right of privacy, which protects information if it (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). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *Id.* at 681-82. The type of information considered intimate and embarrassing

³As our ruling is dispositive, we need not address your argument under section 552.137 of the Government Code for this information.

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. Information that either identifies or tends to identify a victim of sexual assault or other sex-related offense must be withheld under common-law privacy. *See* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982). Whether information is subject to a legitimate public interest and therefore not protected by common-law privacy must be determined on a case-by-case basis. *See* Open Records Decision No. 373 (1983). Upon our review, we find the information we have marked is highly intimate or embarrassing and of no legitimate public concern; thus, the department must withhold the information we have marked under section 552.101 in conjunction with common-law privacy. However, we find that you have failed to demonstrate that the remaining information is highly intimate or embarrassing and not of legitimate public concern. Therefore, the department may not withhold any of the remaining information under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.130 provides information relating to a motor vehicle operator's or driver's license or permit issued by an agency of Texas, another state, or another country is excepted from public release. Act of May 24, 2011, 82nd Leg., R.S., S.B. 1638, § 4 (to be codified as an amendment to Gov't Code § 552.130). We find the department must withhold the information we have marked under section 552.130 of the Government Code. We find the remaining information is not information that is subject to section 552.130 and may not be withheld on that basis.

You raise section 552.147 of the Government Code for portions of the remaining information, including an arrestee's social security number in the remaining basic information. Section 552.147 of the Government Code excepts from disclosure the social security number of a living person. Gov't Code § 552.147. Upon review, we find the department may withhold the social security numbers you have marked under section 552.147 of the Government Code.⁴

In summary: (1) with the exception of the basic front page offense and arrest information, the department may withhold the information you have marked under section 552.108(a)(1) of the Government Code; (2) the department must withhold the fingerprint you have marked under section 552.101 of the Government Code in conjunction with section 560.003 of the Government Code; (3) 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; (4) the department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy; (5) the department must withhold the information we have marked under section 552.130 of the

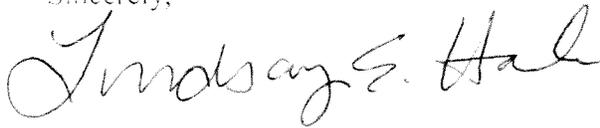
⁴We note section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act.

Government Code; and (6) the department may withhold the social security numbers you have marked under section 552.147 of the Government Code.⁵ The department must release the remaining information.

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,



Lindsay E. Hale
Assistant Attorney General
Open Records Division

LEH/em

Ref: ID# 423029

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁵We note this office issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including: a fingerprint under section 552.101 in conjunction with section 560.003 of the Government Code; and a Texas driver's license number under section 552.130 of the Government Code, without the necessity of requesting an attorney general decision.