



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 2, 2011

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

OR2011-11070

Dear Mr. Waters:

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# 425743 (DSHS File: 18934/2011).

The Texas Department of State Health Services (the "department") received a request for records pertaining to animal shelter inspections and animal impoundment facility inspections during specified time periods. You state the department will provide some of the requested information to the requestor. You claim portions of the submitted inspection-related records are excepted from disclosure under sections 552.101, 552.117, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, you assert portions of the submitted records are excepted under section 81.046 of the Health and Safety Code. You acknowledge this office issued Open Records Letter No. 2010-18849 (2010), a previous determination authorizing the department to withhold information furnished to, or created or gathered by, the department that is related to cases or suspected cases of diseases or health conditions under section 552.101 of the Government Code in conjunction with section 81.046 of the Health and Safety Code, unless the exceptions to confidentiality listed in subsections 81.046(c), (d), or (f) are applicable. *See* Health & Safety Code § 81.046(c), (d), (f). There is no indication the exceptions to confidentiality listed in section 81.046 are applicable in this instance. Therefore, pursuant to Open Records Letter No. 2010-18849, the department must withhold the information you have marked under section 552.101 of the Government Code in conjunction with section 81.046 of the Health and Safety Code. *See* Open Records Decision No. 673 (2001)

(governmental body may rely on previous determination when elements of law, facts, and circumstances have not changed, decision concludes specific, clearly delineated category of information is excepted, and governmental body is explicitly informed it need not seek a decision from this office to withhold information in response to future requests).

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 exception 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 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 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). 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 assert the information you have marked in the remaining inspection-related records reveals the identities of individuals who reported possible violations of criminal or civil statutes to the department. You explain the department’s Zoonosis offices throughout the state have jurisdiction under chapter 823 of the Health and Safety Code to conduct inspections of animal shelters and impound facilities and to enforce criminal or civil statutes pertaining to those shelters and facilities. You state the subjects of the complaints do not know the complainants’ identities. Based on your representations and our review, we conclude the department may withhold the complainant-identifying information we have marked under section 552.101 of the Government Code in conjunction with the common-law informer’s privilege.¹ We find, however, you have not demonstrated how the remaining information you seek to withhold identifies individuals who reported violations of criminal or civil statutes to the department. Consequently, the department may not withhold any of the remaining information at issue under section 552.101 of the Government Code in conjunction with the common-law informer’s privilege. As you have not claimed any other exceptions to disclosure for that information, the department must release it.

You assert some of the remaining information is confidential under both common-law and constitutional privacy. Section 552.101 also encompasses the doctrines of common-law and constitutional privacy. Common-law privacy protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a

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

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. This office has found some kinds of medical information or information indicating disabilities or specific illnesses are generally highly intimate or embarrassing. *See* Open Records Decision No. 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). This office has also determined, however, an individual's name is generally not private information. *See* Open Records Decision No. 554 at 3 (1990) (stating disclosure of person's name not invasion of privacy). You assert the information you have marked, which includes individuals' names, is protected by common-law privacy. Upon review, we agree some of the information at issue, which we have marked, is medical information that we find is not of legitimate public concern. Therefore, the department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. You have failed to demonstrate, however, how the remaining information you seek to withhold, including the individuals' names, is highly intimate or embarrassing. Consequently, the department may not withhold that information under section 552.101 of the Government Code in conjunction with common-law privacy.

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. ORD 455 at 4. 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. *Id.* 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.* The scope of information protected is narrower than under the common-law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)). Upon review, we find you have not demonstrated how any portion of the remaining information at issue falls within the zones of privacy. Furthermore, we find you have not demonstrated how any portion of the remaining information at issue implicates an individual's privacy interests for purposes of constitutional privacy. Consequently, the department may not withhold any of the remaining information at issue under section 552.101 of the Government Code in conjunction with constitutional privacy. As you have not claimed any other exceptions to disclosure for that information, the department must release it.

You have marked a portion of the remaining information as being excepted under section 552.117 of the Government Code. Section 552.117(a)(1) excepts from disclosure the current and former home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former officials or employees of a governmental body who request this information be kept confidential under section 552.024 of the Government Code. Act of May 24, 2011, 82nd Leg., R.S., S.B. 1638, § 2 (to be codified as an amendment to Gov't Code § 552.117(a)). The information you have marked, however, does not consist of the home address, telephone number, emergency contact information, social security number, or family member information of the department

employee involved. Furthermore, you have not provided any arguments explaining how section 552.117 applies to the information you have marked. Consequently, the department may not withhold the information you have marked under section 552.117(a)(1) of the Government Code. As you have not claimed any other exceptions to disclosure for that information, the department must release it.

We note the remaining information contains an employee's cellular telephone number. Section 552.117(a)(1) also encompasses personal cellular telephone numbers, provided the cellular telephone service is paid for by the employee with his or her own funds. *See* Open Records Decision No. 670 at 6 (2001) (extending section 552.117 exception to personal cellular telephone number and personal pager number of employee who elects to withhold home telephone number in accordance with section 552.024). Whether information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). The department may only withhold information under section 552.117(a)(1) on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made.

In this instance, you have not informed us whether or not the employee whose cellular telephone number is at issue timely chose to not allow public access to her personal information. Furthermore, you have not informed us whether or not she paid for her cellular telephone service. Therefore, if the employee timely requested confidentiality for her personal information and she paid for her cellular telephone service, the department must withhold the cellular telephone number we have marked pursuant to section 552.117(a)(1) of the Government Code. If the employee did not timely request confidentiality or she did not pay for her cellular telephone service, the department may not withhold the marked cellular telephone number under section 552.117(a)(1) of the Government Code.

Section 552.137 of the Government Code excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body," unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov't Code § 552.137(a)-(c). The e-mail addresses you have marked in the remaining information are not specifically excluded by section 552.137(c). As such, the department must withhold the e-mail addresses you have marked in the remaining information under section 552.137 of the Government Code, unless the owners of the addresses have affirmatively consented to their release.² *See id.* § 552.137(b).

In summary, pursuant to the department's previous determination in Open Records Letter No. 2010-18849, the department must withhold the information you have marked under

²Open Records Decision No. 684 (2009) is a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including e-mail addresses of members of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

section 552.101 of the Government Code in conjunction with section 81.046 of the Health and Safety Code. The department may withhold the complainant-identifying information we have marked under section 552.101 of the Government Code in conjunction with the common-law informer's privilege. The department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. If the employee whose cellular telephone number we have marked timely requested confidentiality for her personal information and she paid for her cellular telephone service, the department must withhold the marked cellular telephone number pursuant to section 552.117(a)(1) of the Government Code. The department must withhold the e-mail addresses you have marked in the remaining information under section 552.137 of the Government Code, unless the address owners have consented to the release of the addresses. 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,



Leah B. Wingerson
Assistant Attorney General
Open Records Division

LBW/dls

Ref: ID# 425743

Enc. Submitted documents

c: Requestor
(w/o enclosures)