



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 11, 2012

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

OR2012-10725

Dear Ms. Snow:

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# 458816 (DSHS File: 20225/2012).

The Texas Department of State Health Services (the "department") received a request for a specified closed complaint file pertaining to the requestor. You state some information has been or will be made available to the requestor. You claim that portions of the submitted information are excepted from disclosure under section 552.101 of the Government Code.¹ 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. Section 552.101 encompasses laws that make criminal history record information ("CHRI") confidential. CHRI generated by the National Crime Information Center or by the Texas Crime Information Center is confidential under federal and state law. 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. Open Records Decision No. 565 at 7 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* at 10-12. Section 411.083 of the Government Code deems confidential CHRI the Department of Public Safety ("DPS") maintains, except DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. *See* Gov't Code § 411.083.

¹Although you raise section 552.101 in conjunction with section 411.084 of the Government Code, we understand you to raise section 552.101 in conjunction with section 411.083 of the Government Code, as this is the proper section for the substance of your arguments.

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 it has marked under section 552.101 of the Government Code in conjunction with chapter 411 of the Government Code.²

Section 552.101 of the Government Code also encompasses section 48.101 of the Human Resources Code, which pertains to the disclosure of reports of abuse, neglect, or exploitation of elderly and disabled persons in certain facilities. Section 48.101 provides in pertinent part as follows:

(a) The following information is confidential and not subject to disclosure under [the Act]:

(1) a report of abuse, neglect, or exploitation made under this chapter;

(2) the identity of the person making the report; and

(3) except as provided by this section, all files, reports, records, communications, and working papers used or developed in an investigation made under this chapter or in providing services as a result of an investigation.

(b) Confidential information may be disclosed only for a purpose consistent with this chapter and as provided by department or investigating state agency rule and applicable federal law.

...

(d) The executive commissioner [of the Texas Health and Human Services Commission] shall adopt rules providing for the release, on request, to a person who is the subject of a report of abuse, neglect, or exploitation or to that person's legal representative of otherwise confidential information relating to that report. The department or investigating state agency shall edit the information before release to protect the confidentiality of information relating to the reporter's identity and to protect any other individual whose safety or welfare may be endangered by disclosure.

²We note the requestor can obtain his own CHRI from DPS. Gov't Code § 411.083(b)(3).

Hum. Res. Code § 48.101(a), (b), (d). You state that the information contained in Exhibit C was developed as part of an investigation by the Texas Department of Family and Protective Services (“DFPS”) conducted under chapter 48 of the Human Resources Code. *See id.* § 48.252(a)(1), 40 T.A.C. § 711.1. Such information must not be released to the public, except for a purpose consistent with chapter 48 or as provided by a department or investigating state agency rule or federal law. *See* Hum. Res. Code § 48.101(b)-(g) (permitting release of confidential information only in certain circumstances). In this instance, the requestor is the alleged perpetrator. Thus, pursuant to section 48.101(d), the information in Exhibit C is subject to release pursuant to rules adopted by the executive commissioner of the Texas Health and Human Services Commission (the “commissioner”). Subchapter M of chapter 705 of title 40 of the Texas Administrative Code was adopted by the commissioner to explain to whom and under what circumstances case records made confidential under section 48.101 may be released. 40 T.A.C. § 705.7101. Section 705.7107 of that subchapter provides in relevant part:

Upon request and to the extent required by state or federal law, DFPS must make case records or portions of case records available after appropriate redactions to the following persons:

...

- (3) An alleged or designated perpetrator of abuse, neglect, or exploitation of an [Adult Protective Services] client. The perpetrator is only entitled to those portions of the investigation records that relate to the alleged or designated perpetrator[.]

Id. § 705.7107. Consequently, pursuant to section 48.101(d) of the Human Resources Code in conjunction with section 705.7107(3) of title 40 of the Texas Administrative Code, the department must release all information developed as part of the DFPS investigation that pertains to the requestor.

You raise section 552.101 in conjunction with 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 8 John H. Wigmore, *Evidence in Trials at Common Law*, § 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 have marked the information you claim is protected by the informer's privilege. You state the marked information identifies an individual 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 indicate the alleged violations are within the scope of the department's enforcement authority. We understand the violations at issue are punishable by civil or criminal penalties. *See id.* §§ 455.301-455.353. You state the department has no indication that the identity of the informer has been revealed. Based on your representations and our review, we conclude the department may withhold the information it has marked under section 552.101 of the Government Code in conjunction with the common-law informer's privilege.

Section 552.101 of the Government Code also encompasses the doctrine of common-law 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 highly intimate or 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 some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under 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). We note because the submitted documents do not contain the identifying information of the individual whose privacy interests are at issue, we find the release of the information you have marked under common-law privacy does not implicate the privacy rights of that individual. Therefore, the department may not withhold the information it has marked under section 552.101 in conjunction with common-law privacy.

Section 552.101 of the Government Code also encompasses constitutional privacy, which 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 that 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 none of the information you have marked under constitutional privacy falls within the zones of privacy or otherwise implicates an individual's privacy interest for purposes of constitutional privacy. Therefore, the

department may not withhold any of the information it has marked under section 552.101 in conjunction with constitutional privacy.

In summary, the department must withhold the CHRI it has marked under section 552.101 of the Government Code in conjunction with chapter 411 of the Government Code. The department must release all information in Exhibit C developed as part of the DFPS investigation that pertains to the requestor. The department may withhold the information it has marked under section 552.101 of the Government Code in conjunction with the common-law informer's privilege. The remaining information must be released.

You ask this office to issue a previous determination that would permit the department to withhold information pertaining to investigations and protective services for elderly and disabled persons under section 552.101 of the Government Code in conjunction with section 48.101(a) of the Human Resources Code without the necessity of seeking a decision from this office. We decline to issue such a previous determination at this time. Accordingly, 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,



Kathleen J. Santos
Assistant Attorney General
Open Records Division

KJS/eb

Ref: ID# 458816

Enc. Submitted documents

c: Requestor
(w/o enclosures)