



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 20, 2012

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

OR2012-20569

Dear Ms. Elaine 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 #474462 (DSHS File: 20911/2012).

The Texas Department of State Health Services (the "department") received a request for any and all disciplinary information with regard to a named individual. You state some information has been or will be made available to the requestor. You claim 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.

Initially, we must address the department's obligations under the Act. Section 552.301(e-1) of the Government Code requires a governmental body that submits written comments requesting a ruling to the attorney general under subsection 552.301(e)(1)(A), to send a copy of those comments to the person who requested the information from the governmental body not later than the fifteenth business day after the date of receiving the written request. Gov't Code § 552.301(e-1). Section 552.301(e-1) authorizes the governmental body to redact information from those written comments that discloses or contains the substance of the information requested. *Id.* We note the department redacted the entirety of one of its arguments under section 552.101 of the Government Code. We further note the redacted portion of the department's comments neither disclose nor contain the substance of the submitted information. We, therefore, conclude the department failed to comply with section 552.301(e-1) in requesting a decision with respect to its argument under section 552.101 of the Government Code in conjunction with chapter 411 of the Government Code.

Generally, a governmental body's failure to comply with section 552.301 results in the waiver of its claims under the exceptions at issue, unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ); *see also* Open Records Decision No. 630 (1994). In general, a compelling reason to withhold information exists where some other source of law makes the information confidential or where third party interests are at stake. *See* Open Records Decision No. 150 at 2 (1977). Section 552.101 of the Government Code encompasses other laws that make information confidential and can provide a compelling reason for non-disclosure. Accordingly, we will consider the department's assertion of section 552.101 of the Government Code in conjunction with chapter 411 of the Government Code for the information in Exhibit C.

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.

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 Exhibit C under section 552.101 of the Government Code in conjunction with chapter 411 of the Government Code.

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 claim portions of Exhibit B, which you have marked, are protected by the informer's privilege. You state the information you have marked identifies individuals who reported possible violations under chapter 455 of the Occupations Code and section 140.305 of title 25 of the Texas Administrative Code to the department. See Occ. Code §§ 455.001-455.353 (regulating the health profession of massage therapy); see also 25 T.A.C. § 140.305 (sexual misconduct). You state the alleged violations are within the scope of the department's enforcement authority. We understand the violations at issue are punishable by administrative, civil, and criminal penalties. See Occ. Code §§ 455.301-455.353; 25 T.A.C. § 140.372(d). You state the department has no indication that the identities of the informers have been revealed. Based on your representations and our review, we conclude 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, we find the remaining information you have marked does not identify an informer for the purposes of the informer's privilege and may not be withheld under section 552.101 on this basis.

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. Upon review, we find the information we have marked is highly intimate or embarrassing information that is of no legitimate public concern. Accordingly, the department must withhold the information we have marked under section 552.101 of the Government Code 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. Open Records Decision No. 455 at 4 (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. *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 remaining information you have marked 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 remaining information it has marked in Exhibit B under section 552.101 in conjunction with constitutional privacy.

In summary, the department must withhold Exhibit C under section 552.101 of the Government Code in conjunction with chapter 411 of the Government Code. The department must withhold the information we have marked in Exhibit B under section 552.101 of the Government Code in conjunction with common-law informer's privilege and common-law privacy. The remaining information must be released.

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,



Britni Fabian
Assistant Attorney General
Open Records Division

BF/eb

Ref: ID# 474462

Enc. Submitted documents

c: Requestor
(w/o enclosures)