



March 29, 1999

Ms. Stacy E. Sallee  
Associate Counsel  
Texas Health and Human Services Commission  
P.O. Box 13247  
Austin, Texas 78711

OR99-0853

Dear Ms. Sallee:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 123089.

The Texas Health and Human Services Commission (the "Commission") received a request for information related to a complaint made against Dr. Billy Morgan. You have supplied the responsive information for our review. You contend that the information is excepted from public disclosure by section 552.101 of the Government Code in conjunction with the "informer's privilege" and various state and federal statutes and regulations, and by section 552.108 of the Government Code. We have considered the exceptions you claim and have reviewed the documents at issue.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. You state that "the [subject investigation] was based on a complaint and the resulting review of records of Medicaid recipients." You argue that all of the submitted information must, therefore, be withheld because it is confidential Medicaid information under section 12.003 of the Human Resources Code. Section 12.003 of the Human Resources Code provides:

- (a) Except for purposes directly connected with the administration of the department's assistance programs, it is an offense for a person to solicit, disclose, receive, or make use of, or to authorize, knowingly permit, participate in, or acquiesce in the use of the names of, *or any information concerning*, persons applying for or receiving assistance if the information

is directly or indirectly derived from the records, papers, files, or communications of the department or acquired by employees of the department in the performance of their official duties.

(Emphasis added).

In Open Records Decision No. 584 (1991), this office concluded that “[t]he inclusion of the words ‘or any information’ juxtaposed with the prohibition on disclosure of the names of the department’s clients clearly expresses a legislative intent to encompass the broadest range of individual client information, and not merely the clients’ names and addresses.” Consequently, it is the specific information pertaining to individual clients, and not merely the clients’ identities, that is made confidential under section 12.003. *See* Hum. Res. Code § 21.012; Open Records Decision No. 166 (1977).

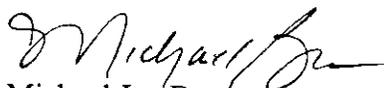
You state that release here is not for the administration of the assistance programs. Consequently, information related to clients, applicants, and recipients of the assistance programs must be withheld under section 552.101. However, not all of the submitted information may be withheld under the rationale of Open Records Decision No. 584 (1991). We have marked the information to indicate that which must be released and that which is confidential and must be withheld.

You also seek to withhold the identity of reporting individual(s), asserting the “informer’s privilege” for this information. What is usually referred to as the “informer’s privilege” is in reality the Government’s privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law. *Roviaro v. United States*, 353 U.S. 53, 59 (1957). Texas courts long have recognized the informer’s privilege, *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), and it is a well-established exception under the Open Records Act. Open Records Decision No. 549 at 4 (1990). Although the informer’s privilege aspect of section 552.101 ordinarily applies to the efforts of law enforcement agencies, it can apply to administrative officials with a duty of enforcing particular laws. Attorney General Opinion MW-575 at 2 (1982); Open Records Decision Nos. 285 at 1 (1981), 279 at 1-2 (1981); *see also* Open Records Decision No. 208 at 1-2 (1978). The privilege excepts the informer’s statement itself only to the extent necessary to protect the informer’s identity. Open Records Decision No. 549 at 5 (1990). However, once the identity of the informer is known to the subject of the communication, the exception is no longer applicable. Open Records Decision No. 202 at 2 (1978). Despite requestor’s assertions to the contrary, the identity of the informer is apparently unknown to the subject of this report. We therefore conclude that the information identifying the informer may be withheld. We have marked the submitted documents accordingly.

You argue that the responsive information is excepted in part or in its entirety by section 552.108 of the Government Code. This section excepts certain information related to law enforcement. This exception generally applies to records of a law-enforcement agency or prosecutor, however, in certain circumstances, an agency that is not a law-enforcement agency may claim section 552.108. *See* Open Records Decision No. 493 (1988). This office has determined that if an investigation by an administrative agency reveals possible criminal conduct that the agency intends to report or already has reported to the appropriate law-enforcement agency, section 552.108 will apply to the information gathered by the administrative agency if its release would interfere with law enforcement. *Id.* You do not indicate that you intend to report or already have reported the information responsive to this request to the appropriate law-enforcement agency, nor have you demonstrated how release of this information would interfere with law enforcement. Consequently, we conclude that you may not withhold any of the requested information under section 552.108 of the Government Code.<sup>1</sup>

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Sincerely,



Michael Jay Burns  
Assistant Attorney General  
Open Records Division

MJB/nc

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<sup>1</sup> You claim that since the commission “acts as an intake point for potential criminal prosecutions,” public disclosure of the commission’s investigation file would “reveal the process used in criminal prosecutions” and the file should therefore be excepted from disclosure by section 552.108. You cite *A & T Consultants, Inc. v. Sharp*, 904 S.W.2d 668 (Tex. 1995) as authority for your interpretation of section 552.108. In *A & T Consultants*, the Texas Supreme Court held that the Comptroller could withhold from disclosure audit papers pursuant to section 552.108 to protect the Comptroller’s interest in enforcing the tax laws. *Id.* at 677. We note that the subject investigation was not forwarded for criminal investigation. We decline to extend *A & T Consultants* to the commission’s interest in civil enforcement. *See* Open Records Decision Nos. 434 at 2 (1986), 287 at 2 (1981) (whether information falls within section 552.108 must be determined on a case-by-case basis).

Ref: ID# 123089

Enclosures: Submitted documents

cc: Mr. Richard J. Karam  
Ariel House  
8118 Datapoint Drive  
San Antonio, Texas 78229-3268  
(w/o enclosures)