



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

April 9, 2020

Ms. Tasheena Byrd
Assistant City Attorney
City of Dallas
1500 Marilla Street, Room 7DN
Dallas, Texas 75201

OR2020-10610

Dear Ms. Byrd:

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# 821509 (ORR# C000046-010220).

The City of Dallas (the "city") received a request for code compliance reports and inspection notes pertaining to two specified addresses during a stated time period.¹ You state the city will withhold certain information pursuant to Open Records Decision No. 684 (2009).² You claim some of the submitted information is excepted from disclosure under section 552.101 of the Government Code.³ We have considered the claimed exception and reviewed the submitted representative sample of information.⁴

¹ You state, and provide documentation demonstrating, the city sought and received clarification of the information requested. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purposes of clarifying or narrowing request); *see also* *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when governmental entity, acting in good faith, requests clarification or narrowing of unclear or overbroad request for public information, ten-day period to request attorney general ruling is measured from date request is clarified or narrowed).

² Open Records Decision No. 684 is a previous determination issued by this office authorizing all governmental bodies to withhold certain categories of information without the necessity of requesting an attorney general decision. *See* ORD 684.

³ We note the city also claims the informer's privilege under Texas Rule of Evidence 508. The Texas Supreme Court has held the Texas Rules of Evidence are "other law" within the meaning of section 552.022 of the Government Code. *See In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001); *see also* Gov't Code § 552.022(a). In this instance, section 552.022 is not applicable to the information the city seeks to withhold under the informer's privilege and, therefore, we do not address the city's argument under rule 508.

⁴ We assume the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Section 552.101 of the Government Code excepts from public disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. You raise section 552.101 in conjunction with the common-law informer’s privilege, which Texas courts have long recognized. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969). 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. *See* Open Records Decision No. 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 1-2 (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 (1988). However, individuals who provide information in the course of an investigation but do not make a report of the violation are not informants for the purposes of claiming the informer’s privilege. The privilege excepts the informer’s statement only to the extent necessary to protect that informer’s identity. Open Records Decision No. 549 at 5 (1990).

You state the informants at issue reported alleged violations of section 27-11 of the city’s code to the city’s 3-1-1 call center. In addition, you state the complaints were referred to the city’s Code Compliance Department, which you explain has the authority to enforce the provisions of the code at issue. Further, you state the alleged violations are punishable by a fine. We have no indication the subjects of the complaints know the identity of the informers. Based upon your representations and our review, we conclude the city has demonstrated the applicability of the common-law informer’s privilege to some of the information at issue. Accordingly, with the exception of the information we marked for release, the city may withhold the information you marked under section 552.101 of the Government Code in conjunction with the common-law informer’s privilege.⁵ However, you have not demonstrated the remaining information you marked consists of the identifying information of an individual who reported a criminal violation to the city for purposes of the informer’s privilege. Therefore, the city may not withhold the remaining information you marked under section 552.101 on that basis.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person, and (2) 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 satisfied. *Id.* at 681-82. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. Additionally, this office has concluded some kinds of medical

⁵ As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

information are generally highly intimate or embarrassing. See Open Records Decision No. 455 (1987). Upon review, we find none of the remaining information at issue satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Therefore, the remaining information you marked is not confidential under common-law privacy, and the city may not withhold it under section 552.101 of the Government Code on that ground.

You also claim the remaining information you marked is protected by the judicial decision in *Scher v. United States*, 305 U.S. 251 (1938). However, upon review, we find this case does not determine the confidentiality of any information for purposes of the Act. Therefore, we find that none of the remaining information at issue may be withheld under section 552.101 of the Government Code in conjunction with *Scher v. United States*.

In summary, with the exception of the information we marked for release, the city may withhold the information you marked under section 552.101 of the Government Code in conjunction with the common-law informer's privilege. The city 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 <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,

James M. Graham
Assistant Attorney General
Open Records Division

JMG/gw

Ref: ID# 821509

Enc. Submitted documents

c: Requestor
(w/o enclosures)