

D-1-GN-17-000617

CAUSE NO. _____

Velva L. Price
District Clerk
Travis County
D-1-GN-17-000617
victoria benavides

THE TEXAS DEPARTMENT OF
STATE HEALTH SERVICES
Plaintiff,

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IN THE DISTRICT COURT OF

V.

TRAVIS COUNTY, TEXAS

KEN PAXTON, ATTORNEY GENERAL
OF TEXAS,
Defendant.

419th JUDICIAL DISTRICT

PLAINTIFF'S ORIGINAL PETITION

Plaintiff The Texas Department of State Health Services (DSHS), through the Attorney General of Texas, files this original petition pursuant to section 552.324 of the Texas Government Code, seeking to challenge Letter Ruling OR2017-00667.

**I.
Discovery Control Plan**

1. Plaintiff intends to conduct discovery, if necessary, under Level 2 of Texas Rules of Civil Procedure 190.

**II.
Parties**

2. Plaintiff The Texas Department of State Health Services (DSHS) is a state agency located in Austin, Texas.

3. Defendant Ken Paxton is the Attorney General of Texas. The Open Records Division of the Office of Attorney General ("ORD") issued Open Records Ruling OR2017-00667, the ruling at issue. The Attorney General may be served in the Price Daniel, Sr. Building, 8th Floor, 209 West 14th Street, Austin, TX, 78701. Issuance of citation is not requested at this time.

**III.
Venue and Jurisdiction**

4. Venue and jurisdiction are proper in this court. Tex. Gov't Code § 552.324.
5. In accordance with section 552.325(b) of the Government Code, the attorney for DSHS will notify the requestor of the following:
 - a. the existence of the suit, including the subject matter and cause number of the suit and the court in which the suit is filed;
 - b. the requestor's right to intervene in the suit or to choose not to participate in the suit;
 - c. the fact that the suit is against the Attorney General in Travis County district court; and
 - d. the address and phone number of the Office of the Attorney General.

**IV.
Cause of Action**

Declaratory relief under section 552.324 of the Texas Government Code

6. On October 26, 2016, DSHS received a request for the number of Zika virus cases in Texas listed by Zip Code. DSHS determined that such information was confidential by law and so excepted from disclosure under section 552.101 of the Government Code in conjunction with section 81.046 of the Texas Health and Safety Code, as well as under common-law privacy. DSHS sought to withhold the confidential information at issue and requested a ruling from the ORD.

7. DSHS's submission of written comments to ORD, stating the reasons why the information should be withheld, and its provision of a copy of the requested information to ORD, were untimely under Government Code Section 552.301. Accordingly, under Government Code section 552.302, the information is presumed to be subject to required public disclosure and must be released unless there is a compelling reason to withhold the information.

8. DSHS asserted that it had a compelling reason to withhold the information because the information at issue was confidential under law.

9. In response to DSHS's request, ORD issued the Letter Ruling, attached as **Exhibit A**, containing the following findings:

- a. DSHS failed to comply with the requirements of Texas Government Code Section 552.301, but because Section 552.101 makes information confidential and provides a compelling reason to overcome the presumption of disclosure, ORD would consider the applicability of Section 551.101 to the submitted information;
- b. Section 552.101 excepts from disclosure information considered confidential by law and encompasses information made confidential under section 81.046 of the Health and Safety Code;
- c. Section 81.046 provides that reports, records, and information furnished to certain public entities related to cases or suspected cases of diseases or health conditions are confidential and not public information under the Public Information Act and so must not be released or made public except as provided by specific exceptions in Section 81.046;
- d. Section 81.046(c)(1) provides that information may be released "for statistical purposes if released in a manner that prevents the identification of any person;"
- e. Because the request at issue sought only statistical information and, in ORD's view, "the requested information is sufficiently de-identified to prevent the identification of any person," it fell under the exception of Section 81.046(c)(1), and so was not confidential under Section 81.046 and may not be withheld under Section 552.101;
- f. No portion of the submitted information was highly intimate or embarrassing or of no legitimate public interest and so none of the information may be withheld on the basis of common-law privacy.

10. Texas Government Code Section 552.101 excepts information from disclosure if the information is confidential by law. Texas Health and Safety Code Section 81.046 makes reports, records, and information furnished to DSHS related to cases or suspected cases of diseases or health conditions confidential and not public information.

11. ORD acknowledges that information made confidential by Section 81.046 is excepted from disclosure under Section 552.101, but erroneously applied the exception of Texas Health and Safety Code Section 81.046(c)(1) to the information at issue in ruling that the information must be disclosed.

12. The exception of Section 81.046(c)(1) relied upon by ORD is inapplicable because release of the information at issue at the zip code geographical level is not sufficiently de-identified and would not prevent the identification of any person. Identification of a patient in a specific zip code is possible and thus release of the number of Zika cases for each zip code could lead to the identification of individuals diagnosed with the disease and violate patients' privacy.

13. Additionally, because this requested information concerns medical conditions of individuals, disclosure of this information would violate common-law privacy, and so be confidential by law and excepted from disclosure under Texas Government Code Section 552.101.

14. Accordingly, because the information at issue is confidential at law; because its release would violate common-law privacy; and because the provisions of Section 81.046 evidence a clear Legislative intent that such sensitive information not be released unless sufficiently de-identified and release of information in the manner requested would not sufficiently de-identify this information, compelling reasons exist to withhold the information at issue.

V.
Request for Relief

15. Plaintiff DSHS requests that this Court issue a final declaratory judgment in its favor ruling that there is a compelling reason to withhold the information at issue and the information at issue is confidential by law and therefore excepted from disclosure under Section 552.101 of the Public Information Act, and that Plaintiff is not required to comply with the directive of OR2017-00667 to disclose such information.

Respectfully submitted,

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

BRANTLEY STARR
Deputy First Assistant Attorney General

JAMES E. DAVIS
Deputy Attorney General for Civil Litigation

JOSHUA R. GODBEY, Chief
Financial Litigation and Charitable Trusts Division

/s/ Cynthia A. Morales

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*Counsel Representing Plaintiff Texas Department of
State Health Services*



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

January 10, 2017

Ms. Elizabeth A. Fitzgerald
Deputy General Counsel
Texas Department of State and Health Services
1100 West 49th Street, M-525
Austin, Texas 78756-3199

OR2017-00667

Dear Ms. Fitzgerald:

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# 643229 (DSHS File No. 26653).

The Texas Department of State and Health Services (the "department") received a request for the number of cases of a specified disease broken down by zip code. You claim the submitted information is 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 information made confidential by other statutes, such as section 81.046 of the Health and Safety Code, which provides in part:

¹We note, and you acknowledge, the department did not comply with section 552.301 of the Government Code in requesting this decision. *See* Gov't Code § 552.301(b), (e). Nonetheless, because section 552.101 of the Government Code makes information confidential and thus can provide a compelling reason to overcome the presumption of openness, we will consider its applicability to the submitted information. *See id.* §§ 552.007, .302, .352.



(a) Reports, records, and information received from any source, including from a federal agency or from another state, furnished to a public health district, a health authority, a local health department, or the department that relate to cases or suspected cases of diseases or health conditions are confidential and may be used only for the purposes of this chapter.

(b) Reports, records, and information relating to cases or suspected cases of diseases or health conditions are not public information under [the Act], and may not be released or made public on subpoena or otherwise except as provided by Subsections (c), (d), and (f).

Health & Safety Code § 81.046(a), (b). In Open Records Decision No. 577 (1990), this office concluded any information acquired or created during an investigation under chapter 81 of the Health and Safety Code is confidential and may not be released unless an exception in the statute applies. *See id.* § 81.046(b)-(d), (f); ORD 577. You assert the submitted information was furnished to the department pursuant to chapter 81 of the Health and Safety Code. However, we note subsection (c)(1) provides for the release of medical or epidemiological information “for statistical purposes if released in a manner that prevents the identification of any person[.]” Health & Safety Code § 81.046(c)(1). In this instance, only statistical information is being requested. Furthermore, we note the requested information is sufficiently de-identified to prevent the identification of any person. Therefore, we find the department has failed to establish the information is confidential pursuant to section 81.046 of the Health and Safety Code. Thus, the submitted information may not be withheld under section 552.101 of the Government Code 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. The types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. Upon review, we find no portion of the submitted information is highly intimate or embarrassing and of no legitimate public interest. Accordingly, the department may not withhold any of the submitted information under section 552.101 of the Government Code on the basis of common-law privacy. As no other exceptions to disclosure are raised, the submitted 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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Kaelan A. Henze
Assistant Attorney General
Open Records Division

KAH/eb

Ref: ID# 643229

Enc. Submitted documents

c: Requestor
(w/o enclosures)

CIVIL CASE INFORMATION SHEET

CAUSE NUMBER (FOR CLERK USE ONLY): _____ COURT (FOR CLERK USE ONLY): _____

STYLED _____
 (e.g., John Smith v. All American Insurance Co; In re Mary Ann Jones; In the Matter of the Estate of George Jackson)

A civil case information sheet must be completed and submitted when an original petition or application is filed to initiate a new civil, family law, probate, or mental health case or when a post-judgment petition for modification or motion for enforcement is filed in a family law case. The information should be the best available at the time of filing.

1. Contact information of person completing this information sheet:	Names of parties in case:	Person or entity completing sheet is:
Name: _____ Email: _____ Cynthia Morales _____ cynthia.morales@oag.texas.go _____ Address: _____ Telephone: _____ PO Box 12548 - 017 _____ 512-936-1313 _____ City/State/Zip: _____ Fax: _____ Austin TX 78711 _____ 512-477-2348 _____ Signature: _____ State Bar No: _____ s/ Cynthia Morales _____ 14417420 _____	Plaintiff(s)/Petitioner(s): _____ Texas Department of State _____ Health Services _____ Defendant(s)/Respondent(s): _____ Ken Paxton, Attorney General _____ of Texas _____	<input checked="" type="checkbox"/> Attorney for Plaintiff/Petitioner <input type="checkbox"/> Pro Se Plaintiff/Petitioner <input type="checkbox"/> Title IV-D Agency <input type="checkbox"/> Other: _____ Additional Parties in Child Support Case: Custodial Parent: _____ Non-Custodial Parent: _____ Presumed Father: _____
[Attach additional page as necessary to list all parties]		

2. Indicate case type, or identify the most important issue in the case (select only 1):

Civil		Family Law		
Contract <input type="checkbox"/> Debt/Contract <input type="checkbox"/> Consumer/DTPA <input type="checkbox"/> Fraud/Misrepresentation <input type="checkbox"/> Other Debt/Contract: Foreclosure <input type="checkbox"/> Home Equity—Expedited <input type="checkbox"/> Other Foreclosure <input type="checkbox"/> Franchise <input type="checkbox"/> Insurance <input type="checkbox"/> Landlord/Tenant <input type="checkbox"/> Non-Competition <input type="checkbox"/> Partnership <input type="checkbox"/> Other Contract:	Injury or Damage <input type="checkbox"/> Assault/Battery <input type="checkbox"/> Construction <input type="checkbox"/> Defamation Malpractice <input type="checkbox"/> Accounting <input type="checkbox"/> Legal <input type="checkbox"/> Medical <input type="checkbox"/> Other Professional Liability: <input type="checkbox"/> Motor Vehicle Accident <input type="checkbox"/> Premises Product Liability <input type="checkbox"/> Asbestos/Silica <input type="checkbox"/> Other Product Liability List Product: <input type="checkbox"/> Other Injury or Damage:	Real Property <input type="checkbox"/> Eminent Domain/Condemnation <input type="checkbox"/> Partition <input type="checkbox"/> Quiet Title <input type="checkbox"/> Trespass to Try Title <input type="checkbox"/> Other Property: Related to Criminal Matters <input type="checkbox"/> Expunction <input type="checkbox"/> Judgment Nisi <input type="checkbox"/> Non-Disclosure <input type="checkbox"/> Seizure/Forfeiture <input type="checkbox"/> Writ of Habeas Corpus—Pre-indictment <input type="checkbox"/> Other:	Marriage/Relationship <input type="checkbox"/> Annulment <input type="checkbox"/> Declare Marriage Void Divorce <input type="checkbox"/> With Children <input type="checkbox"/> No Children Other Family Law <input type="checkbox"/> Enforce Foreign Judgment <input type="checkbox"/> Habeas Corpus <input type="checkbox"/> Name Change <input type="checkbox"/> Protective Order <input type="checkbox"/> Removal of Disabilities of Minority <input type="checkbox"/> Other:	Post-judgment Actions (non-Title IV-D) <input type="checkbox"/> Enforcement <input type="checkbox"/> Modification—Custody <input type="checkbox"/> Modification—Other Title IV-D <input type="checkbox"/> Enforcement/Modification <input type="checkbox"/> Paternity <input type="checkbox"/> Reciprocal (UIFSA) <input type="checkbox"/> Support Order Parent-Child Relationship <input type="checkbox"/> Adoption/Adoption with Termination <input type="checkbox"/> Child Protection <input type="checkbox"/> Child Support <input type="checkbox"/> Custody or Visitation <input type="checkbox"/> Gestational Parenting <input type="checkbox"/> Grandparent Access <input type="checkbox"/> Parentage/Paternity <input type="checkbox"/> Termination of Parental Rights <input type="checkbox"/> Other Parent-Child:
Employment <input type="checkbox"/> Discrimination <input type="checkbox"/> Retaliation <input type="checkbox"/> Termination <input type="checkbox"/> Workers' Compensation <input type="checkbox"/> Other Employment:	Other Civil <input type="checkbox"/> Administrative Appeal <input type="checkbox"/> Antitrust/Unfair Competition <input type="checkbox"/> Code Violations <input type="checkbox"/> Foreign Judgment <input type="checkbox"/> Intellectual Property <input type="checkbox"/> Lawyer Discipline <input type="checkbox"/> Perpetuate Testimony <input type="checkbox"/> Securities/Stock <input type="checkbox"/> Tortious Interference <input checked="" type="checkbox"/> Other: <u>Open Recor</u>			

3. Tax	Probate & Mental Health		
<input type="checkbox"/> Tax Appraisal <input type="checkbox"/> Tax Delinquency <input type="checkbox"/> Other Tax	Probate/Wills/Intestate Administration <input type="checkbox"/> Dependent Administration <input type="checkbox"/> Independent Administration <input type="checkbox"/> Other Estate Proceedings <input type="checkbox"/> Guardianship—Adult <input type="checkbox"/> Guardianship—Minor <input type="checkbox"/> Mental Health <input type="checkbox"/> Other:		

3. Indicate procedure or remedy, if applicable (may select more than 1):

<input type="checkbox"/> Appeal from Municipal or Justice Court <input type="checkbox"/> Arbitration-related <input type="checkbox"/> Attachment <input type="checkbox"/> Bill of Review <input type="checkbox"/> Certiorari <input type="checkbox"/> Class Action	<input checked="" type="checkbox"/> Declaratory Judgment <input type="checkbox"/> Garnishment <input type="checkbox"/> Interpleader <input type="checkbox"/> License <input type="checkbox"/> Mandamus <input type="checkbox"/> Post-judgment	<input type="checkbox"/> Prejudgment Remedy <input type="checkbox"/> Protective Order <input type="checkbox"/> Receiver <input type="checkbox"/> Sequestration <input type="checkbox"/> Temporary Restraining Order/Injunction <input type="checkbox"/> Turnover
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4. Indicate damages sought (do not select if it is a family law case):

Less than \$100,000, including damages of any kind, penalties, costs, expenses, pre-judgment interest, and attorney fees
 Less than \$100,000 and non-monetary relief
 Over \$100,000 but not more than \$200,000
 Over \$200,000 but not more than \$1,000,000
 Over \$1,000,000