



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

June 6, 2013

Mr. Jonathan Miles  
Open Government Attorney  
Texas Department of Family and Protective Services  
P.O. Box 149030  
Austin, Texas 78714-9030

OR2013-09428

Dear Mr. Miles:

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# 489280 (DFPS Request No. 03282013445).

The Texas Department of Family and Protective Services (the "department") received two requests from the same requestor for information related to allegations of abuse at any facility of Bright Horizons Family Solutions, including information concerning a specific child abuse complaint. You state the department does not have information responsive to a portion of the request.<sup>1</sup> You state the department will redact some information under section 552.147 of the Government Code and pursuant to Open Records Decision No. 684 (2009).<sup>2</sup> You claim portions of the submitted information are excepted from disclosure under sections 552.101, 552.130, and 552.136 of the Government Code. We have

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<sup>1</sup>The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1–2 (1990).

<sup>2</sup>Section 552.147 of the Government Code permits a governmental body to redact the social security number of a living person without requesting a decision from this office. *See id.* § 552.147(b). Open Records Decision No. 684 serves as a previous determination to all governmental bodies authorizing them to withhold certain categories of information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without requesting a decision from this office.

considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>3</sup>

As you acknowledge, the department did not request a ruling from this office within the ten-business-day deadline as provided under section 552.301 of the Government Code. *See* Gov't Code § 552.301(b). Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption the information is public and must be released. Information presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *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) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 630 (1994). A compelling reason exists when third-party interests are at stake or when information is confidential under other law. Open Records Decision No. 150 (1977). Although you seek to withhold some information under section 552.101 of the Government Code in conjunction with the informer's privilege, we note the purpose of the informer's privilege is to protect the flow of information to a governmental body, rather than to protect a third person. Thus, the informer's privilege, unlike other claims under section 552.101, may be waived. *See* Open Records Decision No. 549 at 6 (1990). As such, it does not provide a compelling reason for non-disclosure. Therefore, the department may not withhold any of the submitted information under section 552.101 of the Government Code in conjunction with the informer's privilege. However, we will consider your remaining arguments under section 552.101 of the Government Code. We also will consider the applicability of sections 552.130 and 552.136 of the Government Code, as these exceptions make information confidential.

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. This exception encompasses information that other statutes make confidential. Section 40.005 of the Human Resources Code authorizes the department to adopt rules for the purpose of preserving the confidentiality of information concerning child abuse and neglect and provides in part:

- (a) The department shall establish and enforce rules governing the custody, use, and preservation of the department's records, papers, files, and communications.

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<sup>3</sup> 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 those records contain substantially different types of information than those submitted to this office.

(b) The department shall prescribe safeguards to govern the use or disclosure of information relating to a recipient of a department service or to an investigation the department conducts in performing its duties and responsibilities. The safeguards must be consistent with the purposes of the department's programs and must comply with applicable state and federal law and department rules.

Hum. Res. Code § 40.005(a)–(b). In accordance with section 40.005, the department promulgated section 745.8485 of title 40 of the Administrative Code to make child care facility license investigations confidential. Section 745.8485 provides in part:

(c) The following information relating to a completed investigation of child abuse or neglect is confidential and not available to the general public, except as provided under this chapter and applicable federal or state law:

- (1) The description of the allegation of child abuse or neglect;
- (2) The identity of the person making the allegation;
- (3) The files, reports, records, communications, audiotapes, videotapes, and working papers used or developed during an investigation.

40 T.A.C. § 745.8485(c)(1)–(3). You represent to this office some of the requested information is related to investigations of alleged child abuse or neglect at a licensed child care facility, so as to be confidential under section 745.8485(c). You also state the requested information is not subject to disclosure under provisions of chapter 745 of title 40 of the Texas Administrative Code that govern information that must be maintained in the department's monitoring files. *See id.* §§ 745.8481 (information in monitoring file is for most part available to general public), .8487 (department may release to public only those portions of abuse or neglect investigation record that must be filed in monitoring file), .8489 (except for certain specified information, department will maintain all records of abuse or neglect investigation separate from monitoring file). Based on your representations and our review, we find the department must withhold the information we marked under section 552.101 of the Government Code in conjunction with section 745.8485(c) of the Administrative Code. However, we note section 745.8491 of title 40 provides an "attorney ad litem . . . of an alleged victim of child abuse or neglect" may access confidential information pertaining to licensed facilities. *See id.* § 745.8491(a)(3). In this instance, the requestor identifies herself as an attorney for the child victim listed in some of the remaining information you have marked. Therefore, even though section 745.8485(c) makes this information confidential to the general public, this requestor has a right of access to it under section 745.8491(a)(3). Accordingly, the department may not withhold the remaining information at issue from this requestor under section 552.101 of the Government Code.

Section 552.101 of the Government Code also encompasses laws that make criminal history record information (“CHRI”) confidential. CHRI is defined as “information collected about a person by a criminal justice agency that consists of identifiable descriptions and notations of arrests, detentions, indictments, informations, and other formal criminal charges and their dispositions.” Gov’t Code § 411.082(2). 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 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* Section 411.083 of the Government Code deems confidential CHRI that the Department of Public Safety (“DPS”) maintains, except that DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. *See* Gov’t Code § 411.083.

Section 411.114 of the Government Code provides in part:

(a)(2) The [department] shall obtain from the [DPS CHRI] maintained by [DPS] that relates to a person who is:

...

(B) an owner, operator, or employee of or an applicant for employment by a child-care facility, child-placing agency, or family home licensed, registered, certified, or listed under Chapter 42, Human Resources Code

...

(4) Subject to Section 411.087, the [department] is entitled to:

(A) obtain through the Federal Bureau of Investigation [CHRI] maintained or indexed by that bureau that pertains to a person described by Subdivision (2) or (3); and

(B) obtain from any other criminal justice agency in this state [CHRI] maintained by the criminal justice agency that relates to a person described by Subdivision (2)[.]

*Id.* § 411.114(a)(2)(B), (a)(4). The department may not release CHRI except as provided by chapter 411. *See id.* §§ 411.083, .084(c) (agency may not confirm existence or nonexistence of CHRI to any person not eligible to receive the information). Thus, 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 a portion of the submitted information, which we have marked, constitutes CHRI obtained from DPS that is confidential under chapter 411 of the

Government Code. We understand none of the release provisions are applicable in this instance. Accordingly, the department must withhold the information we have marked under section 552.101 in conjunction with chapter 411 the Government Code.<sup>4</sup>

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 types 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. This office has found some kinds of medical information or information indicating disabilities or specific illnesses are protected 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). However, we note common-law privacy is not implicated when an individual requests information as an agent for the person whose privacy interests are at issue. *See* Gov't Code § 552.023 (governmental body may not deny access to person to whom information relates or person's agent on ground that information is considered confidential by privacy principles); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individuals request information concerning themselves). Upon review, we find the requestor has a right of access to some of the information at issue. We also find there is a legitimate public interest in information concerning the tuberculosis test results of a licensed child care provider. Accordingly, the department may not withhold any of the remaining information under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.130 of the Government Code excepts from disclosure information relating to a motor vehicle operator's or driver's license issued by an agency of this state or another state or country. Gov't Code § 552.130(a). Accordingly, in addition to the information you marked, the department must withhold the information we marked under section 552.130 of the Government Code.

Section 552.136(b) of the Government Code provides, “[n]otwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” Gov't Code § 552.136(b); *see id.* § 552.136(a) (defining “access device”). We note, however,

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<sup>4</sup>As our ruling is dispositive, we do not address your assertion of common-law privacy for this information.

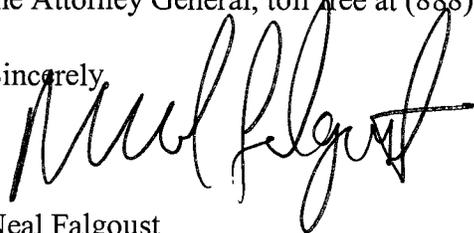
section 552.136 does not apply to check numbers or to information related to a money order. Accordingly, with the exception of the check number you marked and the money order information you marked, the department must withhold the information you marked under section 552.136 of the Government Code.

In summary, the department must withhold the information we have marked under section 552.101 in conjunction with chapter 411 of the Government Code. In addition to the information you marked, the department must withhold the information we marked under section 552.130 of the Government Code. With the exception of the check number you marked and the money order information you marked, the department must withhold the information you marked under section 552.136 of the Government Code. The remaining information must be released.<sup>5</sup>

You also ask this office to issue a previous determination to the department permitting it to withhold under section 552.101 of the Government Code information subject to section 745.8485 of title 40 of the Administrative Code without requesting 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](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,



Neal Falgoust  
Assistant Attorney General  
Open Records Division

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<sup>5</sup>We note the requestor has a right of access to some of the information being released. Accordingly, if the department receives another request for this same information from a different requestor, it must again seek a ruling from this office.

Ref: ID# 489280

Enc. Submitted documents

c: Requestor  
(w/o enclosures)