



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

March 3, 2014

Mr. Jonathan Miles  
Open Government Attorney  
Texas Department of Family and Protective Services  
P.O. Box 149030, Department Mail Code E611  
Austin, Texas 78714-9030

OR2014-03692

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# 515414 (DFPS ORR No. 12052013X1D).

The Texas Department of Family and Protective Services (the "department") received a request for information pertaining to a named facility for a specified time period, including a specified incident. You state the department will release some of the requested information. You also state the department will redact driver's license information pursuant to section 552.130(c) of the Government Code and social security numbers pursuant to section 552.147(b) of the Government Code.<sup>1</sup> You claim the submitted information is excepted from disclosure under section 552.101 of the Government Code. We have

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<sup>1</sup>Section 552.130(c) of the Government Code allows a governmental body to redact the information described in subsection 552.130(a) without the necessity of seeking a decision from the attorney general. Gov't Code § 552.130(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.130(e). *See id.* § 552.130(d), (e). Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act. *Id.* § 552.147(b).

considered the exception you claim and reviewed the submitted representative sample of information.<sup>2</sup>

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 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.

(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. Rules governing the confidentiality of department investigation and facility monitoring records are found at chapter 745 of title 40 of the Texas Administrative Code. The department promulgated section 745.8485 of title 40 of the Texas Administrative Code to make certain child care facility license investigations and records confidential. Section 745.8485 provides, in relevant part, the following:

(a) All investigations are confidential until [the department] complete[s] the investigation and make[s] a finding.

...

(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;

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<sup>2</sup>This letter ruling assumes that the submitted representative sample of information is truly representative of the requested information as a whole. This ruling does not reach, and therefore does not authorize, the withholding of any other requested information to the extent that the other information is substantially different than that submitted to this office. See Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

(2) The identity of the person making the allegation; [and]

(3) The files, reports, records, communications, audiotapes, videotapes, and working papers used or developed during an investigation[.]

40 T.A.C. § 745.8485(a), (c)(1)-(3). You represent to this office the submitted information regarding case number 42777127 pertains to an open investigation by the department of possible child abuse or neglect at a licensed child care facility, so as to be confidential under section 745.8485(a). You represent the submitted information regarding case number 42883697 pertains to a completed investigation of alleged child abuse or neglect at a licensed child care facility, so as to be confidential under section 745.8485(c)(3). You state the information regarding case numbers 42777127 and 42883697 is not subject to disclosure under the 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 information regarding case number 42777127 falls within the scope of section 745.8485(a) and the information regarding case number 42883697 falls within the scope of section 745.8485(c).

In this instance, we find the requestor is not one of the enumerated persons eligible to receive copies of the information regarding case number 42883697 under section 745.8491 of title 40 of the Texas Administrative Code. *Id.* § 745.8491. Therefore, we conclude the department must withhold the information regarding case number 42883697 you have marked under section 552.101 in conjunction with section 745.8485 of title 40 of the Texas Administrative Code.

With respect to case number 42777127, we note section 745.8491 of title 40 provides “[a]n attorney ad litem . . . of an alleged victim of child abuse or neglect” may access confidential information pertaining to an abuse or neglect investigation at a licensed facility. *Id.* § 745.8491(a)(3). In this instance, the requestor states he is the attorney representing the child victim who is the subject of the investigation for case number 42777127. Therefore, even though section 745.8485(a) makes this information confidential to the general public, this requestor has a right of access to it under section 745.8491(a)(3). Accordingly, pursuant to section 745.8491(a)(3), the department may not withhold the information regarding case number 42777127 from this requestor under section 552.101 in conjunction with section 745.8485(a).

In accordance with section 40.005 of the Human Resources Code, the department also promulgated section 745.8493 of title 40 of the Administrative Code. Section 745.8493 provides in part:

(a) [The department] may not release the following portions of an abuse or neglect investigation file to anyone:

(1) The audio taped or videotaped interview of a child, as well as any photographs taken of a child. An authorized person may review them but may not have copies;

...

(3) The name of the person who made the report or any information identifying this person;

...

(6) The identity of any child or information identifying the child, unless the requestor is:

(A) The child's parent or prospective adoptive parent [.]

...

(b) Notwithstanding any other provision in this section, [the department] may provide any of the above confidential information to the following parties in the relevant situations:

(1) [The department's] staff, including volunteers, as necessary to perform their assigned duties;

(2) Law enforcement for the purpose of investigating allegations of child abuse or neglect or false or malicious reporting of alleged child abuse or neglect;

(3) A member of the state legislature when necessary to carry out that member's official duties; and

(4) Any other individuals ordered by an administrative law judge or judge of a court of competent jurisdiction.

*Id.* § 745.8493(a)(1), (3), (6)(A), (b). You state the remaining information was used or developed in investigations of alleged child abuse or neglect. In this instance, we note the requestor has a right of access to some of the remaining information pursuant to section 745.8491 of title 40 of the Texas Administrative Code. As previously noted, section 745.8491 enumerates the parties that may access confidential information pertaining to licensed facilities. *Id.* § 745.8491 (attorney of alleged victim of child abuse or neglect has authority to obtain confidential information relating to abuse or neglect investigation). However, you argue section 745.8493 of title 40 of the Texas Administrative Code prohibits the release of some of the remaining information to anyone, including the requestor. Section 745.8493(a) enumerates certain categories of information, including any photographs taken of a child and the name of a person who made the report, that may not be released to anyone except the parties listed in section 745.8493(b). *Id.* § 745.8493(a)(1), (3). Furthermore, pursuant to section 745.8493(a)(6), the identifying information of a child in an abuse or neglect investigation file may be released only to certain enumerated parties. *Id.* § 745.8493(a)(6). Accordingly, section 745.8493 specifically controls the release of the information enumerated in this section, not section 745.8491.

Upon review, we find the requestor is not one of the parties to whom the department may release the photograph of a child at issue in case number 42883697 or the name of the person who made the report in case number 42777127 under section 745.8493(b). Further, we find the requestor is not one of the parties to whom the department may release the identifying information of the child who is not the requestor's client in case number 42777127 under section 745.8493(a)(6) or section 745.8493(b). Accordingly, we conclude the department must withhold the photograph you have marked in case number 42883697 and the identifying information of the reporting party you have marked in case number 42777127, as well as the additional information we have marked that pertains to the child who is not the requestor's client in case number 42777127, under section 552.101 of the Government Code in conjunction with section 745.8493(a) of title 40 of the Texas Administrative Code.

We note the remaining information includes the identifying information of the child victim at issue in case number 42777127. The requestor states he represents the child victim at issue, as well as another named individual as a next of friend of the child victim at issue. We are unable to determine if the named individual is a parent or prospective adoptive parent of the child victim at issue. As such, we rule conditionally. If the requestor is acting as the authorized representative of a parent or prospective adoptive parent of the child victim at issue in case number 42777127, the requestor has a right of access to the child victim's identifying information under section 745.8493(a)(6)(A) and it may not be withheld from this requestor under section 552.101 of the Government Code in conjunction with section 745.8493(a)(6) of title 40 of the Texas Administrative Code. If, however, the requestor is not acting as the authorized representative of a parent or prospective adoptive parent of the child victim at issue in case number 42777127, then we find the requestor is not one of the parties to whom the department may release the identifying information of the child victim under section 745.8493(a)(6) or section 745.8493(b). In that instance, the

department must withhold this information, which we have marked, under section 552.101 in conjunction with section 745.8493(a)(6).

Next, we will address your arguments against disclosure of the remaining information to which the requestor has a right of access under section 745.8491(a)(3). Although you raise section 552.101 of the Government Code in conjunction with common-law privacy for some of the information we have marked for release, we note a statutory right of access prevails over the common law. *See Collins v. Tex Mall, L.P.*, 297 S.W.3d 409, 415 (Tex. App.—Fort Worth 2009, no pet.) (statutory provision controls and preempts common law only when statute directly conflicts with common law principle); *see also CenterPoint Energy Houston Elec. LLC v. Harris County Toll Rd.*, 436 F.3d 541, 544 (5th Cir. 2006) (common law controls only where there is no conflicting or controlling statutory law). Thus, none of the information to which the requestor has a right of access under section 745.8491(a)(3) may be withheld under section 552.101 in conjunction with common-law privacy.

You have also marked some of this information to withhold under the Medical Practice Act (the “MPA”), chapter 159 of the Occupations Code, which governs access to medical records and is encompassed by section 552.101 of the Government Code. Section 159.002 of the MPA provides in relevant part:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient’s behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Occ. Code § 159.002(b), (c). Information subject to the MPA includes both medical records and information obtained from those medical records. *See id.* §§ 159.002, .004; Open Records Decision No. 598 (1991). Medical records may be disclosed only in accordance with the MPA. *See Occ. Code* §§ 159.002, .004; Open Records Decision Nos. 598, 546 (1990) (because hospital treatment is routinely conducted under supervision of physicians, documents relating to diagnosis and treatment during hospital stay would constitute protected MPA records). Upon review, we find the medical record you have marked in case number 42777127 is confidential under the MPA and must generally be withheld under section 552.101 of the Government Code.

However, as noted above, the requestor in this instance has a statutory right of access under section 745.8491 of title 40 of the Texas Administrative Code to the information that is subject to the MPA. Thus, the instant situation presents a conflict between the protection of

the MPA and the release provision of section 745.8491 of the Texas Administrative Code. Where information falls within both a general and a specific statutory provision, the specific statutory provision prevails as an exception to the general provision, unless the general provision is the later enactment and the manifest intent is that the general provision prevail. *See* Gov't Code § 311.026; *Cuellar v. State*, 521 S.W.2d 277 (Tex. Crim. App. 1975) (under well-established rule of statutory construction, specific statutory provisions prevail over general ones).

The MPA specifically makes medical records confidential, while section 745.8491 gives a general right of access to confidential information relating to an investigation of child abuse or neglect conducted under chapter 745 of the Texas Administrative Code. *See* Occ. Code § 159.002(a), (b); 40 T.A.C. § 745.8491(a)(3). Therefore, we find the confidentiality provisions of the MPA are more specific than the access provision of section 745.8491. Accordingly, the department must withhold the medical record you have marked in case number 42777127 under section 552.101 of the Government Code in conjunction with the MPA.

In summary, the department must withhold the information regarding case number 42883697 you have marked under section 552.101 of the Government Code in conjunction with section 745.8485 of title 40 of the Texas Administrative Code. The department must withhold the photograph you have marked in case number 42883697 and the identifying information of the reporting party you have marked in case number 42777127, as well as the additional information we have marked that pertains to the child who is not the requestor's client in case number 42777127, under section 552.101 of the Government Code in conjunction with section 745.8493(a) of title 40 of the Texas Administrative Code. If the requestor is not acting as the authorized representative of a parent or prospective adoptive parent of the child victim at issue in case number 42777127, the department must withhold the information we have marked that identifies the child victim at issue in case number 42777127 under section 552.101 of the Government Code in conjunction with section 745.8493(a)(6) of title 40 of the Texas Administrative Code. The department must withhold the medical record you have marked in case number 42777127 under section 552.101 of the Government Code in conjunction with the MPA. The department must release the remaining information.<sup>3</sup>

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.

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<sup>3</sup>Because the requestor has a special right of access to the information being released that pertains to case number 42777127, if the department receives another request for this information from an individual other than this requestor or his client, the department must again seek a ruling from this office. *See* 40 T.A.C. § 745.8491(a)(3).

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](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,

A handwritten signature in black ink that reads "Lindsay E. Hale". The signature is written in a cursive, flowing style.

Lindsay E. Hale  
Assistant Attorney General  
Open Records Division

LEH/tch

Ref: ID# 515414

Enc. Submitted documents

c: Requestor  
(w/o enclosures)