



January 20, 2015

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

OR2015-01019

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# 550549 (DFPS ORR Request No. 10212014VWO).

The Texas Department of Family and Protective Services (the "department") received a request for all records related to a named preparatory academy from January 1, 2005, to the date of the present request.¹ You state you will withhold certain information as permitted by the previous determination issued in Open Records Letter No. 2003-5590 (2003).² You claim some of the submitted information is excepted from disclosure under section 552.101 of the

¹We note the department sought and received clarification of the information requested. *See* Gov't Code § 552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify request); *see also* *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or over-broad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

²Open Records Letter No. 2003-5590 is a previous determination authorizing the department to withhold, without the necessity of seeking a decision from this office, the records concerning an investigation of an allegation of abuse or neglect of a child and the records used or developed in providing services as a result of such an investigation under section 552.101 of the Government Code in conjunction with section 261.201(a) of the Family Code, unless the department's rules permit the department to release requested records to a particular requestor.

Government Code. We have considered the exception you claim and reviewed the submitted representative sample of information.³

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 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(a)-(b). 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 confidential certain child care facility license investigations and records.⁴ Section 745.8485(c) provides as follows:

(c) Completed investigations of child abuse or neglect are confidential and not available to the general public, except as provided under this chapter and applicable federal or state law.

40 T.A.C. § 745.8485(c). We understand each of the submitted investigations is completed. Investigation number 2025876 relates to an investigation that resulted in a finding of child abuse or neglect at a licensed child care facility. Thus, we find this information is subject to section 745.8485(c). Section 745.8491 of title 40 of the Texas Administrative Code enumerates the parties who may obtain confidential information pertaining to an

³We assume that 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.

⁴Although you do not cite to this rule in your brief, we understand you to raise it based on your markings.

investigation of licensed facilities. *Id.* § 745.8491. The requestor is not one of the persons enumerated under section 745.8491 of title 40 of the Texas Administrative Code eligible to receive copies of the information at issue. *Id.* Accordingly, the department must withhold report number 2025876, which you have marked, under section 552.101 of the Government Code in conjunction with section 745.8485(c) of title 40 of the Texas Administrative Code.

You seek to withhold portions of the remaining information under section 552.101 of the Government Code in conjunction with section 745.8493(a), which is also encompassed by section 552.101 and states, in relevant part, the following:

(a) [The department] may not release the following portions of Licensing records to anyone:

...

(2) Any information identifying the person who made a report that resulted in an investigation[.]

...

(7) The identity of any child or information identifying the child in an abuse or neglect investigation[.]

Id. § 745.8493(a)(2), (7). Section 745.8493(a)(2) of title 40 of the Texas Administrative Code prohibits release to anyone of information that identifies the person who made a report that resulted in an investigation. *Id.* § 745.8493(a)(2). We note under section 745.8493(b), the department may provide the information made confidential under section 745.8493(a) to certain parties in relevant situations. *Id.* § 745.8493(b). The requestor is not one of the parties to whom the department may release the information made confidential under section 745.8493(a). Therefore, the department must withhold the identity of the reporting parties, which you have marked, within the remaining reports under section 552.101 of the Government Code in conjunction with section 745.8493(a)(2) of title 40 of the Texas Administrative Code.

The remaining information includes the identities of children involved in a child abuse or neglect investigation. Section 745.8493(a)(7) prohibits the department from releasing this information. *Id.* § 745.8493(a)(7). However, section 745.8493(a)(7)(A) allows the department to release such information to certain parties. *Id.* § 745.8493(a)(7)(A). We find the requestor is not one of the specified parties entitled to the information subject to section 745.8493(a)(7). After review of the remaining information, we conclude the department must withhold the information that identifies the children in the remaining

investigation reports, which we have marked, under section 552.101 of the Government Code in conjunction with section 745.8493(a)(7) of title 40 of the Texas Administrative Code.⁵

Section 552.101 of the Government Code 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. This office has concluded some kinds of medical information are generally highly intimate or embarrassing. *See* Open Records Decision No. 455 (1987). You assert the information you have highlighted is protected by common-law privacy. Upon review, however, we find the information at issue pertains to individuals who have been de-identified and whose privacy interests are, thus, protected. Accordingly, none of the information at issue may be withheld under section 552.101 in conjunction with common-law privacy.

Section 552.101 of the Government Code also encompasses information protected by the common-law informer's privilege, which has long been recognized by Texas courts. *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). The informer's privilege protects 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 report does not already know their identities. Open Records Decision Nos. 515 at 2-3 (1988), 434 at 1-2 (1986), 208 at 1-2 (1978). For the informer's privilege to apply, the report must be of a violation of a criminal or civil statute. *See* Open Records Decision Nos. 582 at (1990), 515 at 3-4. The privilege affords protection to individuals who report violations of statutes to criminal 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)). However, witnesses 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 the informer's privilege. Upon review, we find you have not demonstrated any of the remaining information at issue identifies an individual who reported a violation of law to the department. Therefore, the department may not withhold any of the remaining information you have marked under section 552.101 on the basis of the common-law informer's privilege.

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

In summary, the department must withhold the information you have marked under section 552.101 of the Government Code in conjunction with section 745.8485(c) of title 40 of the Texas Administrative Code. The department must withhold the identity of the reporting parties, which you have marked, within the remaining reports under section 552.101 of the Government Code in conjunction with section 745.8493(a)(2) of title 40 of the Texas Administrative Code. The department must withhold the information that identifies the children in the remaining investigation reports, which we have marked, under section 552.101 of the Government Code in conjunction with section 745.8493(a)(7) of title 40 of the Texas Administrative Code. The remaining 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,



Rustam Abedinzadeh
Assistant Attorney General
Open Records Division

RA/dls

Ref: ID# 550549

Enc. Submitted documents

c: Requestor
(w/o enclosures)