



February 4, 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

OR2015-02252

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# 552633 (DFPS ORR Request No. 11062014BST).

The Texas Department of Family and Protective Services (the "department") received a request for any and all records relating to any complaints, violations, or fines issued against a specified child care facility. You claim some of the submitted information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted representative sample of information.¹

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:

¹We 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.

(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. Section 745.8485(a) provides "all investigations are confidential until [the department] complete[s] the investigation and make[s] a finding." 40 T.A.C. § 745.8485(a). You explain the information at issue consists of files, reports, records, or working papers concerning an investigation of alleged child abuse or neglect at a licensed child care facility that was ongoing at the time the department received the request, and is confidential under section 745.8485(a). We understand the information at issue is not information that must be maintained in the department's monitoring files. *See id.* §§ 745.8481(a) (information in monitoring file is for most part available to general public), .8487(a) (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 at issue falls within the scope of section 745.8485(a). Accordingly, the department must withhold the information you have marked under section 552.101 of the Government Code in conjunction with section 745.8485(a) of title 40 of the Texas Administrative Code.

You seek to withhold portions of the remaining information, which consist of completed investigations, under section 552.101 of the Government Code in conjunction with section 745.8493(a), which is also encompassed by section 552.101 of the Government Code 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; [and]

...

(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 identities 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) allows the department to release such information to certain parties. *Id.* We find the requestor is not one of the specified parties entitled to the information subject to section 745.8493(a)(7). Additionally, as noted above, the requestor is not one of the parties listed in section 745.8493(b) to whom the department may release the information made confidential under section 745.8493(a). *See id.* § 745.8493(b). 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.²

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. This office has concluded some kinds of medical information are generally highly intimate or embarrassing. *See* Open Records Decision No. 455 (1987). You state the information you have marked is protected by common-law privacy. We find the information you have marked satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Therefore, the department must withhold the information you have

²As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

marked under section 552.101 of the Government Code 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 of the Government Code on the basis of the common-law informer's privilege.

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(a) of title 40 of the Texas Administrative Code. The department must withhold the identities 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 department must withhold the information you have marked under section 552.101 of the Government Code in conjunction with common-law privacy. 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# 552633

Enc. Submitted documents

c: Requestor
(w/o enclosures)