



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

March 27, 2015

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

OR2015-05907

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# 557692 (DFPS ORR. 12302014YXB)

The Texas Department of Family and Protective Services (the "department") received a request for information pertaining to a specified incident at a named daycare. You claim some of the requested 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 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:

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). In accordance with section 40.005, the department promulgated section 745.8485 of title 40 of the Texas Administrative Code to make child care facility license investigations confidential. 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). You state the information you have marked 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 state the investigations are completed. You also inform us 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 you have marked falls within the scope of section 745.8485(c). You state the requestor is not one of the enumerated persons eligible to receive copies of the information at issue under section 745.8491 of title 40 of the Texas Administrative Code. *Id.* § 745.8491. Therefore, we conclude the department must withhold the information you have marked under section 552.101 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). You state the remaining information was used or developed in an investigation of alleged child abuse or neglect. You inform our office that as the attorney representing one of the child victims of the abuse or neglect at issue, the requestor has a right of access to some of the submitted information. Section 745.8491 of title 40 of the Texas Administrative Code 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). Thus, pursuant to section 745.8491, the department will release some of the submitted information to the requestor. However, 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)(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)(2). Therefore, the department must withhold the identity of the reporting party, which you have marked, within the report at issue 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, other than the requestor's client, 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). However, we note some of the information you have marked under section 745.8493(a)(7) does not consist of identifying information of a child involved in a child abuse or neglect investigation. Accordingly, we find the department may not withhold this information, which we have marked for release, under section 552.101 in conjunction with section 745.8493(a)(7). With the exception of the information we have marked for release, the department must withhold the information you 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.

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. 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.

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 information you have marked under section 552.101 of the Government Code in conjunction with section 745.8493(a)(2) and of title 40 of the Texas Administrative Code. With the exception of the information we have marked for release, the department must withhold the information you 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 release the remaining information to this requestor.²

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,



Paige Lay
Assistant Attorney General
Open Records Division

PL/bhf

²We note the information to be released contains information to which the requestor has a right of access. Because such information may be confidential with respect to the general public, if the department receives another request for this information from a different requestor, the department must again seek a ruling from this office.

Ref: ID# 557692

Enc. Submitted documents

c: Requestor
(w/o enclosures)