



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

June 1, 2015

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

OR2015-10581

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# 565502 (DPFS# 03122015GOS).

The Texas Department of Family and Protective Services (the "department") received a request for any and all records pertaining to the investigation conducted by the department regarding a specified incident at Brookhaven Youth Ranch. You state you will redact information pursuant to the previous determination issued in Open Records Letter No. 2003-5590 (2003).¹ You also state you will redact information pursuant to sections

¹Open Records Letter No. 2003-5590 is a previous determination authorizing the department to withhold, under section 552.101 of the Government Code in conjunction with section 261.201(a) of the Family Code, 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, unless the department's rules permit the department to release requested records to a particular requestor.

552.130(c), 552.136(c), and 552.147 of the Government Code.² Finally, you state you will redact fingerprints from the submitted information pursuant to Open Records Decision No. 684 (2009).³ You claim some of the submitted information is excepted from disclosure under section 552.101 of the Government Code. You inform us the department also notified the McLennan County Sheriff's Office (the "sheriff's office") of the request pursuant to section 552.304 of the Government Code.⁴ *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have considered the exception you claim and reviewed the submitted representative sample of information.⁵

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. Section 552.101 encompasses section 58.007 of the Family Code, which provides, in relevant part:

(c) Except as provided by Subsection (d), law enforcement records and files concerning a child and information stored, by electronic means or otherwise, concerning the child from which a record or file could be generated may not be disclosed to the public and shall be:

(1) if maintained on paper or microfilm, kept separate from adult files and records;

²Section 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. *See* 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 552.136(c) of the Government Code permits a governmental body to withhold the information described in section 552.136(b) without the necessity of seeking a decision from this office. *See id.* § 552.136(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.136(e). *See id.* § 552.136(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. *Id.* § 552.147(b).

³Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold certain categories of information without the necessity of requesting an attorney general decision, including fingerprints under section 552.101 in conjunction with section 560.003 of the Government Code. Open Records Decision No. 684 at 6 (2009); Gov't Code §§ 552.101, 560.003.

⁴As of the date of this letter, we have not received comments from this sheriff's office.

⁵We 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 that those records contain substantially different types of information than that submitted to this office.

(2) if maintained electronically in the same computer system as records or files relating to adults, be accessible under controls that are separate and distinct from controls to access electronic data concerning adults; and

(3) maintained on a local basis only and not sent to a central state or federal depository, except as provided by Subchapters B, D, and E.

Fam. Code § 58.007(c). For purposes of section 58.007(c), “child” means a person who is ten years of age or older and under seventeen years of age at the time of the reported conduct. *See id.* § 51.02(2); *see also id.* § 51.03(a)-(b) (defining “delinquent conduct” and “conduct in need of supervision” for purposes of section 58.007(c)). Upon review, we find the submitted information includes law enforcement records involving juvenile delinquent conduct or conduct indicating a need for supervision that occurred after September 1, 1997. As such, this information constitutes juvenile law enforcement records that are confidential pursuant to section 58.007(c). It does not appear any of the exceptions to confidentiality under section 58.007 apply in this instance. Thus, the department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 58.007(c) of the Family Code.⁶

Section 552.101 of the Government Code also encompasses section 40.005 of the Human Resources Code. Section 40.005 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.

(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 chapter 745 of title 40 of the Texas Administrative Code to make confidential certain information in department inspections and investigations. Section 745.8493(a) states, in relevant part, the following:

⁶As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

(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[.]

40 T.A.C. § 745.8493(a)(2), (7). You indicate the submitted information was used or developed in an investigation of alleged child abuse or neglect that was closed on the date of the present request. 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, 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 submitted information includes the identities of children, other than the child of 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). Although section 745.8493(a)(7)(A) allows the department to release such information to certain parties, we find the requestor is not one of the specified parties entitled to the information subject to section 745.8493(a)(7). *See id.* § 745.8493(a)(7)(A). 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, and the additional information 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.

Section 745.8495(a) of title 40 of the Texas Administrative Code provides that the department “may provide a copy of a photograph or an audio or visual recording, depiction, or documentation of a child in Licensing records” to five categories of individuals. 40 T.A.C. § 745.8495(a). Additionally, section 745.8495(b) provides that the department may allow four categories of individuals to “review a photograph or an audio or visual recording,

depiction, or documentation of a child in Licensing records,” but those individuals “may not have a copy.” *See id.* § 745.8495(b). You state the requestor is not one of the parties to whom the department may release the information at issue under section 745.8495. Accordingly, we find the department must withhold the audio identifying information of children in the submitted information, which you have indicated, under section 552.101 of the Government Code in conjunction with section 745.8495 of title 40 of the Texas Administrative Code.

You argue portions of the remaining information are subject to section 411.083 of the Government Code, which pertains to criminal history record information (“CHRI”). CHRI generated by the National Crime Information Center (“NCIC”) or by the Texas Crime Information Center is confidential under federal and state law. CHRI means “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 obtained from the NCIC network or other states. *See* 28 C.F.R. § 20.21. The federal regulations allow each state to follow its individual law with respect to CHRI it generates. Open Records Decision No. 565 at 7 (1990); *see generally* Gov’t Code ch. 411 subch. F. Section 411.083 of the Government Code deems confidential CHRI the Texas Department of Public Safety (“DPS”) maintains, except DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. *See* Gov’t Code § 411.083. Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *Id.* § 411.089(b)(1). 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 Government Code chapter 411, subchapter F. We note, however, active warrant information or other information relating to an individual’s current involvement in the criminal justice system does not constitute criminal history information for purposes of section 552.101. *See id.* § 411.081(b). Upon review, we find you have failed to demonstrate any of the remaining information includes confidential CHRI. Therefore, the department may not withhold any portion of the remaining information under section 552.101 of the Government Code on this basis.

Section 552.101 also encompasses section 560.003 of the Government Code. Section 560.003 provides that “[a] biometric identifier in the possession of a governmental body is exempt from disclosure under [the Act].” *Id.* § 560.003; *see also id.* §§ 560.001(1) (defining “biometric identifier” to include fingerprints), .002(1)(A) (governmental body may not sell, lease, or otherwise disclose individual’s biometric identifier to another person unless individual consents to disclosure), .003 (biometric identifiers in possession of governmental body exempt from disclosure under the Act). You do not inform us, and the submitted information does not indicate, section 560.002 permits the disclosure of the marked handprint information in this instance. Therefore, the department must withhold the

information you have marked under section 552.101 in conjunction with section 560.003 of the Government Code.

Section 552.101 of the Government Code further encompasses information protected by chapter 611 of the Health and Safety Code, which provides for the confidentiality of records created or maintained by a mental health professional. Section 611.002(a) states “[c]ommunications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.” Health & Safety Code § 611.002(a). Section 611.001 defines a “professional” as (1) a person authorized to practice medicine, (2) a person licensed or certified by the state to diagnose, evaluate or treat mental or emotional conditions or disorders, or (3) a person the patient reasonably believes is authorized, licensed, or certified. *Id.* § 611.001(b). Sections 611.004 and 611.0045 provide for access to mental health records only by certain individuals. *See* Open Records Decision No. 565 (1990). Portions of the remaining information constitute mental health records. Upon review, we find the department must withhold the mental health records you have marked under section 552.101 of the Government Code in conjunction with section 611.002(a) of the Health and Safety 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 mark some information as 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 we have marked under section 552.101 of the Government Code in conjunction with section 58.007(c) of the Family Code. With the exception of the information we have marked for release, the department must withhold the information you have marked, and additional information we have marked, under section 552.101 of the Government Code in conjunction with sections 745.8493 and 745.8495 of title 40 of the Texas Administrative Code. The department must also withhold the information you have marked under section 552.101 of the Government Code in conjunction with section 560.003 of the Government Code and section 611.002 of the Health and Safety Code. The department must release the remaining submitted information.

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,

Handwritten signature of Ramsey A. Abarca in black ink.

Ramsey A. Abarca
Assistant Attorney General
Open Records Division

RAA/eb

Ref: ID# 565502

Enc. Submitted documents

c: Requestor
(w/o enclosures)