



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

September 28, 2015

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

OR2015-20332

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# 580814 (DFPS ORR# 06292015JKD).

The Texas Department of Family and Protective Services (the "department") received a request for information pertaining to two specified child care operations. You state you have released some information to the requestor. You state you will redact information pursuant to the previous determination issued in Open Records Letter No. 2003-5590 (2003).¹ Further, you state you will redact social security numbers pursuant to section 552.147(b).² You claim portions of the submitted information are excepted from disclosure under

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.

²Section 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. Gov't Code § 552.147(b).

section 552.101 of the Government Code.³ We have considered the exception you claim and reviewed the submitted representative sample of information.⁴

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:

(a) The executive commissioner [of the Texas Health and Human Services Commission] shall establish and enforce rules governing the custody, use, and preservation of the department’s records, papers, files, and communications.

(b) The executive commissioner 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.

Act of March 30, 2015, 84th Leg., R.S., ch. 1, § 4.187, 2015 Tex. Sess. Law Serv. 1, 773 (Vernon) (to be codified as an amendment to 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 provides, in relevant part:

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

³We note the department did not comply with the requirements of section 552.301 of the Government Code. See Gov’t Code § 552.301. Compare *id.* § 552.2615(g) (“The time deadlines imposed by this section do not affect the application of a time deadline imposed on a governmental body under Subchapter G [of the Act].”), with *id.* § 552.263(e) (if governmental body requires deposit or bond for anticipated costs pursuant to section 552.263, request for information is considered to have been received on date that governmental body receives deposit or bond). Nonetheless, section 552.101 of the Government Code is a mandatory exception that can provide a compelling reason to overcome the presumption of openness caused by a failure to comply with section 552.301. See *id.* §§ 552.007, .302. Thus, we will consider the department’s claims under section 552.101.

⁴We 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 those records contain substantially different types of information than that submitted to this office.

...

(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(a), (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. You indicate some of the information you have marked under section 745.8485 pertains to open investigations. You 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(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 also state the remaining information you have marked under section 745.8485 pertains to completed investigations that did not result in the facility being cited as a result of the investigations. You inform us this information is not information that must be maintained in the department's monitoring files. *See id.* §§ 745.8481(a), .8487(a), .8489. 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, which consist of completed investigations that resulted in citations against the facility, 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[.]

Id. § 745.8493(a)(2). 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). You state 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, under section 552.101 in conjunction with section 745.8493(a)(2) 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 you have marked pictures of children contained in investigation files of the child care operation at issue and audio recordings of children to be withheld under section 552.101 of the Government Code in conjunction with section 745.8495 of title 40 of the Texas Administrative Code. Further, you state “the requestor has not provided the [d]epartment with any indication that the requestor has a right of access to a copy of the photographs and audio recordings of children in the submitted information.” However, we note section 745.8495(b)(2) of title 40 of the Texas Administrative Code provides that an operation cited for a deficiency as a result of the inspection or investigation during which the photographs were taken or the audio or visual recording was made may review but may not have a copy of the photographs or the audio or visual recording. *See* 40 T.A.C. § 745.8495(b)(2). We are unable to determine whether the submitted photographs and audio recordings relate to an inspection or investigation that resulted in the operation at issue being cited for a deficiency. Accordingly, we must rule conditionally. If the submitted photographs and audio recordings are from an inspection or investigation that resulted in the operation at issue being cited for a deficiency, then the requestor may review but may not have a copy of the information at issue. Conversely, if the submitted photographs and audio recordings are not from an inspection or investigation that resulted in the operation at issue being cited for a deficiency, then the department must withhold the information at issue under section 552.101 of the Government Code in conjunction with section 745.8495 of title 40 of the Texas Administrative 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). 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 Medical Practice Act (the “MPA”), subtitle B of title 3 of the Occupations Code. Section 159.002 of the MPA provides in relevant part the following:

(a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.

(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(a)-(c). Information subject to the MPA includes both medical records and information obtained from those records. *See id.* §§ 159.002, .004. This office has concluded the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See Open Records Decision Nos. 487 at 3-4 (1988), 370 at 2 (1983), 343 at 1 (1982).* Upon review, we find the information we have marked was obtained from medical records. Accordingly, the department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with the MPA.⁵

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

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

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. Further, under the common-law right of privacy, an individual has a right to be free from the publicizing of private affairs in which the public has no legitimate concern. *Id.* at 682. In considering whether a public citizen's date of birth is private, the Third Court of Appeals looked to the supreme court's rationale in *Texas Comptroller of Public Accounts v. Attorney General of Texas*, 354 S.W.3d 336 (Tex. 2010). *Paxton v. City of Dallas*, No. 03-13-00546-CV, 2015 WL 3394061, at *3 (Tex. App.—Austin May 22, 2015, pet. denied) (mem. op.). The supreme court concluded public employees' dates of birth are private under section 552.102 of the Government Code because the employees' privacy interest substantially outweighed the negligible public interest in disclosure.⁶ *Texas Comptroller*, 354 S.W.3d at 347-48. Based on *Texas Comptroller*, the court of appeals concluded the privacy rights of public employees apply equally to public citizens, and thus, public citizens' dates of birth are also protected by common-law privacy pursuant to section 552.101. *City of Dallas*, 2015 WL 3394061, at *3. Additionally, this office has concluded some kinds of medical information are generally highly intimate or embarrassing. *See* Open Records Decision No. 455 (1987).

Upon review, we find the remaining information includes public citizens' dates of birth as well as information that satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the department must withhold all public citizens' dates of birth as well as the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. However, we find the department has failed to demonstrate the remaining information is highly intimate or embarrassing and of no legitimate public interest. Thus, the department may not withhold the remaining information under section 552.101 of the Government Code 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(a) 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 745.8485(c) of title 40 of the Texas Administrative Code. The department must withhold the identities of the reporting parties, which you have marked, under section 552.101 in conjunction with section 745.8493(a)(2) of title 40 of the Texas Administrative Code. To the extent the submitted photographs and audio recordings are not from an inspection or investigation that resulted in the operation at issue being cited for a deficiency, the department must withhold the information at issue under section 552.101 of the Government Code in conjunction with section 745.8495 of title 40 of the Texas Administrative Code. However, to the extent the submitted photographs and audio

⁶Section 552.102(a) exempts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a).

recordings are from an inspection or investigation that resulted in the operation at issue being cited for a deficiency, the department must make this information available to the requestor, but may not provide the requestor with a copy. 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. The department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with the MPA. The department must withhold all public citizens' dates of birth as well as the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The department must release the remaining information.⁷

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,



Cristian Rosas-Grillet
Assistant Attorney General
Open Records Division

CRG/cbz

Ref: ID# 580814

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁷We note the requestor has a special right of access to information being released pursuant to section 745.8593(a)(7)(B). *See* 40 T.A.C. § 745.8493(a)(7)(B). If the department receives another request for this information from a different requestor, then the department should again seek a decision from this office.