



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

January 15, 2016

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

OR2016-01274

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# 594396 (DFPS# 09232015KXA).

The Department of Family and Protective Services (the "department") received a request for specified child care licensing records for a specified company during a specified time period.<sup>1</sup> You claim 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.<sup>2</sup>

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<sup>1</sup>We 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 when governmental entity, acting in good faith, requests clarification of unclear or overbroad request for public information, ten-business-day period to request attorney general opinion is measured from date request is clarified or narrowed).

<sup>2</sup>We 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.

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. 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 you have marked 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 40.005(a)-(b) of the Human Resources Code and section 745.8485(a) of title 40 of the Texas Administrative Code.

You seek to withhold portions of the remaining information, which you state consist of completed investigations, under section 552.101 of the Government Code in conjunction with section 40.005(a)-(b) of the Human Resources Code and section 745.8493(a) of title 40 of the Texas Administrative Code. Section 745.8493(a) 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) prohibits release to anyone 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). 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, within the remaining reports under section 552.101 of the Government Code in conjunction with section 40.005(a)-(b) of the Human Resources Code and 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 you have marked that identifies the children in the remaining investigation reports under section 552.101 of the Government Code in conjunction with section 40.005(a)-(b) of the Human Resources Code and section 745.8493(a)(7) of title 40 of the Texas Administrative Code.<sup>3</sup>

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. *Id.* § 745.8495(a). Additionally, section 745.8495(b) provides that the department may allow

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<sup>3</sup>As our ruling is dispositive, we need not address your remaining argument against disclosure.

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 audio recordings of children to be withheld under section 552.101 of the Government Code in conjunction with section 745.8495(b). Further, 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 marked audio recordings under section 552.101 of the Government Code in conjunction with section 40.005(a)-(b) of the Human Resources Code and section 745.8495 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. 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 marked is protected by common-law privacy. However, the information you have marked pertains to individuals who have been de-identified, and thus, these individuals’ privacy interests have been protected. Accordingly, the department may not withhold the marked 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 40.005(a)-(b) of the Human Resources Code and section 745.8485(a) of title 40 of the Texas Administrative Code. The department must withhold the information you have marked that identifies the reporting party and the children in the remaining investigation reports under section 552.101 of the Government Code in conjunction with section 40.005(a)-(b) of the Human Resources Code and sections 745.8493(a)(2) and 745.8493(a)(7) of title 40 of the Texas Administrative Code. The department must also withhold the video recordings under section 552.101 of the Government Code in conjunction with section 40.005(a)-(b) of the Human Resources Code and section 745.8495 of title 40 of the Texas Administrative Code. The department must release the remaining 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,

A handwritten signature in black ink, appearing to read "Ashley Crutchfield". The signature is written in a cursive style with a long horizontal flourish extending to the right.

Ashley Crutchfield  
Assistant Attorney General  
Open Records Division

AC/dls

Ref: ID# 594396

Enc. Submitted documents

c: Requestor  
(w/o enclosures)