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ATTORNEY GENERAL

Office of the Attorney General
State of Texas

April 18, 1991

Mr. Ron Lindsey
Commissioner
Texas Department of Human Services
P. O. Box 149030
Austin, Texas 78714-9030

Open Records Decision No. 587

Re: Confidentiality of information from
investigation of a complaint of child
abuse at a day care facility licensed by the
Department of Human Services
(RQ-2167)

Dear Commissioner Lindsey:

You ask whether information in a file maintained by the Day Care Licensing Division of the Department of Human Services relating to the investigation of an alleged case of child abuse at a day care center is subject to required public disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S.

You inform us that when the department receives a report of abuse or neglect of a child involving a day care facility, its licensing division conducts an investigation pursuant to chapter 34 of the Family Code. *See* Fam. Code § 34.05 (requiring the department to investigate cases of child abuse or neglect reported to it). The department simultaneously conducts an investigation under chapter 42 of the Human Resources Code for violation of licensing standards. *See* Hum. Res. Code §§ 42.071 (license suspension, evaluation, or probation), 42.072 (license denial or revocation); 40 T.A.C. § 85.2019(a)(7) (department may take corrective or adverse action against licensed day care center for instance of abuse or neglect of a child at the facility).

Section 34.08(a) of the Family Code provides for the confidentiality of chapter 34 investigative materials as follows:

Except as provided in Subsections (b) and (c) or this section, the reports, records, and working papers used or developed in an investigation made under this chapter are confidential and may be disclosed only for purposes consistent with the purposes

of this code under regulations adopted by the investigating agency.¹

You note that article 6252-17b, V.T.C.S., makes information in an agency's licensing files public "unless the information is excepted by law from public disclosure." Your question concerns whether the confidentiality provisions of chapter 34 for records generated in the course of an investigation under that chapter apply when the information is maintained in the department's licensing files. In our opinion, section 34.08 of the Family Code, in conjunction with section 3(a)(1) of the Open Records Act, serves to except the licensing information here from public disclosure. That the information requested here is maintained in licensure records of the department does not remove the information from the protection of section 34.08. *See* Open Records Decision No. 440 (1986) (information in police department file collected in chapter 34 investigation remains confidential under section 34.08).²

You also ask whether, assuming the licensing investigation file material is excepted from public disclosure, section 3B of the Open Records Act would provide certain parties a special right of access to the information.³

Section 3B of the Open Records Act provides, in subsection (a):

¹Section 34.08(a) was first adopted by the legislature in 1975. Acts 1975, 64th Leg., ch. 476, § 54. The "except as provided" clause of subsection (a) and the provisions of subsections (b) and (c) relating to disclosure of investigative materials to adoptive parents of a child were added in 1989. Acts 1989, 71st Leg., ch. 1231. Pursuant to the section's authorization for the department to provide by rule for limited purpose disclosure of the information to which the section applies, the department has adopted regulations permitting disclosure of abuse or neglect data, under certain circumstances, to persons who control the alleged perpetrator's access to children. 40 T.A.C. § 49.602.

²You note that your request is not made within ten days as required by section 7(a) of the Open Records Act, but argue that the consequent presumption that the information is public is inapplicable in this case because the information is made confidential by law. We agree. *See* Open Records Decision No. 150 (1977).

³Although this question is not prompted by a specific request for the information, as was your first question, we respond to it here because as head of a state agency you are entitled to request attorney general opinions on questions of statutory construction under Government Code section 402.042.

A person or the authorized representative of a person has, beyond the right of the general public, a special right of access to and to copies of any records held by a governmental body that contain information relating to the person that is protected from public disclosure by laws intended to protect that person's privacy interests. The fact that the information is deemed confidential by privacy principles under this Act does not grant the governmental body the right to deny access to the person, or the person's representative, to whom the information relates. However, laws and provisions of this Act, other than ones intended to protect that person's privacy interests, may still form the basis for denial of access to the person or the person's representative to whom the information relates.

Under section 3B, a person may have a special right of access to information which is withheld from disclosure to the general public pursuant to laws intended to protect that person's privacy interests. However, where information is withheld from public disclosure pursuant to laws intended to protect more than privacy interests, section 3B may not be invoked. *See* Open Records Decision No. 565 (1990) (provisions of Medical Practices Act making medical records confidential are intended to protect more than just the privacy interests of the patient).⁴

We believe that the provisions of section 34.08 are intended to do more than protect privacy interests. Open Records Decision No. 176 (1977), in finding that section 34.08 also protects the identities of informants, indicated that the confidentiality provisions of section 34.08 reflected law enforcement considerations in addition to privacy concerns. This conclusion is supported by the requirement of Family Code section 34.23(c) that where the department finds that abuse has occurred or may occur at a licensed facility, it must report the matter to a law

⁴*Cf.* Open Records Decision No. 577 (1990) (provisions of Communicable Disease Prevention and Control Act limiting release of medical or epidemiological information are designed solely to protect individual privacy since information may be released under those provisions if individuals identified in the information consent to such release; therefore such individuals have a special right of access under section 3B).

enforcement agency. Thus, in our opinion, section 3B of the Open Records Act would not provide special rights of access to the information in question.⁵

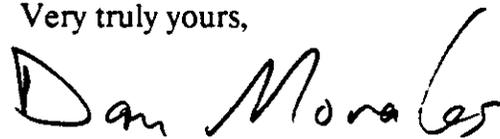
Your last question is predicated on our determination that a special right of access under section 3B would exist in this case. In that we have concluded that it would not, we need not address this question.

SUMMARY

Section 34.08 of the Family Code prohibits public disclosure of records of child abuse/neglect investigations carried out by the Department of Human Services and maintained in the department's licensing files. Therefore, such records are excepted from public disclosure under section 3(a)(1) of the Open Records Act.

The confidentiality provisions of Family Code section 34.08 are intended to protect law enforcement as well as privacy interests. Therefore, section 3B of the Open Records Act cannot operate to give any individual a special right of access to information within the protection of section 34.08.

Very truly yours,



DAN MORALES
Attorney General of Texas

WILL PRYOR
First Assistant Attorney General

⁵We do not address to what extent the department may provide by rule for limited disclosure of such information pursuant to the provision of section 34.08. That section allows information to be disclosed "for purposes consistent with the purposes of this code under regulations adopted by the investigating agency."

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