



December 28, 1999

Ms. Phoebe Knauer
Deputy General Counsel
Department of Protective and Regulatory Services
P.O. Box 149030, MC E-611
Austin, Texas 78751

OR99-3779

Dear Ms. Knauer:

You ask this office to reconsider our decision in Open Records Letter No. 99-2156 (1999). Your request for reconsideration was assigned ID#128686.

The Department of Protective and Regulatory Services (the “department”) received an open records request for the “name, date of birth, and address of all foster care parents and providers.” You contend that this information is made confidential in its entirety by section 261.201 of the Family Code, and rules promulgated by the department pursuant to its authority under section 40.005 of the Human Resource Code. We have considered the confidentiality provisions that apply to this information.

Chapter 261 of the Family Code deals with the investigation of reports of child abuse or neglect. With exceptions that do not apply here, section 261.201(a) makes confidential

the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

Section 40.005 of the Human Resource Code provides statutory authority for the department to promulgate rules regarding release of the department’s records. In pertinent part it reads:

- (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.

You contend that section 700.202 of title 40 of the Texas Administrative Code, a rule promulgated by the department, defines the subject records as confidential. That provision reads in pertinent part (emphasis added):

The words and terms used in this subchapter shall have the following meanings, unless the context clearly indicates otherwise:

Case records--All records described in §261.201(a) of the Texas Family Code which were collected, developed, or used in a child abuse or neglect investigation, or in providing services as a result of an investigation, and which are under the custody and control of the Texas Department of Protective and Regulatory Services (TDPRS). The term case records, as used in this subchapter, shall include investigation records, as well as all records in the custody and control of TDPRS which relate to the placement of a child in foster care or in other substitute care, or which relate to the provision of other services to a child or the child's family.

...

Investigation records--That portion of the records described in § 261.201(a) of the Texas Family Code which were collected, developed, or used in a child abuse or neglect investigation and which are under the custody and control of TDPRS. The term investigation records, as used in this subchapter, shall not include those records under the custody and control of TDPRS which relate solely to the placement of a child in substitute care or to the provision of services to a child or the child's family.

This rule distinguishes "case records" from "investigation records" in categorizing the records described in section 261.201 of the Family Code. The rule does not expand the scope of the Family Code confidentiality provisions. Contrary to your assertion, this rule does not include a definition of "confidential records." Access to and release of "case records" and "investigation records" is controlled by section 700.203 of Title 40 of the Texas Administrative Code. "To the extent required by state or federal law, or to the extent deemed necessary by TDPRS for the protection and care of children, TDPRS may release case records information made confidential under § 261.201(a) of the Texas Family Code to the following listed persons or entities: [*inter alia*, TDPRS staff, law enforcement officials, a grand jury, and an attorney ad litem]."

We conclude that these statutory and regulatory restrictions make confidential the records described in section 261.201(a) of the Texas Family Code, *i.e.* records which were collected, developed, or used in a child abuse or neglect investigation, or in providing services as a result of such an investigation. As regards the responsive information, we note that some, but not all, foster care is provided as a result of such an investigation. Information that is derived from the records of individuals who provide foster care *as a result of an investigation under chapter 261 of the Family Code* is confidential. Information about foster care givers that provide care for a reason other than as a result of an investigation conducted under chapter 261 is not made confidential by statute.

However, section 552.101 of the Government Code excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. This section encompasses the common law right to privacy. The common law right to privacy protects information if the information (1) contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430. Section 552.101 also encompasses constitutional privacy. The constitutional right to privacy protects two interests: the interest in independence in making certain important decisions related to the “zones of privacy” recognized by the United States Supreme Court, and the interest in avoiding disclosure of personal matters. Open Records Decision No. 600 (1992) at 4 (citing *Ramie v. City of Hedwig Village*, 765 F.2d 490 (5th Cir. 1985), *cert. denied*, 474 U.S. 1062 (1986)). Only information concerning the “most intimate aspects of human affairs” is within the scope of constitutional privacy. *See* Open Records Decision No. 455 (1987) at 5 (citing *Ramie v. City of Hedwig Village*, 765 F.2d 490, 492 (5th Cir. 1985), *cert. denied*, 474 U.S. 1062 (1986)). Constitutional privacy doctrine is far narrower than its common law counterpart.

Because the foster care of children necessarily involves intimate and personal matters, we are of the opinion that the requested information is of the type protected by a right of privacy. We conclude that the rights of individual foster care providers in information which would tend to identify those providers outweighs the legitimate public interest in this information. Therefore, irrespective of the facts which led to the placement of a child in foster care, information which identifies a provider of such care is confidential and must be withheld under section 552.101 of the Government Code.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by

filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Michael Jay Burns
Assistant Attorney General
Open Records Division

MJB/ch

Ref: ID# 128686

cc: Mr. Matt Goldberg
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