



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

July 8, 2004

Ms. Ruth Soucy
Manager and Legal Counsel
Open Records Division
Comptroller of Public Accounts
P.O. Box 13528
Austin, Texas 78711-3528

OR2004-5599

Dear Ms. Soucy:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 204008.

The Comptroller of Public Accounts (the "comptroller") received a request for "all work papers and any other supporting material gathered by [the comptroller] in the preparation of 'Forgotten Children,' a special report on the foster care system" issued by the comptroller on April 6, 2004.¹ You indicate that some responsive information will be released to the requestor. You claim, however, that the remainder of the requested information is excepted from disclosure under sections 552.101, 552.117, 552.130, and 552.137 of the Government Code. You also inform us that you notified the Texas Department of Family and Protective Services ("DFPS") of the request, to provide DFPS with the opportunity to submit arguments to this office as to why the information should not be released. *See Gov't Code § 552.304* (permitting interested third party to submit reasons why information should be withheld). We have considered the exceptions you claim and reviewed the submitted representative sample of information.² We have also considered comments submitted by DFPS.

¹ You advise that the requestor subsequently narrowed the request to exclude certain internal communications. *See Gov't Code § 552.222* (providing that a governmental body may ask the requestor to narrow or clarify the request if request is broad or if what information is requested is unclear to the governmental body); *see also* Open Records Decision No. 663 at 5 (1999)(discussing requests for clarification).

² We assume that 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.

We begin by addressing the documents attached to the supplemental submission of the comptroller, received by this office on July 2, 2004. We note that this supplemental information was submitted more than fifteen days after the date the comptroller received the present request. *See* Gov't Code § 552.301(e) (governmental body requesting attorney general decision must submit samples of information requested no later than fifteen business days after the date request was received). When a governmental body fails to comply with the procedural requirements of section 552.301, the information at issue is presumed public. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex. App.--Austin 1990, no writ); *City of Houston v. Houston Chronicle Publ'g Co.*, 673 S.W.2d 316, 323 (Tex. App.—Houston [1st Dist.] 1984, no writ); Open Records Decision No. 319 (1982). The governmental body must show a compelling interest to withhold the information to overcome this presumption. *See id.* Normally, a compelling interest exists when some other source of law makes the information confidential. Open Records Decision No. 150 at 2 (1977). As the presumption of openness can be overcome by a showing that information is confidential by law, we will consider the submitted arguments under section 552.101 for this information.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision,” and encompasses information made confidential by other statutes. The comptroller and DFPS contend that the documents attached to the supplemental submission of the comptroller are confidential in their entirety pursuant to section 261.201 of the Family Code. Section 261.201(a) provides as follows:

(a) The following information is confidential, is not subject to public release under Chapter 552, Government Code, and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

- (1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and
- (2) except as otherwise provided in this section, 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.

Fam. Code § 261.201(a). DFPS informs us that the sample documents attached to the July 2, 2004 submissions consist of records of Child Protective Services (“CPS”) that were used or developed in investigations of child abuse or neglect. DFPS advises that these CPS records were used or developed in the course of in-home investigations and do not involve any facility regulated under chapter 42 of the Human Resources Code. *See* Fam. Code § 261.201(h) (information used or developed in investigation of child abuse or neglect in facility regulated under chapter 42 of Human Resources Code generally not confidential under section 261.201 of Family Code). DFPS also advises that DFPS rules do not permit

the disclosure of the information at issue to this requestor in this instance. *See* 40 T.A.C. § 700.203. Accordingly, based on the representations of DFPS and our review, we agree that these CPS investigation records, which we have marked, are confidential under section 261.201 of the Family Code and must be withheld pursuant to section 552.101 of the Government Code.

We next address the information submitted as Samples 1 through 4.³ DFPS indicates that Samples 1 through 4 include information regarding investigations of alleged or suspected child abuse or neglect in residential child care facilities licensed by DFPS. DFPS contends that portions of this information are confidential pursuant to state law and DFPS rules promulgated in accordance with the federal Child Abuse Prevention and Treatment Act (“CAPTA”) and state law. *See* 42 U.S.C. § 5106a(b)(1)(A), § 5106a(b)(2)(A)(viii). CAPTA conditions federal grant funding for state child abuse prevention and treatment programs on the fulfillment of certain eligibility criteria, and requires states to adopt methods to preserve the confidentiality of information concerning child abuse and neglect. *Id.*

In accordance with CAPTA, certain information concerning alleged or suspected child abuse or neglect is made confidential under provisions of chapter 261 of the Family Code. As noted, section 261.201 makes confidential a report of alleged or suspected abuse or neglect made under chapter 261, and the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation chapter 261. *See* Fam. Code § 261.201(a)(1), (2). Furthermore, section 261.101 of the Family Code makes confidential the identity of a person reporting alleged or suspected child abuse or neglect in accordance with the reporting requirements of chapter 261. *See* Fam. Code § 261.101(a), (d).

Section 40.005 of the Human Resources Code authorizes DFPS to adopt rules for the purpose of preserving the confidentiality of information concerning child abuse and neglect, and provides in pertinent part:

(a) [DFPS] shall establish and enforce rules governing the custody, use, and preservation of [DFPS] records, papers, files, and communications.

(b) [DFPS] shall prescribe safeguards to govern the use or disclosure of information relating to a recipient of a [DFPS] service or to an investigation the [DFPS] conducts in performing its duties and responsibilities. The safeguards must be consistent with the purposes of [DFPS] programs and must comply with applicable state and federal law and [DFPS] rules.

Hum. Res. Code § 40.005. The comptroller and DFPS contend that portions of the information in Samples 1 through 4 at issue are made confidential under sections 261.101

³ This information was timely submitted by the comptroller.

and 261.201 of the Family Code, and under chapter 745 of title 40 of the Texas Administrative Code.

Samples 1 through 4 pertain in part to investigations of residential child care facilities licensed under chapter 42 of the Human Resources Code. *See* Hum. Res. Code §§ 42.001-.078. As noted above and as DFPS points out, information pertaining to investigations of child abuse or neglect in a facility regulated under chapter 42 is generally not confidential under section 261.201 of the Family Code. Fam. Code § 261.201(h). However, DFPS has marked information in the submitted documents that identifies persons reporting alleged or suspected child abuse or neglect pursuant to chapter 261; we find that this information is confidential under section 261.101 of the Family Code and must be withheld. Furthermore, DFPS has marked a small amount of information in the documents contained in Samples 1 through 4 that consists of reports of alleged or suspected abuse or neglect made to CPS. DFPS informs us that this information consists CPS intake records that are of reports of alleged or suspected abuse or neglect made to CPS in accordance with chapter 261. Based on the representations of the comptroller and DFPS and our review of the information, we find that this portion of the information in Samples 1 through 4 is confidential under section 261.201 of the Family Code. We have marked the information in Samples 1 through 4 that must be withheld under section 552.101 in conjunction with section 261.201.

Chapter 745 of title 40 of the Texas Administrative Code contains rules adopted by DFPS governing the confidentiality of its investigation and facility monitoring records. DFPS contends that portions of the records at issue consisting of information obtained in the course of abuse or neglect investigations of residential child care facilities are made confidential under section 745.8485 of title 40. Section 745.8485 provides in part:

(c) The following information relating to a completed investigation of child abuse or neglect is confidential and not available to the general public, except as provided under this chapter and applicable federal or state law:

- (1) The description of the allegation of child abuse or neglect;
- (2) The identity of the person making the allegation; and
- (3) The files, reports, records, communications, audiotapes, videotapes, and working papers used or developed during an investigation.

40 T.A.C. § 745.8485(c). The comptroller and DFPS advise that the information DFPS seeks to withhold under section 745.8485 was used or developed in investigations of alleged or suspected child abuse or neglect at residential child care facilities. Based on the representations of the comptroller and DFPS and our review of the information at issue, we agree that a portion of the information in Samples 1 through 4, which we have marked, is confidential under section 745.8485 of title 40 of the Texas Administrative Code.

Accordingly, the comptroller must withhold the information we have marked in Samples 1 through 4 under section 552.101 in conjunction with section 745.8485 of title 40 of the Texas Administrative Code.

Next, DFPS has marked a portion of the information in Sample 3 which DFPS contends is information from the regulatory monitoring file of a licensed residential child care facility. DFPS advises that this information is not part of an abuse or neglect investigation file and is not confidential under section 261.201 or section 745.8485. However, DFPS contends that this information is protected by common-law privacy. The comptroller also indicates that a portion of the information in Sample 7 is protected by common-law privacy. Section 552.101 also encompasses the doctrine of common-law privacy, which protects information if (1) the information contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683. Based on the representations of the comptroller and DFPS, we agree that portions of the information in Sample 3 and Sample 7 are protected by common-law privacy. We have marked the information in Sample 3 and Sample 7 that the comptroller must withhold under section 552.101 in conjunction with common-law privacy. We further determine, however, that the remaining information at issue is subject to a legitimate public interest. Consequently, the remainder of the information at issue is not protected by common-law privacy and may not be withheld under section 552.101 on that basis.

The comptroller states that Sample 5 contains information that is excepted under section 552.130 of the Government Code. Section 552.130 excepts information relating to a Texas motor vehicle driver's license and information relating to a Texas motor vehicle title or registration. Gov't Code § 552.130. We have marked the information in Sample 5 that the comptroller must withhold under section 552.130 of the Government Code.

Next, the comptroller has marked information in Sample 6 that you contend is excepted under section 552.117 of the Government Code. Section 552.117(a)(1) of the Government Code excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who timely elect to keep this information confidential pursuant to section 552.024. *See also* Open Records Decision No. 670 (2001) (extending section 552.117(a)(1) exception to personal cellular phone number and personal pager number of employee who elects to withhold home phone number in accordance with section 552.024). Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is received by the governmental body. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the comptroller may only withhold information under section 552.117 on behalf of current or

former officials or employees who elected to keep information confidential pursuant to section 552.024 prior to the date on which the request for this information was made. Sample 6 contains the home and personal cellular telephone numbers of an employee of the comptroller. You indicate that the employee timely requested confidentiality for this information. Accordingly, we determine that the comptroller must withhold the information we have marked in Sample 6 pursuant to section 552.117(a)(1) of the Government Code.

Finally, the comptroller indicates that Sample 7 contains an e-mail address that is excepted under section 552.137 of the Government Code. Section 552.137 provides:

(a) Except as otherwise provided by this section, an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.

(b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

(c) Subsection (a) does not apply to an e-mail address:

(1) provided to a governmental body by a person who has a contractual relationship with the governmental body or by the contractor's agent;

(2) provided to a governmental body by a vendor who seeks to contract with the governmental body or by the vendor's agent;

(3) contained in a response to a request for bids or proposals, contained in a response to similar invitations soliciting offers or information relating to a potential contract, or provided to a governmental body in the course of negotiating the terms of a contract or potential contract; or

(4) provided to a governmental body on a letterhead, coversheet, printed document, or other document made available to the public.

(d) Subsection (a) does not prevent a governmental body from disclosing an e-mail address for any reason to another governmental body or to a federal agency.

Gov't Code § 552.137. Section 552.137 excepts certain e-mail addresses of members of the public that are not within the scope of section 552.137(c), unless the relevant members of the public have affirmatively consented to the release of the e-mail addresses. We note, however, that section 552.137 does not apply to the work e-mail addresses of officers or

employees of a governmental body, a website address, or the general e-mail address of a business. We have marked an e-mail address in Sample 7 that is within the scope of section 552.137(a). Provided the comptroller has not received affirmative consent to release it, the comptroller must withhold this e-mail address under section 552.137 of the Government Code.

In summary, we have marked the CPS investigation records that are confidential in their entirety under section 261.201 of the Family Code and must be withheld under section 552.101 of the Government Code. We have also marked a small portion of information in the records submitted as Samples 1 through 4 that the comptroller must withhold pursuant to section 552.101 in conjunction with section 261.201 of the Family Code. We have marked portions of the remaining information in Samples 1 through 4 that the comptroller must withhold under section 552.101 in conjunction with section 261.101 of the Family Code and section 745.8485 of title 40 of the Texas Administrative Code. We have also marked portions of the submitted information that must be withheld under section 552.101 in conjunction with common-law privacy. The home and personal cellular telephone numbers of an employee of the comptroller, which we have marked, must be withheld under section 552.117(a)(1) of the Government Code. We have marked information that must be withheld under sections 552.130 and 552.137 of the Government Code. The remainder of the submitted information must be released to the requestor.

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 thirty calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within ten 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 ten 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 ten 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); *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within ten calendar days of the date of this ruling.

Sincerely,



David R. Saldivar
Assistant Attorney General
Open Records Division

DRS/seg

Ref: ID# 204008

Enc: Submitted documents

c: Mr. Guillermo Garcia
San Antonio Express-News
1005 Congress Avenue, Suite 430
Austin, Texas 78701
(w/o enclosures)

Mr. James G. Nolan
Office of General Counsel
Texas Department of Family and Protective Services
P.O. Box 149030
Austin, Texas 78714-9030