



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

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

OR2004-6884

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# 206256.

The Comptroller of Public Accounts (the "comptroller") received a request for information pertaining to "allegations of sexual assault or 'inappropriate' behavior" at specified residential child care facilities, and "any ongoing investigations involving suspicion of criminal activities at these facilities." You state that the comptroller has released some information to the requestor. You claim, however, that the remainder of the requested information is excepted from disclosure under sections 552.101, 552.117, 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.¹ We have also considered comments submitted by DFPS.

¹ 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.

Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision,” and encompasses information made confidential by statute. DFPS contends that portions of the submitted samples of 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. 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). DFPS contends that portions of the information in Samples 1 and 4 are confidential under section 261.101. However, DFPS indicates, and the documents reflect, that Samples 1 and 4 consist of records created by the comptroller and not by DFPS. The comptroller is not an agency authorized to conduct an investigation under chapter 261. *See* Fam. Code §§ 261.301, .401. Consequently, we determine that the information at issue is not confidential under section 261.101 of the Family Code and may not be withheld under section 552.101 on that basis.

DFPS also contends that portions of the submitted information are confidential pursuant to DFPS rules. 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. Rules governing the confidentiality of DFPS investigation and facility monitoring records are found at chapter 745 of title 40 of the Texas Administrative Code. DFPS contends that Samples 1, 3, and 4 contain information that is confidential under several provisions of chapter 745. As noted above, however, Samples 1 and 4 consist of records created by the comptroller and not by DFPS. We find that the rules at chapter 745 of title 40 apply to records of investigations and regulatory monitoring of residential child care facilities that are created and maintained by DFPS, and do not apply to records created

by the comptroller. We therefore determine that the comptroller may not withhold any of the information in Samples 1 and 4 pursuant to section 552.101 in conjunction with the confidentiality provisions under chapter 745 of title 40 of the Texas Administrative Code.

With respect to Sample 3, DFPS advises, and the documents reflect, that Sample 3 consists of information from the regulatory monitoring file maintained by DFPS pertaining to DFPS regulatory oversight of the facility at issue. Based on the representations of DFPS, we find that the information in Sample 3 consists of records created and maintained by DFPS. Thus, we will consider whether the rules at chapter 745 of title 40 are applicable to this information. We understand DFPS to contend that information identifying persons who reported alleged violations by the facility is confidential pursuant to section 745.8483. We also understand DFPS to contend that information identifying "alleged perpetrators," to the extent such persons are identified in records of an investigation of child abuse or neglect, is confidential under section 745.8487. We note that DFPS has not marked the information in Sample 3 to identify any information in the submitted documents that is within the scope of these provisions. Upon review, we determine that Sample 3 does not contain any information identifying persons who reported any alleged violations by the facility. Furthermore, DFPS does not inform us that any of the information in Sample 3 comes from records of an investigation of child abuse or neglect. The documents reflect that Sample 3 consists of records of DFPS evaluations of the facility for compliance with regulatory standards. Thus, based on our review of the submitted information and comments submitted by DFPS, we determine that Sample 3 does not contain any information from records of an investigation of child abuse or neglect. We therefore determine that none of the information in Sample 3 is made confidential pursuant to section 745.8483 or section 745.8487 of title 40. Consequently, the comptroller may not withhold any of the information in Sample 3 pursuant to section 552.101 in conjunction with the confidentiality provisions under chapter 745 of title 40 of the Texas Administrative Code.

Next, DFPS contends that the information in Sample 5 is confidential pursuant to the federal Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), sections 1320d through 1320d-8 of title 42 of the United States Code. At the direction of Congress, the United States Department of Health and Human Services ("HHS") has promulgated regulations setting privacy standards for medical records, which HHS issued as the Federal Standards for Privacy of Individually Identifiable Health Information. *See* HIPAA, 42 U.S.C. § 1320d-2 (Supp. IV 1998) (historical & statutory note); Standards for Privacy of Individually Identifiable Health Information, 45 C.F.R. §§ 160, 164 ("Privacy Rule"); *see also* Attorney General Opinion JC-0508 at 2 (2002). These standards govern the releasability of protected health information by a covered entity. *See* 45 C.F.R. §§ 160, 164. Under these standards, a covered entity may not use or disclose protected health information, excepted as provided by parts 160 and 164 of the Code of Federal Regulations. 45 C.F.R. § 164.502(a).

This office recently addressed the interplay of the Privacy Rule and the Public Information Act (the "Act"), in Open Records Decision No. 681 (2004). In that decision, we noted that section 164.512 of title 45 of the Code of Federal Regulations provides that a covered entity may use or disclose protected health information to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law. *See* 45 C.F.R. § 164.512(a)(1). We further noted that the Act "is a mandate in Texas law that compels Texas governmental bodies to disclose information to the public." *See* Open Records Decision No. 681 at 8 (2004); *see also* Gov't Code §§ 552.002, .003, .021. We therefore held that the disclosures under the Act come within section 164.512(a). Consequently, the Privacy Rule does not make information confidential for the purpose of section 552.101 of the Government Code. *Open Records Decision No. 681 at 9 (2004); see also* Open Records Decision No. 478 (1987) (as general rule, statutory confidentiality requires express language making information confidential). We therefore determine that the comptroller may not withhold the information in Sample 5 pursuant to section 552.101 in conjunction with HIPAA.

The comptroller and DFPS also contend that the portions of the submitted information are excepted under section 552.101 of the Government Code in conjunction with common-law privacy. Common-law privacy 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. The submitted documents include information identifying children in the care of the residential child care facilities at issue. We determine that this information is protected from disclosure under common-law privacy, and we have therefore marked the information in the submitted documents that the comptroller must withhold pursuant to section 552.101 in conjunction with common-law privacy. We note that DFPS contends that additional information in the submitted documents is protected by common-law privacy. We find, however, that the additional information that DFPS seeks to withhold under privacy does not contain highly intimate or embarrassing facts and is subject to a legitimate public interest. We therefore determine that the additional information DFPS seeks to withhold under common-law privacy is not protected by common-law privacy and may not be withheld under section 552.101 on that basis.

We note the comptroller has marked information in Sample 2 that the comptroller seeks to withhold 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 2 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 2 pursuant to section 552.117(a)(1) of the Government Code.

The comptroller also indicates that e-mail addresses contained in Samples 2 and 3 are excepted under section 552.137 of the Government Code, which provides in part:

- (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.

Gov't Code § 552.137(a), (b). Section 552.137 excepts certain e-mail addresses of members of the public who have not affirmatively consented to the release of the e-mail addresses. Section 552.137(c) provides certain conditions under which e-mail addresses of members of the public are not excepted from disclosure, which are not applicable here. *See* Gov't Code § 552.137(c) (e-mail address provided by contractor or vendor, contained in bid proposal, or on letterhead or document available to public generally not excepted under section 552.137). Further, section 552.137 does not apply to a website address or the general e-mail address of a business. Unless the relevant individuals have consented to their release, we determine that the comptroller must withhold the e-mail addresses we have marked in Samples 2 and 3 pursuant to section 552.137(a).

In summary, we have marked information in the submitted documents that the comptroller must withhold pursuant to section 552.101 of the Government Code in conjunction with common-law privacy. We have marked information in Sample 2 that the comptroller must withhold pursuant to section 552.117(a)(1) of the Government Code. We have also marked e-mail addresses in Samples 2 and 3 that the comptroller must withhold under section 552.137 of the Government Code, unless the comptroller receives affirmative consent

to release them. 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,



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Open Records Division

DRS/seg

Ref: ID# 206256

Enc: Submitted documents

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