



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 1, 2007

Ms. Patricia Fernandez
Open Government Attorney
Texas Department of Family and Protective Services
P.O. Box 149030
Austin, Texas 78714-9030

OR2007-14294

Dear Ms. Fernandez:

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# 293563.

The Texas Department of Family and Protective Services (the "department") received three requests for information pertaining to a specified investigation. You state that some responsive information has been released, but you claim that the remaining requested information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Initially, we must address the department's procedural obligations under the Act. Under section 552.301(b), a governmental body must ask for the attorney general's decision and state any exceptions to disclosure that it claims not later than the tenth business day after the date of its receipt of the written request for information. *See* Gov't Code § 552.301(b). If a governmental body fails to comply with section 552.301, the requested information is presumed to be subject to required public disclosure and must be released, unless there is a compelling reason to withhold any of the information. *See id.* § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ). You have not demonstrated that the department complied with section 552.301(b) with regard to the first

request for information.¹ *See* Gov't Code § 552.301(e)(1)(C) (governmental body must submit signed statement or evidence sufficient to establish date of receipt of written request for information). The information submitted in response to the first request is therefore presumed to be public under section 552.302 of the Government Code. *See* Gov't Code § 552.302 (governmental body's failure to comply with procedural requirements of section 552.301 results in legal presumption that information is public and must be released).

Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 319 (1982). Because section 552.101 of the Government Code can provide a compelling reason to overcome the presumption of openness, we will address your arguments under that exception.

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. Section 552.101 encompasses information that other statutes make confidential. You contend that the information submitted in the Appendix is confidential pursuant to section 745.8485 of title 40 of the Texas Administrative Code. Chapter 42 of the Human Resources Code governs the licensing and regulation of child-care facilities. Section 42.044 authorizes the department to conduct investigations of facilities it regulates. *See* Hum. Res. Code § 42.044. Section 40.005 authorizes the department to adopt rules for the purpose of preserving the confidentiality of information concerning child abuse and neglect at certain child-care facilities, and provides in pertinent 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.

¹You state that the department received the first request for information on August 15, 2007; consequently, the department's ten-business-day deadline under section 552.301(b) was August 29, 2007. We received the department's requests for this decision on August 30. *See* Gov't Code § 552.308(b) (prescribing standards for timeliness of action by United States or interagency mail or common or contract carrier).

Id. § 40.005(a), (b). In accordance with section 40.005, the department promulgated section 745.8485 of title 40 of the Texas Administrative Code to make certain child care facility license investigations and records created by the department confidential. *See* 40 T.A.C. § 745.8485. Section 745.8485(c) provides the following:

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.

Id. § 745.8485(c). You advise that the information the department seeks to withhold under section 745.8485 was used or developed in an investigation of alleged or suspected child abuse or neglect at a child care facility subject to regulation by the department. *See* Hum. Res. Code § 42.041(a) (license issued by department required for operation of child-care facility); *see also id.* § 42.002(3) (defining child-care facility). It does not appear that any of the exceptions in section 745.8491 apply. *See* 40 T.A.C. § 745.8491. Based on your representations and our review of the information at issue, we find that the information in the Appendix is confidential under section 745.8485 of title 40 of the Texas Administrative Code. The department must, therefore, withhold this information under section 552.101 of the Government Code.

Finally, you request that this office issue a “previous determination” that would permit the department in the future to withhold from disclosure information related to abuse and neglect investigation records concerning child-care facilities regulated under chapter 42 of the Human Resources Code without the need of requesting a ruling from us about whether such information can be withheld from disclosure. We decline to issue such a previous determination at this time.

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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 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 Office of the Attorney General 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. 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,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/mcf

Ref: ID# 293563

Enc. Submitted documents

c: Ms. Paige Hewitt
c/o Ms. Patricia Fernandez
Texas Department of Families and Protective Services
P.O. Box 149030
Austin, Texas 78714-9030
(w/o enclosures)

Ms. Shern-Min Chow
KHOU-TV
1945 Allen Parkway
Houston, Texas 77019
(w/o enclosures)

Ms. Joyce Healy
Houston Racquet Club
10709 Memorial Drive
Houston, Texas 77024
(w/o enclosures)