



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 30, 2013

Mr. Jonathan Miles
DFPS Open Government Attorney
Texas Department of Family and Protective Services
P.O. Box 149030, Department Mail Code E611
Austin, Texas 78714-9030

OR2013-08987

Dear Mr. Miles:

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# 488695 (DFPS ORR Request No. 03142013H40).

The Texas Department of Family and Protective Services (the "department") received a request for all records pertaining to two named child-placing agencies. You state you have released some information to the requestor with some information redacted pursuant to sections 552.130(c) and 552.136(c) of the Government Code and e-mail addresses redacted pursuant to Open Records Decision 684 (2009).¹ You claim some of the submitted information is excepted from disclosure under sections 552.101 and 552.137 of the

¹Section 552.130(c) of the Government Code authorizes a governmental body to redact, without the necessity of requesting an attorney general decision, information described in subsection 552.130(a)(1). *See* Gov't Code § 552.130(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.130(e). *See id.* § 552.130(d)-(e) (requestor may appeal governmental body's decision to withhold information under section 552.130(c) to attorney general and governmental body withholding information pursuant to section 552.130(c) must provide certain notice to requestor). Section 552.136 of the Government Code permits a governmental body to withhold the information described in section 552.136(b) without the necessity of seeking a decision from this office. *See id.* § 552.136(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.136(e). Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold certain categories of information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general opinion. *See* ORD 684 at 14.

Government Code.² We have considered the exceptions you claim and reviewed the submitted representative sample of information.³

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses information that other statutes make confidential. Section 40.005 of the Human Resources Code authorizes the department to adopt rules for the purpose of preserving the confidentiality of information concerning child abuse and neglect and provides in 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.

Hum. Res. Code § 40.005(a), (b). In accordance with section 40.005, the department promulgated section 745.8485 of title 40 of the Administrative Code to make child care facility license investigations confidential. 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[.]

²Although you do not raise section 552.137 of the Government Code in your brief, we understand you to raise this exception based on your markings in the submitted documents.

³We assume 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.

40 T.A.C. § 745.8485(c)(1)-(3). You represent to this office a portion of the submitted information is related to an investigation of alleged child abuse or neglect at a licensed child care facility, so as to be confidential under section 745.8485(c)(3). You also state the information at issue is not subject to disclosure under the provisions of chapter 745 of title 40 of the Texas Administrative Code that govern information that must be maintained in the department's monitoring files. *See id.* §§ 745.8481 (information in monitoring file is for most part available to general public), .8487 (department may release to public only those portions of abuse or neglect investigation record that must be filed in monitoring file), .8489 (except for certain specified information, department will maintain all records of abuse or neglect investigation separate from monitoring file). Based on your representations and our review, we find the information at issue falls within the scope of section 745.8485(c). In addition, we note section 745.8491 of title 40 enumerates parties that may access confidential information pertaining to licensed facilities. *See id.* § 745.8491. In this instance, we find the requestor is not one of the enumerated persons eligible to receive copies of the requested records under section 745.8491 of title 40. We therefore conclude the department must withhold the information you have marked under section 552.101 of the Government Code in conjunction with section 745.8485 of title 40 of the Texas Administrative Code.

Section 552.101 also encompasses information protected by the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. *See Occ. Code* §§ 151.001-168.202. Section 159.002 of the MPA provides, in part:

(a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Id. § 159.002(a)-(c). Information that is subject to the MPA includes both medical records and information obtained from those medical records. *See id.* §§ 159.002, .004. This office has concluded the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. Upon review, we find the information you have marked constitutes a medical record. Accordingly, the department must withhold the information you have marked under section 552.101 in conjunction with the MPA.

Section 552.101 of the Government Code also encompasses information made confidential by other statutes. Criminal history record information (“CHRI”) generated by the National Crime Information Center or by the Texas Crime Information Center is confidential. CHRI is defined as “information collected about a person by a criminal justice agency that consists of identifiable descriptions and notations of arrests, detentions, indictments, informations, and other formal criminal charges and their dispositions.” Gov’t Code § 411.082(2). Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that states obtain from the federal government or other states. Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* Section 411.083 of the Government Code deems confidential CHRI that the Department of Public Safety (“DPS”) maintains, except that DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. *See* Gov’t Code § 411.083.

Section 411.114 of the Government Code provides in part:

(a)(2) The [department] shall obtain from [DPS CHRI] maintained by [DPS] that relates to a person who is:

...

(G) a person providing or applying to provide in-home, adoptive, or foster care for children in the care of the Department of Family and Protective Services and other persons living in the residence in which the child will reside;

...

(4) Subject to Section 411.087, the [department] is entitled to:

(A) obtain through the Federal Bureau of Investigation [CHRI] maintained or indexed by that bureau that pertains to a person described by Subdivision (2) or (3); and

(B) obtain from any other criminal justice agency in this state [CHRI] maintained by that criminal justice agency that relates to a person described by Subdivision (2)[.]

Id. § 411.114(a)(2)(G), (4). The department may not release CHRI except as provided by chapter 411. *See id.* §§ 411.083, .084(c) (agency may not confirm existence or nonexistence of CHRI to any person not eligible to receive the information). Thus, any CHRI generated by the federal government or another state may not be made available to the requestor except in accordance with federal regulations. *See* ORD 565. Furthermore, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 of the Government Code in conjunction with chapter 411 of the Government Code. Upon review, we find that a portion of the submitted information, which we have marked,

constitutes CHRI obtained from DPS that is confidential under chapter 411 of the Government Code. We understand none of the release provisions are applicable in this instance. Accordingly, the department must withhold the information we have marked under section 552.101 in conjunction with section chapter 411 the Government Code.

Section 552.101 of the Government Code also encompasses the doctrines of common-law and constitutional privacy. Common-law privacy protects information that (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. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The type of information considered intimate or 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. *Id.* at 683. Upon review, we find some of the submitted information is highly intimate or embarrassing and not of legitimate public concern. We note some of the information you seek to withhold under common-law privacy pertains to the requestor's clients and their children. Section 552.023(a) of the Government Code states that a person or person's authorized representative has a special right of access to information that is excepted from public disclosure under laws intended to protect that person's privacy interest. *See Gov't Code § 552.023(a)*; Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning herself). Thus, the requestor has a right of access to his clients' and their children's information, and the department may not withhold such information under section 552.101 of the Government Code in conjunction with common-law privacy. However, upon review, we find some information related to other individuals, which we have marked, is highly intimate or embarrassing and not of legitimate public interest. Accordingly, this information must be withheld under section 552.101 in conjunction with common-law privacy. Further, we find the remaining information either does not identify a particular individual or is not highly intimate or embarrassing. Accordingly, none of the remaining information may be withheld under section 552.101 on this basis.

Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. *See Whalen v. Roe*, 429 U.S. 589, 599-600 (1977); Open Records Decision Nos. 600 at 3-5 (1992), 478 at 4 (1987), 455 at 3-7(1987). The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. ORD 455 at 4. The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* at 7. The scope of information protected is narrower than that under the common-law doctrine of privacy; constitutional privacy under section 552.101 is reserved for "the most intimate aspects of human affairs." *Id.* at 5 (quoting *Ramie v. City of Hedwig Village, Tex.*, 765 F.2d 490 (5th Cir. 1985)). As noted above, the requestor has a right of access to his clients' and their children's private information pursuant to section 552.023 of the Government Code, and the department may not withhold such information under section 552.101 in conjunction with constitutional privacy. *See Gov't Code § 552.023(a)*;

ORD 481. Further, we find you have failed to demonstrate any portion of the remaining information you have marked falls within the zones of privacy or implicates an individual's privacy interests for purposes of constitutional privacy. Therefore, the department may not withhold any of the remaining information you seek to withhold under section 552.101 of the Government Code in conjunction with constitutional privacy.

Section 552.101 of the Government Code also encompasses the common-law informer's privilege, which Texas courts have long recognized. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969). The informer's privilege protects from disclosure the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law-enforcement authority, provided the subject of the information does not already know the informer's identity. *See* Open Records Decision No. 208 at 1-2 (1978). The informer's privilege protects the identities of individuals who report violations of statutes to the police or similar law-enforcement agencies, as well as those who report violations of statutes with civil or criminal penalties to "administrative officials having a duty of inspection or of law enforcement within their particular spheres." Open Records Decision No. 279 at 2 (1981) (citing 8 John H. Wigmore, *Evidence in Trials at Common Law*, § 2374, at 767 (J. McNaughton rev. ed. 1961)). The report must be of a violation of a criminal or civil statute. *See* Open Records Decision Nos. 582 at 2 (1990), 515 at 4 (1988).

You state portions of the remaining information, which you have marked, identify an individual who reported possible violations of department rules for facilities overseen by the department. *See* Hum. Res. Code § 42.042 (department shall promulgate rules and procedure regulating child-care facilities); *see also* 40 T.A.C. § 745.31 (regulated operations include child-placing agencies). You state the alleged violations are within the scope of the department's enforcement authority. You also state the violations at issue are punishable by administrative and civil penalties. *See* Hum. Res. Code §§ 42.074, .075. You do not indicate, nor does it appear, the subject of the complaint knows the identity of the complainant. Therefore, we conclude the department may withhold the informant's identifying information, which you have marked, under section 552.101 of the Government Code in conjunction with the common-law informer's privilege.

Section 552.136(b) of the Government Code states "[n]otwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential."⁴ Gov't Code § 552.136(b). Accordingly, the department must withhold the partial credit card number we have marked under section 552.136 of the Government Code.

Section 552.137 of the Government Code excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body," unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *Id.* § 552.137(a)-(c). The

⁴The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

department must withhold the e-mail addresses it has marked, as well as the additional e-mail addresses we have marked, under section 552.137 of the Government Code, unless the owners of the addresses have affirmatively consented to their release.

In summary, the department must withhold the information marked under section 552.101 of the Government Code in conjunction with (1) section 745.8485 of title 40 of the Texas Administrative Code, (2) the MPA, (3) chapter 411 of the Government Code, and (4) common-law privacy. The department may withhold the information you have marked under section 552.101 of the Government Code in conjunction with the common-law informer's privilege. The department must withhold the information we have marked under section 552.136 of the Government Code. The department must withhold the e-mail addresses you have marked, and the additional e-mail addresses we have marked, under section 552.137 of the Government Code, unless the owners have affirmatively consented to their release. The department must release the remaining information.

Finally, you also ask this office to issue a previous determination that would permit the department to withhold information subject to section 745.8485 of title 40 of the Texas Administrative Code. We decline to issue such a previous determination at this time. Accordingly, 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 more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free at (888) 672-6787.

Sincerely,



Kathleen J. Santos
Assistant Attorney General
Open Records Division

KJS/bhf

Ref: ID# 488695

Enc. Submitted documents

c: Requestor
(w/o enclosures)