



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 11, 2013

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

OR2013-09797

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# 489796 (DFPS Reference #03202013957).

The Texas Department of Family and Protective Services (the "department") received a request for any complaints, violations, or fines issued against a specified child care facility prior to March 9, 2013.¹ You state the department will redact account numbers under section 552.136 of the Government Code and social security numbers under section 552.147 of the Government Code.² You claim the remaining requested information is excepted from

¹The department sought and received clarification of the information requested. *See* Gov't Code § 552.222 (if request for information is unclear, governmental body may ask requestor to clarify request).

²Section 552.136 of the Government Code authorizes a governmental body to redact, without the necessity of requesting a decision from this office, access device numbers subject to section 552.136(b). *See* Gov't Code § 552.136(c); *see also id.* § 552.136(d)-(e) (requestor may appeal governmental body's decision to withhold information under section 552.136(c) to attorney general and governmental body withholding information pursuant to section 552.136(c) must provide certain notice to requestor). Section 552.147(b) of the Government Code authorizes a governmental body to withhold a living person's social security number without requesting a decision under the Act. *Id.* § 552.147(b).

disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted representative sample of information.³

Initially, you note the requestor excluded the names of minors from her request. Accordingly, this information is not responsive to the instant request. The department need not release non-responsive information in response to this request, and this ruling will not address that information.

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. 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;

³We assume the “representative sample” of information 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 those records contain substantially different types of information than those submitted to this office.

(3) The files, reports, records, communications, audiotapes, videotapes, and working papers used or developed during an investigation[.]

40 T.A.C. § 745.8485(c)(1)-(3). You represent to this office that a portion of the information at issue pertains to investigations 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 that the information at issue is not subject to disclosure under 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), 745.8487 (department may release to public only those portions of abuse or neglect investigation record that must be filed in monitoring file), 745.8489 (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 that the information we have marked falls within the scope of section 745.8485(c). In addition, we note that section 745.8491 of title 40 of the Texas Administrative Code enumerates parties that may access confidential information pertaining to licensed facilities. *Id.* § 745.8491. In this instance, we find the requestor is not one of the enumerated persons eligible to receive copies of the information at issue under section 745.8491 of title 40 of the Texas Administrative Code. We therefore conclude that the department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 745.8485 of title 40 of the Texas Administrative Code.⁴

Section 552.101 of the Government Code also encompasses the common-law right to privacy, which protects information if it (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). To demonstrate the applicability of common-law privacy, both prongs of this test must be met. *Id.* at 681-82.

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. A compilation of an individual's criminal history is highly embarrassing information, the publication of which would be highly objectionable to a reasonable person. *Cf. U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 764 (1989) (finding significant privacy interest in compilation of individual's criminal history by recognizing distinction between public records found in courthouse files and local police stations and compiled summary of

⁴As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

criminal history information). Furthermore, we find a compilation of a private citizen's criminal history is generally not of legitimate concern to the public. Upon review, we find you have failed to demonstrate how any of the remaining information is highly intimate or embarrassing and of no legitimate public interest. Thus, the department may not withhold the remaining information under section 552.101 of the Government Code in conjunction with common-law privacy.

In summary, the department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 745.8485 of title 40 of the Texas Administrative Code. The department must release the remaining information.

You also ask this office to issue a previous determination that would permit the department to withhold the description of an allegation of child abuse or neglect, the identity of the person making the allegation, and the documents used or developed during an investigation of child abuse or neglect as described in 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,



James D. Cypert
Assistant Attorney General
Open Records Division

JDC/ac

Ref: ID# 489796

Enc. Submitted documents

c: Requestor
(w/o enclosures)