



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 21, 2014

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

OR2014-03297

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# 514747 (DFPS No. 11182013KU6).

The Texas Department of Family and Protective Services (the "department") received a request for all information pertaining to a specified facility during a specified time period.¹ You state the department will redact driver's license information pursuant to section 552.130(c) of the Government Code, social security numbers pursuant to section 552.147(b) of the Government Code, and fingerprints under section 552.101 of the Government Code in conjunction with section 560.003 of the Government Code pursuant to Open Records Decision No. 684.² You claim portions of the submitted information are

¹We note the department sought and received clarification of the information requested. *See* Gov't Code § 552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify request); *see also* *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or over-broad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

²Section 552.130(c) of the Government Code allows a governmental body to redact the information described in subsection 552.130(a) without the necessity of seeking a decision from the attorney general. *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). Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office. *See id.* § 552.147(b). Open Records Decision No. 684 (2009) is a previous determination to all governmental bodies authorizing them to withhold certain categories of information, including a fingerprint under section 552.101 of the Government Code in conjunction with section 560.003 of the Government Code, without the necessity of requesting an attorney general opinion.

excepted from 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

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. 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 Texas 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;

(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 some of the submitted information pertains to investigations of alleged child abuse or neglect at a licensed child

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 those records contain substantially different types of information than that submitted to this office.

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 the information you 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. You state 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. *See id.* § 745.8491. Therefore, we 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.

The department promulgated section 745.8483 of title 40 of the Texas Administrative Code to make the name of an individual who makes a report that results in a child care facility license investigation confidential. *Id.* § 745.8483. You assert the information you have marked consists of information identifying individuals who made reports that resulted in investigations of child care operations. Upon review, we agree the information we have marked is confidential pursuant to section 745.8483. Therefore, the department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 745.8483 of title 40 of the Texas Administrative Code.⁴ However, we find none of the remaining information is subject to section 745.8483 and may not be withheld under section 552.101 on that basis.

Section 552.101 also encompasses the Medical Practice Act ("MPA"), subtitle B of title 3 of the Occupations Code, which governs release of medical records. *See Occ. Code* §§ 151.001-168.202. Section 159.002 of the MPA provides, in relevant 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.

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

(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 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. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). Upon review, we find the information you have marked constitutes a record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that was created or is maintained by a physician. Accordingly, the department must withhold the information you have marked under section 552.101 of the Government Code in conjunction with the MPA.

Section 552.101 also encompasses section 161.007 of the Health and Safety Code, which provides in relevant part:

(a) The [Texas Department of State Health Services ("DSHS"), for the primary purpose of establishing and maintaining a single repository of accurate, complete, and current immunization records . . . shall establish and maintain an immunization registry. The executive commissioner of the Health and Human Services Commission by rule shall develop guidelines to:

(1) protect the confidentiality of patients in accordance with Section 159.002, Occupations Code[.]

...

(j) Except as provided by Sections 161.00705, 161.00706, 161.00735(b), and 161.008, information obtained by [DSHS] for the immunization registry is confidential and may be disclosed only with the written or electronic consent of the individual or the individual's legally authorized representative.

Health & Safety Code § 161.007(a)(1), (j). You state DSHS established an immunization registry, ImmTrac, that functions as the state's immunization registry. You further explain DSHS promulgated rules pursuant to section 161.007(a)(1) to protect the confidentiality of patient information found in ImmTrac. Section 100.2 of title 25 of the Texas Administrative Code, as adopted by the department pursuant to section 161.007(a)(1), provides in part:

Except as provided by Health and Safety Code, Chapter 161, Subchapter A, § 161.00705, information that individually identifies a child or other individual, and is received by the department for the immunization registry, is confidential and may be used by the department for registry purposes only.

Unless specifically authorized by Health and Safety Code, Chapter 161, Subchapter A, the department may not release registry information to any individual or entity without the written consent of the person or, if a minor, the parent, managing conservator, or legal guardian.

25 T.A.C § 100.2; *see also id.* §§ 100.1, .3-.7. Upon review, we find the information you have marked was obtained by DSHS for the immunization registry. Further, there is no indication that the parent of the child at issue has provided written consent to release registry information to this requestor. Accordingly, the information you have marked is confidential under section 161.007(j) of the Health and Safety Code and must be withheld under section 552.101 of the Government Code on that basis.

Section 552.101 of the Government Code also encompasses laws that make criminal history record information (“CHRI”) confidential. CHRI generated by the National Crime Information Center or by the Texas Crime Information Center is confidential under federal and state law. 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 at 7 (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 the Department of Public Safety (“DPS”) maintains, except DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. *See Gov’t Code* § 411.083. Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *Id.* § 411.089(b)(1). Other entities specified in chapter 411 of the Government Code are entitled to obtain CHRI from DPS or another criminal justice agency; however, those entities may not release CHRI except as provided by chapter 411. *See generally id.* §§ 411.090-.127. Similarly, 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 Government Code chapter 411, subchapter F. You state the CHRI you have marked was obtained from DPS. Upon review, we find the department must withhold the CHRI we have marked under section 552.101 of the Government Code in conjunction with chapter 411 of the Government Code.⁵ However, none of the remaining information you have marked consists of CHRI for the purposes of chapter 411 of the Government Code and may not be withheld on that basis.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person and (2) 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 satisfied. *Id.* at 681-82. Types of information considered

⁵As our ruling is dispositive for this information, we need not address your remaining argument against its disclosure.

intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *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 criminal history information). Furthermore, we find a compilation of a private citizen's criminal history is generally not of legitimate concern to the public. Additionally, this office has concluded some kinds of medical information are generally highly intimate or embarrassing. *See Open Records Decision No. 455* (1987).

Upon review, we find the department has failed to demonstrate how any of the remaining information is highly intimate or embarrassing and not of legitimate public interest. Therefore, the department may not withhold any portion of the remaining information under section 552.101 in conjunction with common-law privacy.

In summary, the department must withhold 1) 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, 2) the information we have marked under section 552.101 of the Government Code in conjunction with section 745.8483 of title 40 of the Texas Administrative Code, 3) the information you have marked under section 552.101 of the Government Code in conjunction with the MPA, 4) the information you have marked under section 552.101 of the Government Code in conjunction with section 161.007(j) of the Health and Safety Code, 5) the information we have marked under section 552.101 of the Government Code in conjunction with chapter 411 of the Government Code, and 6) the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The department must release the remaining information.

You also ask this office to issue a previous determination that would permit the department to withhold information subject to section 745.8483 of title 40 of the Texas Administrative Code and section 745.8485 of title 40 of the Texas Administrative Code under section 552.101 of the Government Code without the necessity of requesting a decision under section 552.301 of the Government Code. We decline to issue such a previous determination at this time. Accordingly, this letter ruling is limited to the particular information 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 information 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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in cursive script that reads "Megan G. Holloway". The signature is written in black ink and is positioned above the typed name.

Megan G. Holloway
Assistant Attorney General
Open Records Division

MGH/akg

Ref: ID# 514747

Enc. Submitted documents

c: Requestor
(w/o enclosures)