



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 29, 2014

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

OR2014-07128

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# 521004 (DFPS Reference No. 02062014BFF).

The Texas Department of Family and Protective Services (the "department") received a request for information pertaining to a specified incident. You state you will redact information pursuant to section 552.147 of the Government Code, Open Records Decision No. 684 (2009), and the previous determination issued in Open Records Letter No. 2003-5590 (2003).¹ You claim some of the requested information is excepted from

¹Section 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 under the Act. Gov't Code § 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 e-mail addresses of members of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision. Open Records Letter No. 2003-5590 is a previous determination authorizing the department to withhold, under section 552.101 of the Government Code in conjunction with section 261.201(a) of the Family Code, the records concerning an investigation of an allegation of abuse or neglect of a child and the records used or developed in providing services as a result of such an investigation, unless the department's rules permit the department to release requested records to a particular requestor.

disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted representative sample of information.²

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 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). Rules governing the confidentiality of department investigation and facility monitoring records are found at chapter 745 of title 40 of the Texas Administrative Code. The department promulgated section 745.8485 of title 40 of the Texas Administrative Code to make confidential certain child care facility license investigations and records. Section 745.8485(c) provides as follows:

(c) Completed investigations of child abuse or neglect are confidential and not available to the general public, except as provided under this chapter and applicable federal or state law.

40 T.A.C. § 745.8485(c). You explain some of the submitted information consists of an investigation of child abuse or neglect at a licensed child care facility, so as to be subject to section 745.8485(c). We understand the investigation is completed. You inform our office that as the parent of the child who was the victim of the abuse or neglect at issue, the requestor has a right of access to some of the submitted information. Section 745.8491 of title 40 of the Texas Administrative Code enumerates the parties who may obtain

²We 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.

confidential information pertaining to an investigation of licensed facilities. *Id.* § 745.8491. Section 745.8491(a)(2) reads in pertinent part as follows:

(a) The following may obtain information from the confidential portions of an abuse or neglect investigation file, subject to the limitations described in § 745.8493 of this title . . . and § 745.8495 of this title . . . :

...

(2) The parent of the child who is the subject of the investigation . . . [.]

Id. § 745.8491(a)(2). Thus, pursuant to section 745.8491(a)(2), the department acknowledges the requestor has a right of access to some of the submitted information.

However, you argue section 745.8493(a)(2) of title 40 of the Texas Administrative Code prohibits the release to anyone, including the requestor, of information that identifies the person who made a report that resulted in an investigation. *Id.* § 745.8493(a)(2). Section 745.8493(a)(2) states:

(a) [The department] may not release the following portions of Licensing records to anyone:

...

(2) Any information identifying the person who made a report that resulted in an investigation[.]

Id. § 745.8493(a)(2). Under section 745.8493(b), the department may provide the information made confidential under section 745.8493(a) to certain parties in relevant situations. *Id.* § 745.8493(b). Upon review, we find the requestor is not one of the parties to whom the department may release the information made confidential under section 745.8493(a). However, in this case, the reporting party is the requestor. To construe section 745.8493(a)(2) to require a governmental body to withhold the identifying information of a reporting party from a requestor who is himself the reporting party would lead to an absurd result that the department could not have intended. *See Hernandez v. Ebrom*, 289 S.W.3d 316, 318 (Tex. 2009) (stating unambiguous statutory language is interpreted according to its plain language unless such an interpretation would lead to absurd results); Attorney General Opinion GA-0876 (2011) (noting courts avoid construing statutes in ways that lead to foolish result). Therefore, the department may not withhold the identity of the reporting party who is the requestor under section 552.101 in conjunction with section 745.8493(a)(2) of title 40 of the Texas Administrative Code.

We note the submitted information includes the identities of children who are not the requestor's children. Section 745.8493(a)(7) prohibits the department from releasing to anyone "[t]he identity of any child or information identifying the child in an abuse or neglect investigation, unless the requestor is" one of three specified parties.³ *Id.* § 745.8493(a)(7). With respect to the children who are not the requestor's children, we find the requestor is not one of the specified parties entitled to the information subject to section 745.8493(a)(7). After review of the submitted information, we conclude the department must withhold the information that identifies the children who are not the requestor's children under section 552.101 of the Government Code in conjunction with section 745.8493(a)(7) of title 40 of the Texas Administrative Code. We have marked the information accordingly.

You also seek to withhold a photograph of the requestor's child and copies of audio-taped interviews of other children pursuant to section 745.8493(a). However, section 745.8495 of title 40 of the Texas Administrative Code, rather than section 745.8493(a), now specifically addresses who may review or obtain a copy of a photograph or an audio or visual recording, depiction, or documentation of a child who is in the licensing records. *Id.* § 745.8495. Section 745.8495(a)(4) of title 40 of the Texas Administrative Code states as follows:

(a) [The department] may provide a copy of a photograph or an audio or visual recording, depiction, or documentation of a child in Licensing records to any of the following:

...

(4) The parent of the child[.]

Id. § 745.8495(a)(4); *see also* Hum. Res. Code § 42.004 (providing photograph, videotape, audiotape or other audio or visual recording, depiction, or documentation of child made by department in course of an inspection or investigation under chapter 42 or section 261.401, Family Code, is confidential, is not subject to release under chapter 552, Government Code, and may be released only as required by state or federal law or department rules). Thus, because the requestor is the parent of the child whose photograph is at issue, the department may not withhold a copy of that photograph from this requestor under section 552.101 of the Government Code in conjunction with section 745.8485(c). However, we find the department must withhold the audio recordings of interviews with children who are not the requestor's children under section 552.101 of the Government Code in conjunction with section 745.8493(a)(7) of title 40 of the Texas Administrative Code.

³The Office of the Attorney General will raise a confidentiality provision on behalf of a governmental body. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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 intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. 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, as the identifying information of the children at issue is protected from disclosure under section 745.8493(a)(7), we find the information you have marked does not implicate the privacy rights of any identified individual. Accordingly, the department may not withhold any of the remaining information under section 552.101 of the Government Code on the basis of with common-law privacy.

In summary, the department must withhold the information that identifies the children who are not the requestor's children and copies of audio-taped interviews of children who are not the requestor's children under section 552.101 of the Government Code in conjunction with section 745.8493(a)(7) of title 40 of the Texas Administrative Code. The remaining information must be released to this requestor.⁴

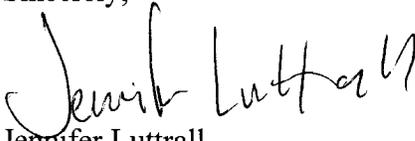
Finally, you ask this office to issue a previous determination permitting the department to withhold information under section 552.101 of the Government Code in conjunction with section 745.8493(a) of title 40 of the Texas Administrative Code, without seeking a ruling from this office. See Gov't Code § 552.301(a) (allowing governmental body to withhold information subject to previous determination); Open Records Decision No. 673 (2001) (previous determinations). Having considered your request, 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.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

⁴Because the requestor has a right of access to certain information that otherwise would be excepted from release under the Act, the department must again seek a decision from this office if it receives a request for this information from a different requestor.

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 "Jennifer Luttrall".

Jennifer Luttrall
Assistant Attorney General
Open Records Division

JL/akg

Ref: ID# 521004

Enc. Submitted documents

c: Requestor
(w/o enclosures)