



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 28, 2014

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

OR2014-09142

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# 524018 (TXDFPS ORR No. 03072014STW).

The Texas Department of Family and Protective Services (the "department") received a request for information regarding a specified adoption agency. You inform us you do not have some of the requested information.¹ You also inform us you will redact certain information pursuant to the previous determination issued to the department in Open Records Letter No. 2003-5590 (2003).² Additionally, you state you will redact the following information, to the extent it exists: driver's license information pursuant to section 552.130(c) of the Government Code, access device numbers pursuant to section 552.136(c) of the Government Code, personal e-mail addresses subject to section 552.137 of the Government Code pursuant to Open Records Decision No. 684 (2009), and social security numbers pursuant to section 552.147(b) of the

¹The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

²Open 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.

Government Code.³ You claim some of the submitted information is excepted from disclosure under section 552.101 of the Government Code.⁴ We have considered the exception you claim and reviewed the submitted representative sample of information.⁵

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). The department promulgated section 745.8493(a) of title 40 of the Texas Administrative Code, which prohibits the release of certain information pertaining to licensing records. 40 T.A.C. § 745.8493(a). Section 745.8493(a)(1) states:

³Section 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 552.136 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). *See id.* § 552.136(d), (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. 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 under the Act. *Id.* § 552.147(b).

⁴We note the department did not comply with section 552.301 of the Government Code with regard to the information submitted on April 10, 2014. *See* Gov’t Code § 552.301(b), (e). Nevertheless, because the exception you claim can provide a compelling reason to overcome the presumption of openness, we will consider your claimed exception for this information. *See id.* §§ 552.007, .302, .352.

⁵We 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.

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

(1) Any information that would interfere with an ongoing law enforcement investigation or prosecution[.]

Id. § 745.8493(a)(1). You inform us the release of the information you have marked would interfere with an ongoing criminal investigation of a specified law enforcement agency. Therefore, upon review we find the information at issue falls within the scope of section 745.8493(a). 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). Therefore, we conclude the department must withhold the information you have marked under section 552.101 of the Government Code in conjunction with section 745.8493(a) of title 40 of the Texas Administrative Code.⁶

The department promulgated section 745.8485 of title 40 of the Texas Administrative Code to make certain child care facility license investigations and records confidential. Section 745.8485(c) provides:

(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.

Id. § 745.8485(c). The information we have marked consists of an investigation of child abuse or neglect at a licensed facility, so as to be confidential under section 745.8485(c). We note the investigation reflects it is completed. Therefore, upon review we find the information at issue falls within the scope of section 745.8485(c). We note 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. *Id.* § 745.8491. Therefore, we conclude the department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 745.8485(c) of title 40 of the Texas Administrative Code.⁷

The department also 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. The department asserts the information it has marked in the remaining information consists of information identifying

⁶As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

⁷As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

an individual who made a report that resulted in an investigation of a child care operation. Upon review, we agree the remaining information you have marked is confidential pursuant to section 745.8483. Therefore, the department must withhold the remaining information you have marked under section 552.101 of the Government Code in conjunction with section 745.8483 of title 40 of the Texas Administrative Code.

Section 552.101 of the Government Code also encompasses federal law. Prior decisions of this office have held section 6103(a) of title 26 of the United States Code renders tax return information confidential. *See* Attorney General Opinion H-1274 (1978) (tax returns). Section 6103(b) defines the term "return information" as "a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments . . . or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary [of the Treasury] with respect to a return or with respect to the determination of the existence, or possible existence, of liability . . . for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense[.]" 26 U.S.C. § 6103(b)(2)(A). Federal courts have construed the term "return information" expansively to include any information gathered by the Internal Revenue Service regarding a taxpayer's liability under title 26 of the United States Code. *See Mallas v. Kolak*, 721 F. Supp 748, 754 (M.D.N.C. 1989), *aff'd in part*, 993 F.2d 1111 (4th Cir. 1993). Thus, the submitted 1120S form constitutes tax return information that is confidential under section 6103(a) of title 26 of the United States Code and must be withheld under section 552.101 of the Government Code on that basis. However, we find the remaining information does not consist of tax return information that is confidential under section 6103(a) of title 26 of the United States Code. Accordingly, the department may not withhold any of the remaining information under section 552.101 of the Government Code 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 intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. Upon review, we find none of the remaining information is highly intimate or embarrassing and of no legitimate public interest. Accordingly, none of the remaining information may be withheld under section 552.101 on the basis of common-law privacy.

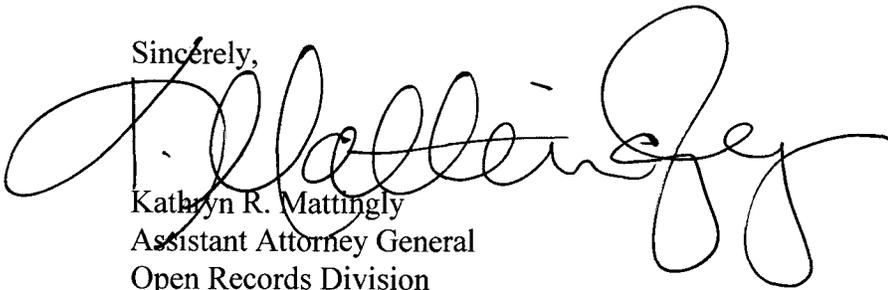
In summary, the department must withhold (1) the information you have marked under section 552.101 of the Government Code in conjunction with section 745.8493(a) of title 40 of the Texas Administrative Code, (2) the information we have marked under section 552.101 of the Government Code in conjunction with section 745.8485(c) of title 40 of the Texas Administrative Code, (3) the remaining information you have marked under section 552.101 of the Government Code in conjunction with section 745.8483 of title 40 of

the Texas Administrative Code, and (4) the submitted 1120S form under section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States 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 information subject to section 745.8483 of title 40 of the Texas Administrative Code without requesting a ruling from this office. 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 large, stylized handwritten signature in black ink, appearing to read 'K. Mattingly', is written over the typed name and title.

Kathryn R. Mattingly
Assistant Attorney General
Open Records Division

KRM/bhf

Ref: ID# 524018

Enc. Submitted documents

c: Requestor
(w/o enclosures)