



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

June 25, 2015

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

OR2015-12685

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# 568875 (DFPS ORR No. 04062015NQ3).

The Texas Department of Family and Protective Services (the "department") received a request for all records pertaining to a specified entity during a specified time frame.¹ You state the department will redact certain motor vehicle record information pursuant to section 552.130(c) of the Government Code, insurance policy numbers and bank account numbers pursuant to section 552.136(c) of the Government Code, social security numbers pursuant to section 552.147(b) of the Government Code, and personal e-mail addresses subject to section 552.137 of the Government Code pursuant to Open Records Decision

¹We note the department sought and received clarification of this request from the requestor. See Gov't Code § 552.222 (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) (if governmental entity, acting in good faith, requests clarification of unclear or over-broad request, ten-day period to request attorney general ruling is measured from date request is clarified).

No. 684 (2009).² You further state the department will redact certain information pursuant to the previous determination issued to the department in Open Records Letter No. 2003-5590 (2003).³ You claim the requested information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.⁴

Initially, you state some of the requested information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2015-11848 (2015). In Open Records Letter No. 2015-11848, we determined the department may withhold the information at issue under section 552.103 of the Government Code. Based on your representation that the department reasonably anticipated being named as a responsible third party in a lawsuit styled *Haygood v. Southern American Insurance Agency, Inc.*, Cause No. 2013-58394, then pending in the 125th Judicial District Court of Harris County, Texas, we found the department reasonably anticipated litigation. However, you now inform us that, prior to receipt of the present request, the department was named a responsible third party in that lawsuit. Therefore, we find the facts or circumstances on which Open Records Letter No. 2015-11848 was based have changed. Thus, the department may not rely on Open Records Letter No. 2015-11848 as a previous determination or withhold any of the information at issue in accordance with that ruling. *See* Open Records Decision No. 673

²Section 552.130(c) of the Government Code allows a governmental body to redact the information described in section 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(c) of the Government Code allows a governmental body to redact the information described in section 552.136(b) without the necessity of seeking a decision from the attorney general. *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). 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 serves as a previous determination to all governmental bodies authorizing them to withhold certain categories of information, including personal e-mail addresses under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision. *See* ORD 684.

³Open Records Letter No. 2003-5590 is a previous determination authorizing the department to withhold, without the necessity of seeking a decision from this office, 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 under section 552.101 of the Government Code in conjunction with section 261.201(a) of the Family Code, unless the department's rules permit the department to release requested records to a particular requestor.

⁴We 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.

at 6-7 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes information is or is not excepted from disclosure). Accordingly, we will consider your arguments against disclosure of the submitted information.

Next, we note some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). The submitted information includes completed reports and investigations subject to section 552.022(a)(1). The department must release this information, which we have marked, unless it is excepted from disclosure under section 552.108 of the Government Code or is made confidential under the Act or other law. You seek to withhold this information under section 552.103 of the Government Code. However, section 552.103 is a discretionary exception and does not make information confidential under the Act. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive Gov't Code § 552.103); *see also* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, the department may not withhold the information at issue under section 552.103 of the Government Code. However, you also raise section 552.101 of the Government Code for portions of the information at issue. As section 552.101 can make information confidential under the Act, we will consider your argument under this section. We will also address your argument under section 552.103 for the information not subject to section 552.022 of the Government Code.

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(a)-(b). 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(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 state the information you have marked is related to investigations of alleged child abuse or neglect at a licensed child care facility, so as to be confidential under section 745.8485(c). You state the investigations are completed. You also inform us the information at issue is not information that must be maintained in the department's monitoring files. *See id.* §§ 745.8481(a) (information in monitoring file is for most part available to general public), .8487(a) (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 you have marked falls within the scope of section 745.8485(c). 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 of the Texas Administrative Code. *Id.* § 745.8491. Therefore, we conclude the department must withhold the information you have marked under section 552.101 in conjunction with section 745.8485(c) of title 40 of the Texas Administrative Code.

Section 552.101 of the Government Code also encompasses section 745.8493(a) of title 40 of the Texas Administrative Code. Section 745.8493(a) states, in relevant part, the following:

(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[.]

...

(7) The identity of any child or information identifying the child in an abuse or neglect investigation[.]

Id. § 745.8493(a)(2), (7). Thus, section 745.8493(a) of title 40 of the Texas Administrative Code prohibits the release of information in a licensing record that identifies either the person who made a report that resulted in an investigation or any child in an abuse or neglect investigation. *Id.* Upon review, we find the information you have marked consists of information in a licensing record that identifies a person who made a report that resulted in an investigation. *Id.* § 745.8493(a)(2). We further find the information we have marked consists of information in a licensing record that identifies a child in an abuse or neglect investigation. *Id.* § 745.8493(a)(7). We note 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). The requestor is not one of the parties to whom the department may release the information made confidential under section 745.8493(a). Thus, the department must withhold the information you have marked, as well as the information we 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.⁵

We now turn to the information not subject to section 552.022(a)(1). Section 552.103 of the Government Code provides in relevant part as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The governmental body has the burden of providing relevant facts and documents to show the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or

⁵As our ruling is dispositive, we do not address your other argument to withhold this information.

reasonably anticipated on the date the governmental body received the request for information and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, orig. proceeding); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The governmental body must meet both prongs of this test for information to be excepted from disclosure under section 552.103(a).

You state the department was named a responsible third party in the aforementioned lawsuit styled *Haygood v. Southern American Ins. Agency*, Cause No. 2013-53894, before it received the request for information. Therefore, we find litigation was pending when the department received the request. We also find you have established the information at issue is related to the pending litigation for purposes of section 552.103(a). Therefore, the department may withhold the information not subject to section 552.022(a)(1) under section 552.103(a) of the Government Code.⁶

However, once the information has been obtained by all parties to the anticipated litigation, no section 552.103(a) interest exists with respect to that information. Open Records Decision No. 349 at 2 (1982). We also note the applicability of section 552.103(a) ends when the litigation has concluded or is no longer anticipated. Attorney General Opinion MW-575 at 2 (1982); Open Records Decision Nos. 350 at 3 (1982), 349 at 2.

In summary, the department must withhold the information you 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. The department must withhold the information you have marked, as well as the information we 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. The department may withhold the information not subject to section 552.022(a)(1) under section 552.103(a) of the Government Code. The remaining information must be released pursuant to section 552.022(a)(1) of the Government Code.

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

⁶As our ruling is dispositive, we do not address your other arguments to withhold this information.

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 black ink, appearing to read "Brian E. Berger". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Brian E. Berger
Assistant Attorney General
Open Records Division

BB/akg

Ref: ID# 568875

Enc. Submitted documents

c: Requestor
(w/o enclosures)