



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

February 6, 2020

Mr. Jonathan Miles
Open Records Attorney
Texas Health and Human Services Commission
P.O. Box 13247
Austin, Texas 78711-3247

OR2020-03538

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# 810609 (Reference No. OR-20191108-20402).

The Texas Health and Human Services Commission (the "commission") received a request for all documents pertaining to a specified facility during a defined time period. You claim some of the submitted information is excepted from disclosure under section 552.101 of the Government Code. You also state you notified the Texas Department of Family and Protective Services ("the department") of the request for information and of its right to submit arguments to this office as to why the submitted information should not be released.¹ See Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have considered the exception you claim and reviewed the submitted information.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. Section 552.101 encompasses section 261.201 of the Family Code, which provides, in part, as follows:

(a) [T]he following information is confidential, is not subject to public release under [the Act] and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

¹ As of the date of this letter, we have not received any comments from the department explaining why any portion of the submitted information should not be released to the requestor.

(1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and

(2) except as otherwise provided in this section, the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

...

(h) This section does not apply to an investigation of child abuse or neglect in a home or facility regulated under Chapter 42, Human Resources Code.

Fam. Code § 261.201(a), (h). Upon review, we find the information you marked was used or developed in investigations of alleged or suspected child abuse or neglect. However, section 261.201 does not apply to an investigation of child abuse or neglect in a home or facility regulated under chapter 42 of the Human Resources Code. *Id.* § 261.201(h). The information at issue is related to investigations of alleged abuse or neglect occurring in a child care facility that was regulated by the department under chapter 42 of the Human Resources Code at the time of the incident in question. Therefore, we find section 261.201 is not applicable to the investigations at issue, and the commission may not withhold any portion of the investigations you marked under section 552.101 on that basis.

Section 552.101 of the Government Code also encompasses section 40.005 of the Human Resources Code. Section 40.005 authorizes the department to adopt rules for the purpose of preserving the confidentiality of information concerning child abuse and neglect, and provides, in relevant part:

(a) The executive commissioner [of the department] shall establish and the department shall enforce rules governing the custody, use, and preservation of the department's records, papers, files, and communications.

(b) The executive commissioner [of 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 records are found at chapter 745 of title 40 of the Texas Administrative Code. In accordance with section 40.005, the department promulgated section 745.8485 of title 40 of the Texas Administrative Code to make certain 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). We note the investigations you marked are completed. We understand the information at issue is not information that must be maintained in the monitoring file for the entity. *See id.* §§ 745.8481(a) (information in monitoring file is for most part available to general public), .8487(a) (only those portions of abuse or neglect investigation record that must be filed in monitoring file may be released), .8489 (except for certain specified information, all records of abuse or neglect investigation maintained separate from monitoring file). Based on these representations and our review, we find the information at issue consists of completed investigations of child abuse or neglect that fall within the scope of section 745.8485(c). The commission states 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 commission must withhold the information we marked under section 552.101 in conjunction with section 40.005 of the Human Resources Code and section 745.8485(c) of title 40 of the Texas Administrative Code. *See* Hum. Res. Code § 40.005(f) (department shall provide commission with access to any information relating to department's child abuse, neglect, or exploitation investigation of child care facility).

Section 552.101 of the Government Code also encompasses the Medical Practice Act ("MPA"), subtitle B of title 3 of the Occupations Code, which governs release of medical records. 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.
- (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.

Occ. Code § 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 marked constitutes a record of the identity, diagnosis, evaluation, or treatment of a

patient by a physician. Accordingly, the commission must withhold the information at issue under section 552.101 of the Government Code in conjunction with the MPA.

The commission indicates the remaining information consists of investigations of a licensed child care facility, so as to be subject to section 745.8485. We understand the investigations at issue were authorized by chapter 42 of the Human Resources Code. Rules governing the confidentiality of commission investigation and facility monitoring records are found at chapter 745 of title 40 of the Texas Administrative Code.² The commission 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(b) provides as follows:

(b) Completed investigations that do not involve abuse or neglect become part of the operation's monitoring file, which is, for the most part, available to the general public, as provided in § 745.8481 of this title[.]

40 T.A.C. § 745.8485(b). Upon review, we find the remaining information consists of investigations that do not involve abuse or neglect of a child. We understand each of the investigations is completed. *See id.* § 745.8485(a) (all investigations are confidential until completed and finding has been made). Thus, we understand the remaining documents consist of information maintained in the monitoring file for the licensed child care facility under Section 745.8491 of title 40 of the Texas Administrative Code. *See id.* § 745.8485(b) (completed investigations that do not involve abuse or neglect become part of monitoring file). Accordingly, pursuant to section 745.8481 of title 40 of the Texas Administrative Code, the remaining information is generally available to the public. *See id.* § 745.8481 (information in operation's monitoring file is, for the most part, available to general public).

However, section 745.8493(a) states, in relevant part:

(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), (9). Thus, section 745.8493(a) prohibits, in relevant part, the release of the identities of the reporting party and of children involved in the investigation. *Id.* §§ 745.8493(a)(2), (7). Section 745.8493(a)(7) lists parties who may obtain certain

² We note the Eighty-Fourth Legislature passed Senate Bill 200, which as of September 1, 2017, transferred certain investigation functions of the department to the commission.

confidential information related to an investigation contained in the monitoring file of a licensed facility. *Id.* §§ 745.8493(a)(7). The commission informs us the requestor does not fall within any of the categories of individuals or entities who may obtain the confidential portions of the information. Upon review, we find the information the commission marked, and the additional information we indicated, consists of the identifying information of children and their families that is protected by section 745.8493(a)(7) of title 40 of the Texas Administrative Code. Accordingly, the commission must withhold the information it marked and we indicated 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 commission must also withhold the identities of the reporting parties, which you marked and we indicated, under section 552.101 in conjunction with section 745.8493(a)(2) of title 40 of the Texas Administrative Code.³

Section 745.8495(a) of title 40 of the Texas Administrative Code provides that 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 five categories of individuals. 40 T.A.C. § 745.8495(a). Additionally, section 745.8495(b) provides that the department may allow four categories of individuals to “review a photograph or an audio or visual recording, depiction, or documentation of a child in Licensing records,” but those individuals “may not have a copy.” *See id.* § 745.8495(b). The commission states the requestor is not one of the parties to whom the department may release the information at issue under section 745.8495. Accordingly, we find the commission must withhold the photograph you marked under section 552.101 of the Government Code in conjunction with section 745.8495 of title 40 of the Texas Administrative Code.

In summary, the commission must withhold the information we marked under section 552.101 in conjunction with section 40.005 of the Human Resources Code and section 745.8485(c) of title 40 of the Texas Administrative Code. The commission must withhold the information you marked under section 552.101 of the Government Code in conjunction with the MPA. The commission must withhold the information it marked and we indicated under section 552.101 of the Government Code in conjunction with sections 745.8493(a)(2) and 745.8493(a)(7) of title 40 of the Texas Administrative Code. The commission must withhold the photograph you marked under section 552.101 of the Government Code in conjunction with section 745.8495 of title 40 of the Texas Administrative Code. The commission must release the remaining information.

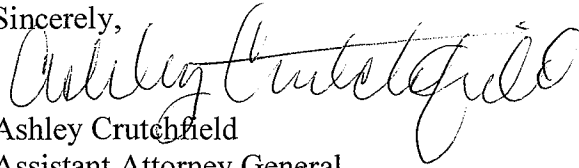
This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

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 <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG’s Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable

³ As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in cursive script, appearing to read "Ashley Crutchfield".

Ashley Crutchfield
Assistant Attorney General
Open Records Division

AC/mo

Ref: ID# 810609

Enc. Submitted documents

c: Requestor
(w/o enclosures)