



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

September 1, 2020

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

OR2020-21935

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# 839852 (HHSC ORR Nos. 22500, 22567, 22840, 22868, 22972).

The Texas Health and Human Services Commission (the "commission") received five requests from different requestors for information regarding COVID-19 cases in child care operations. You state the commission does not have information responsive to a portion of the requests.¹ You state the commission will release some information. You claim the submitted information is either not subject to the Act or excepted from disclosure under section 552.101 of the Government Code. We have considered your arguments and reviewed the submitted representative sample of information.²

Initially, we address your argument the submitted information does not consist of public information subject to the Act pursuant to section 552.002(d) of the Government Code. The Act applies to "public information," which is defined in section 552.002(a) of the Government Code as "information that is written, produced, collected, assembled, or

¹ The 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).

² We 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.

maintained under a law or ordinance or in connection with the transaction of official business[.]” Gov’t Code § 552.002(a)(1). However, “protected health information” as defined by section 181.006 of the Health and Safety Code is expressly excluded from the Act’s definition of “public information.” *See id.* § 552.002(d). Section 181.006 of the Health and Safety Code provides, in relevant part:

[F]or a covered entity that is a governmental unit, an individual’s protected health information:

(1) includes any information that reflects that an individual received health care from the covered entity[.]

Health & Safety Code § 181.006(1). Section 181.001(b)(2)(A) defines “covered entity,” in part, as any person who:

for commercial, financial, or professional gain, monetary fees, or dues, or on a cooperative, nonprofit, or pro bono basis, engages, in whole or in part, and with real or constructive knowledge, in the practice of assembling, collecting, analyzing, using, evaluating, storing, or transmitting protected health information. The term includes a business associate, health care payer, governmental unit, information or computer management entity, school, health researcher, health care facility, clinic, health care provider, or person who maintains an Internet site[.]

Id. § 181.001(b)(2)(A). Section 181.001 states, “[u]nless otherwise defined in this chapter, each term that is used in this chapter has the meaning assigned by the Health Insurance Portability and Accountability Act and Privacy Standards [(“HIPAA”).” *Id.* § 181.001(a). Accordingly, as chapter 181 does not define “protected health information,” we turn to HIPAA’s definition of the term. HIPAA defines “protected health information” as individually identifiable health information that is transmitted or maintained in electronic media or any other form or medium. *See* 45 C.F.R. § 160.103. HIPAA defines “individually identifiable health information” as information that is a subset of health information, including demographic information collected from an individual, and:

(1) Is created or received by a health care provider, health plan, employer, or health care clearinghouse; and

(2) Relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual; and

(i) That identifies the individual; or

(ii) With respect to which there is a reasonable basis to believe the information can be used to identify the individual.

Id. Although you assert the commission is a covered entity, you have failed to demonstrate the submitted information consists of protected health information. Accordingly, we find the submitted information is subject to the Act, and the commission must release it unless it falls within an exception to public disclosure under the Act. *See* Gov't Code §§ 552.006, .021, .301, .302.

Section 552.101 of the Government Code excepts from public disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” *Id.* § 552.101. Section 552.101 encompasses section 40.005 of the Human Resources Code. Section 40.005 authorizes the commission to adopt rules for the purpose of preserving the confidentiality of information, and provides, in relevant part:

(a) The executive commissioner [of the Texas Department of Family and Protective Services (the “department”)]³ 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 commission investigation and facility monitoring records are found at chapter 745 of title 40 of the Texas Administrative Code. Section 745.8485 of title 40 of the Texas Administrative Code makes confidential certain child care facility license investigations and records. Section 745.8485(a) provides “all investigations are confidential until [the commission] complete[s] the investigation and make[s] a finding.” 40 T.A.C. § 745.8485(a). The commission explains the information at issue consists of files, reports, records, or working papers concerning investigations of licensed child care facilities by the commission that were ongoing at the time the commission received the request, and are confidential under section 745.8485(a). We understand the information at issue is not information that must be maintained in the child care facilities’ monitoring files. *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 to the public), .8489 (except for certain specified information, all records of abuse or neglect investigation will be maintained separate from monitoring file). Based on these representations and our review, we find the information you indicated falls within the scope of section 745.8485(a). Accordingly, the commission must withhold the information you indicated under section 552.101 of the Government Code in conjunction

³The Eighty-Fourth Legislature passed Senate Bill 200, which as of September 1, 2017, transferred certain investigation functions of the department to the commission. *See* Gov't Code §§ 531.02001, .0202.

with section 40.005 of the Human Resources Code and section 745.8485(a) of title 40 of the Texas Administrative Code.⁴

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 or embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. 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 agree the information at issue, which we have marked, satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Therefore, the commission must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common law privacy.

In summary, the commission must withhold the information you indicated under section 552.101 of the Government Code in conjunction with section 40.005 of the Human Resources Code and section 745.8485(a) of title 40 of the Texas Administrative Code. The commission must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common law privacy. 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 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,

Erin Groff
Assistant Attorney General
Open Records Division

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

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Enc. Submitted documents

c: 5 Requestors
(w/o enclosures)