



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

December 7, 2022

Ms. Susan E. Tennyson
Open Government Attorney
Texas Department of Family and Protective Services
P.O. Box 149030
Austin, Texas 78714-9030

OR2022-37963

Dear Ms. Tennyson:

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# 984598 (Reference Number R002711-091722).

The Texas Department of Family and Protective Services (the "department") received a request for information pertaining to a specified investigation. You claim the submitted information is excepted from disclosure under section 552.101 of the Government Code. 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." Gov't Code § 552.101. This exception encompasses information 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 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 707 of title 40 of the Texas Administrative Code. The department promulgated section 707.763 of title 40 of the Texas Administrative Code to make confidential certain child care facility investigations and records. Section 707.763(a) provides, in relevant part:

(a) Abuse, neglect, and exploitation investigation records of child care operations are confidential pursuant to the federal Child Abuse Prevention and Treatment Act and Texas Human Resources Code (HRC) § 40.005 and § 42.004 and not available to the general public, except as provided under applicable federal or state law and as further described in the rules in this division. However, [the] Child Care Licensing [division of Texas Health and Human Services] (CCL) maintains a monitoring file for each operation and will have access to the investigation records pursuant to HRC § 40.042(f). The portions of the abuse, neglect, or exploitation investigation records that are maintained by CCL in the operation's monitoring file are not confidential and may be released to the public.

(b) Notwithstanding subsection (a) of this section, [the department] does not release any records until the investigation is complete.

40 T.A.C. § 707.763(a)-(b). You state the submitted information consists of information developed in an investigation of alleged child abuse or neglect at a licensed child care facility. We understand the investigation at issue is complete. Thus, you assert the submitted information is confidential under section 707.763(a). We understand the information at issue is not information that must be maintained in CCL's monitoring files. *See id.* §§ 707.703(a)(6) (explaining "CCL" is a department of the Regulatory Services Division of the Texas Health and Human Services Commission that regulates child care operations under Chapter 42, Human Resources Code), .763(a) (information in CCL's monitoring file is for the most part available to general public). Based on your representations and our review of the submitted information, we find the submitted information falls within the scope of section 707.763(a).

However, we note section 707.765(a)(3) reads in, pertinent part, as follows:

(a) The following may obtain confidential abuse, neglect, and exploitation investigation information from [the department] subject to the limitations described in § 707.767 . . . in this division:

...

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

Id. § 707.765(a)(3). In this instance, the requestor is an attorney for the parent of the child who is the subject of the investigation at issue. Therefore, even though section 707.763(a) makes this information confidential to the general public, this requestor generally has a

right of access to it under section 707.765(a)(3). Accordingly, pursuant to section 707.765(a)(3), the department may not withhold the information at issue from this requestor under section 552.101 of the Government Code in conjunction with section 707.763(a) of title 40 of the Texas Administrative Code. However, this requestor's general right of access under section 707.765(a)(3) is limited by section 707.767.

In accordance with section 40.005 of the Human Resources Code, the department also promulgated section 707.767 of title 40 of the Administrative Code. Section 707.767 provides in part:

(a) [The department] may not release the following portions of the abuse, neglect, and exploitation investigation 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, neglect, or exploitation investigation, unless the requestor is:

(A) The child's parent or prospective adoptive parent . . . [and]

...

(9) Any other information made confidential under state or federal law.

Id. § 707.767(a)(2), (7)(A), (9). Thus, section 707.767(a) of title 40 of the Texas Administrative Code prohibits the release of certain information to anyone. *Id.* As such, section 707.767 specifically controls the release of the information enumerated in this section, not section 707.765. We note under section 707.767(b), the department may provide the information made confidential under section 707.767(a) to certain parties in relevant situations. *Id.* § 707.767(b). However, the requestor is not one of the parties to whom the department may release the information made confidential under section 707.767(a). Section 707.767(a)(2) states any information identifying the person who made a report that resulted in an investigation shall be withheld from disclosure. *Id.* § 707.767(a)(2). Accordingly, we find the department must withhold any information identifying the person who made a report that resulted in an investigation, which we marked, under section 552.101 of the Government Code in conjunction with section 707.767(a)(2) of title 40 of the Texas Administrative Code. Additionally, section 707.767(a)(9) states any information that is excepted from required disclosure under state

or federal law must still be withheld from disclosure. *Id.* § 707.767(a)(9). Accordingly, we will consider whether the information at issue is otherwise excepted from disclosure.

The department also seeks to withhold the submitted information under section 552.101 in conjunction with section 42.004 of the Human Resources Code. Section 552.101 of the Government Code also encompasses section 42.004, which provides “[a] photograph, videotape, audiotape, or other audio or visual recording, depiction, or documentation of a child that is made by the department in the course of an inspection or investigation authorized by [chapter 42] or Section 261.401, Family Code, is confidential, is not subject to release under [the Act], and may be released only as required by state or federal law or rules adopted by the executive commissioner.” Hum. Res. Code § 42.004. Section 707.769(b)(5) provides that the department “may provide a copy of a photograph or an audio or visual recording, depiction, or documentation of a child in [department] records” to “[t]he parent of the child.” *See* 40 T.A.C. § 707.769(b)(5). Thus, because the requestor’s client is the parent of the child whose information is at issue, the department may not withhold the information at issue from this requestor under section 552.101 of the Government Code in conjunction with section 42.004 of the Human Resources Code.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). Under the common-law right of privacy, an individual has a right to be free from the publicizing of private affairs in which the public has no legitimate concern. *Id.* at 682. The Third Court of Appeals has concluded public citizens’ dates of birth are protected by common-law privacy pursuant to section 552.101. *See Paxton v. City of Dallas*, No. 03-13-00546-CV, 2015 WL 3394061, at *3 (Tex. App.—Austin May 22, 2015, pet. denied) (mem. op.). Thus, the department must withhold the public citizens’ dates of birth we marked under section 552.101 of the Government Code in conjunction with common-law privacy.

In summary, the department must withhold the information we marked under section 552.101 of the Government Code in conjunction with section 707.767(a)(2) of title 40 of the Texas Administrative Code. The department must withhold the public citizens’ dates of birth we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The department must release the remaining information.¹

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

¹ Because the requestor has a special right of access to the information being released in this instance, if the department receives another request for this information from an individual other than this requestor, the department must again seek a ruling from this office.

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,

D. Michelle Case
Assistant Attorney General
Open Records Division

DMH/pt

Ref: ID# 984598

Enc. Submitted documents

c: Requestor
(w/o enclosures)