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Criminal District Attorney
Tarrant County

February 15, 2024

Honorable Ken Paxton
Office of the Texas Attorney General
Attention: Opinion Committee
P.O. Box 12548
Austin, Texas 78711-2548

Re: Request for opinion regarding the applicability of Code of Criminal Procedure article 39.14 to third-party records in the possession of the local juvenile justice agency and used in support of its social history report to the juvenile court.

Dear General Paxton:

The Tarrant County Criminal District Attorney has obligations both to prosecute cases criminally and to act as civil counsel for various county entities and officials. *See* Tex. Gov't Code § 44.320. This request hopes for an opinion that will resolve a question that has arisen in how to fulfill that dual role, specifically, when ensuring compliance with discovery obligations while advising a county agency how to maintain appropriate confidentiality of records it has obtained.

Tarrant County Juvenile Services ("Juvenile Services") is the local juvenile probation department for Tarrant County. When a petition to the juvenile court ends in an adjudication of delinquency and proceeds to disposition, Juvenile Services prepares social history reports for the juvenile justice court's use. *See* Tex. Fam. Code § 54.04(b). The juvenile court provides access to the parties of the social history report and any other records it possesses and is relying on for disposition. *See* Tex. Fam. Code § 54.04(b).

However, the social history reports created for disposition are often based on information Juvenile Services has obtained throughout its work of providing services to the juvenile. The sources of the information may include confidential information from third parties, such as schools and mental health providers. Often, when reports are based on such a totality of information, the reports submitted to the juvenile court do not include a list of the sources of information or documents relied upon when preparing the report.

Attorneys of the Tarrant County Criminal District Attorney's Office assigned to the 323rd District Court act as Tarrant County's local juvenile prosecuting attorneys. In a

Hon. Ken Paxton

Request for Opinion – the applicability of Code of Criminal Procedure article 39.14 to third-party records in the possession of the local juvenile justice agency and used in support of its social history report to the juvenile court.

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particular case, a juvenile prosecuting attorney has been asked by the attorney for the juvenile to obtain and disclose any and all records relied upon by Juvenile Services in its report and to disclose them to respondent pursuant to Code of Criminal Procedure article 39.14(a). The tension created by that request lies between the ethical obligations implicated by Article 39.14 and the confidentiality that adheres to those underlying records.

For the pending case, we have resolved the matter by asking the attorney for the juvenile to have the juvenile sign a release and to subpoena the material directly from Juvenile Services. *See* Tex. Fam. Code § 51.17(a), (b); Tex. R. Civ. P. 205.1(d). However, the question is likely to recur.

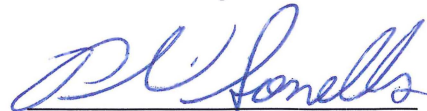
Accordingly, Tarrant County requests the Office of the Attorney General to issue an opinion clarifying the scope of obligations imposed by Texas Code of Criminal Procedure article 39.14 on the Tarrant County Criminal District Attorney to obtain and disclose information held by Tarrant County Juvenile Services. Specifically:

1. Is Tarrant County Juvenile Services, as a non-law-enforcement county agency, “the State” or an entity “under contract with the state” such that it must provide records in its possession to the Tarrant County Criminal District Attorney for discovery to a juvenile respondent under Code of Criminal Procedure article 39.14?
2. What is the role of the juvenile court in the handling of privileged and confidential information such as mental health information, information protected by HIPAA, attorney/client privileged information, and attorney work product?

A brief in support of this request is enclosed.

Respectfully submitted,

Phil Sorrells
Criminal District Attorney
Tarrant County, Texas

A handwritten signature in blue ink, appearing to read "Phil Sorrells", is written over a horizontal line.

**BRIEF IN SUPPORT OF
REQUEST FOR OPINION OF THE
TEXAS ATTORNEY GENERAL**

THE APPLICABILITY OF CODE OF CRIMINAL PROCEDURE ARTICLE 39.14 TO THIRD-PARTY
RECORDS IN THE POSSESSION OF THE LOCAL JUVENILE JUSTICE AGENCY AND USED IN
SUPPORT OF ITS SOCIAL HISTORY REPORT TO THE JUVENILE COURT

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OVERVIEW

Tarrant County Juvenile Services (“Juvenile Services”) is the local juvenile probation department for Tarrant County, operating under the auspices of the statewide Texas Juvenile Justice Department. *See* 2020 Juvenile Justice Handbook, Office of the Attorney General (“Handbook”) at 2-4. In some instances, Juvenile Services determines that the juvenile’s case provides probable cause to believe the juvenile engaged in delinquent conduct, and under Section 53.01 of the Family Code, refers the youth to the juvenile prosecuting attorney for review.

Attorneys of the Tarrant County Criminal District Attorney’s Office assigned to the 323rd District Court act as Tarrant County’s local juvenile prosecuting attorneys. *See* Tex. Fam. Code § 53.012(a); *see also* Handbook at 5. Upon a referral from Juvenile Services, attorneys from my office will review the case for legal sufficiency and desirability of prosecution to decide whether to file a petition to adjudicate the juvenile to be delinquent. *See* Tex. Fam. Code §§ 53.012(a), 53.04.

When a petition to the juvenile court ends in an adjudication of delinquency and the need for a disposition, Juvenile Services prepares a social history report for the juvenile justice court’s use in determining the appropriate disposition. *See* Tex. Fam. Code § 54.04(b). The statute requires that the juvenile court will provide access to the parties of the records it possesses and is relying on before the disposition hearing *See* Tex. Fam. Code § 54.04(b).

The social history reports that are created for disposition are often based on information Juvenile Services has obtained throughout its work of providing services to the juvenile. The information contained in such reports may have as its source numerous records from third parties, such as schools and mental health providers. When reports are based on such a totality of information, the reports submitted to the juvenile court generally do not include a list of the sources of information or documents relied upon when preparing the report. Therefore, when the juvenile court provides the parties access to the juvenile services reports, it does not generally provide access to the underlying source information.

In a particular case, the juvenile prosecuting attorney has been asked to obtain and disclose any and all records relied upon by Juvenile Services in its report and to disclose them to respondent pursuant to Code of Criminal Procedure article 39.14(a). The tension created by that request lies between the statutory and ethical obligations implicated by Code of Criminal Procedure article 39.14 and the confidentiality that adheres to those underlying records.

The following questions have arisen:

1. Is Tarrant County Juvenile Services, as a non-law-enforcement county agency, “the State” or an entity “under contract with the state” such that it must provide records in its possession to the Tarrant County Criminal District Attorney for discovery to a juvenile respondent under Code of Criminal Procedure article 39.14?
2. What is the role of the juvenile court in the handling of privileged and confidential information such as mental health information, information protected by HIPAA, attorney/client privileged information, and attorney work product?

APPLICABLE LAW

The Michael Morton Act

Although juvenile cases are civil matters, they are “quasi-criminal” in nature, and certain aspects of the trial are governed by the Code of Criminal Procedure and the rules of evidence applicable to criminal cases. *In re J.T.M.*, 441 S.W.3d 455, 464 (Tex. App.—El Paso 2014, no pet.). Discovery is among those aspects of juvenile proceedings governed by the Code of Criminal Procedure. *See* Tex. Fam. Code § 51.17. Section 51.17 provides that, with certain exceptions or “when in conflict with a provision of this title, the Texas Rules of Civil Procedure govern proceedings under this title.” Tex. Fam. Code § 51.17(a). And, that section immediately makes provision for matters of discovery and evidence:

(b) Discovery in a proceeding under this title is governed by the Code of Criminal Procedure and by case decisions in criminal cases.

(c) Except as otherwise provided by this title, the Texas Rules of Evidence applicable to criminal cases and Articles 33.03 and 37.07 and Chapter 38, Code of Criminal Procedure, apply in a judicial proceeding under this title.

Tex. Fam. Code § 51.17.

Chapter 39 of the Code of Criminal Procedure governs criminal discovery. Prior to 2014, Article 39.14 provided for production upon request of documents “**in the possession, custody or control of the State or any of its agencies.**” *See* Acts 2005, 79th Leg., ch. 1019, § 1, eff. June 18, 2005 (emphasis added). Thus, the question before 2014 was whether every governmental agency qualified as “the State or any of its agencies.”

Answering that question, Texas courts have held that material possessed by agencies with non-law-enforcement purposes are not subject to discovery under Article 39.14 or the

Brady rule.¹ See *Harm v. State*, 183 S.W.3d 403, 407-408 (Tex. Crim. App. 2006) (en banc) (CPS records not possessed by prosecutor not subject to discovery under Article 39.14(a)); see also *Valdez v. State*, 116 S.W.3d 94 (Tex. App.—Houston [14th Dist.] 2002, pet. ref'd) (“In discovery matters, the State’s attorney is answerable only for evidence in his direct possession or in the possession of law enforcement agencies.”); *Mitchell v. State*, No. 11-93-00024-CR, 1994 WL 16189625, at *3-4 (Tex. App. – Eastland November 17, 1994, pet. ref'd) (not designated for publication) (holding that records of a crisis center not possessed by the State are not subject to discovery under Article 39.14).

But in 2014, “the Michael Morton Act did not merely amend a portion of Article 39.14(a); it revamped Article 39.14 completely.” *Watkins v. State*, 619 S.W.3d 265, 277 (Tex. Crim. App. 2021), reh’g denied (Apr. 14, 2021). Among the changes made, the phrase in Article 39.14(a) requiring production of documents “in the possession, custody or control of the State or any of its agencies” was amended to read “**in the possession, custody, or control of the state or any person under contract with the state.**” Tex. Code Crim. Proc. art. 39.14, Acts 2013, 83rd Leg., ch. 49 (S.B. 1611), § 2, eff. Jan. 1, 2014 (emphasis added).

Whether or not the pre-2014 distinction between agencies with a law enforcement function and agencies with another primary purpose remains good law for Article 39.14 purposes has not been well-litigated. In unreported decisions, at least three courts of appeals have continued to quote with approval the *Valdez* holding that “In discovery matters, the State’s attorney is answerable only for evidence in his direct possession or in the possession of law enforcement agencies.” See *Arredondo v. State*, No. 07-22-00089-CR, 2023 WL 1415624, at *3 (Tex. App.—Amarillo Jan. 31, 2023, pet. ref'd) (mem. op., not designated for publication) (records of defendant’s prior convictions); *Bennett v. State*, No. 03-21-00225-CR, 2022 WL 16973692, at *13 (Tex. App.—Austin Nov. 17, 2022, pet. ref'd) (mem. op., not designated for publication) (cell phone records); *State v. Norwood*, No. 09-15-00083-CR, 2015 WL 5093332, at *1 (Tex. App.—Beaumont August 5, 2015, pet. ref'd) (mem. op., not designated for publication) (DEA records).

The distinction will likely continue to be made, since it has historically extended beyond Article 39.14(a) and into the contexts of *Brady*, *Miranda*,² and the Fourth Amendment. The distinction made in those contexts was based on the recognition that not every government employee serves the role of “the State” in a criminal prosecution. *Harm*, 183 S.W.3d at 407-08. “Our law recognizes that different types of state employees serve different roles.” *Wilkerson v. State*, 173 S.W.3d 521, 528 (Tex. Crim. App. 2005).

¹ See *Brady v. Maryland*, 373 U.S.83 (1963).

² See *Miranda v. Arizona*, 384 U.S. 436 (1966).

Thus, under *Brady*, the State has a constitutional duty to disclose to a defendant material, exculpatory and impeachment evidence in its possession. *Pena v. State*, 353 S.W.3d 797, 810 (Tex. Crim. App. 2011). The duty does not extend to information the State does not possess and that is not known to exist. *Id.* at 797. The State is required to learn of *Brady* evidence only when it is known to others acting on the State's behalf in a particular case. *Harm*, 183 S.W.3d at 406 (citing *Kyles v. Whitley*, 514 U.S. 419, 437–38, 115 S.Ct. 1555, 1567–68 (1995)); *Ex parte Mitchell*, 977 S.W.2d 575, 578 (Tex. Crim. App. 1997), cert. denied, 525 U.S. 873, 119 S.Ct. 172 (1998) (noting that *Brady* requires the State to disclose material exculpatory evidence in the possession of police agencies and other parts of the prosecutorial team).

In *Wilkerson*, the Court of Criminal Appeals recognized that distinction in the context of the *Miranda* Rule. Mere employment by a state agency “does not, by itself, make the person an ‘agent of the state’ for the purpose of defining ‘custodial interrogation.’” *Wilkerson*, 173 S.W.3d at 529. Conversely, for purposes of custodial interrogations, even a private party may be a state agent when the person acts as a proxy for law enforcement and at law enforcement’s behest. *Id.* at 530.

In the Fourth Amendment context, to determine whether a non-law-enforcement party is acting as an agent of the government, courts ask, *inter alia*, “whether the party performing the search intended to assist law enforcement efforts or, instead, to further his own ends.” *Stoker v. State*, 788 S.W.2d 1, 11 (Tex. Crim. App. 1989); *see also Dawson v. State*, 106 S.W.3d 388, 392 (Tex. App.—Houston [1st Dist.] 2003, no pet.).

Thus, while the duties of many agencies may entail investigation of misconduct, that fact alone “does not automatically transform” an employee of such a department into law enforcement officers or state agents subject to the rules of criminal investigation and procedure. *Harm*, 183 S.W.3d at 407-08.

The Function of the Juvenile Probation Department

The definitions of criminal justice agencies and juvenile justice agencies found in Chapter 58 of the Family Code comport with the above-described distinctions. For the former, Family Code section 58.101(1) refers to the Government Code for the definition of a “criminal justice agency.” The referred-to Government Code section provides that a “criminal justice agency” means:

a federal or state agency that is engaged in the administration of criminal justice under a statute or executive order and that allocates a substantial portion of its annual budget to the administration of criminal justice.

Tex. Gov't Code § 411.082(3)(A).

In contrast, the Family Code provides that “juvenile justice agency” means an agency that has custody or control over juvenile offenders. Tex. Fam. Code § 58.101(5).

The word “custody” should not be misunderstood. The Family Code specifically provides that the “taking of a child into custody is not an arrest.” Tex. Fam. Code § 52.01(b). A child’s “custody” may include, for example, probation and placement in a foster home. *E.g., In the Matter of E.A.R.*, S.W.2d 454 (Tex. Civ. App.—Texarkana 1977, no writ).

Not every child taken into custody becomes the subject of a juvenile court case. *See generally* Dawson, Texas Juvenile Law, 9th Ed. Chapter 4. The juvenile probation department is also charged with conducting a preliminary investigation to screen cases for possible referral to the juvenile court. *See* Tex. Fam. Code § 53.01. Upon a finding of no probable cause, the child will be immediately released. *See* Tex. Fam. Code § 53.01(b). Eligible children may be referred for services. *See* Tex. Fam. Code §§ 53.01(b-1), 53.011. Children taken into custody may be diverted to a first offender program or other informal disposition. *See* Tex. Fam. Code §§ 52.031, 52.032. “Supervisory caution” and “counsel and release” are descriptive terms used for “the variety of non-judicial dispositions that juvenile intake may make in a case.” Dawson, Texas Juvenile Law, 9th Ed., at 90. “These dispositions may involve, for example, referring the child to a social agency, contacting parents to inform them of the child’s activities, or simply warning the child about his or her activities.” *Id.* Those informal dispositions are available so long as there is not probable cause to believe that the child engaged in delinquent conduct or conduct indicating a need for supervision. *See* Tex. Fam. Code § 52.032(b).

If the initial screening ends with a probable cause determination, the juvenile probation department refers the case to the prosecuting attorney. Upon such a referral, the prosecuting attorney shall promptly review the referral for legal sufficiency and the desirability of prosecution. *See* Tex. Fam. Code § 53.012(a). The “juvenile prosecuting attorney” may be either an assistant district attorney or an assistant county attorney. *See* Handbook at 5. If the juvenile prosecuting attorney accepts the case, a petition will be filed. *See* Tex. Fam. Code § 53.04.

Given the just-described structure, the fact that the juvenile probation department makes a referral to the prosecuting attorney does not make it a law-enforcement agency. Rather, it stands between law enforcement and the prosecuting attorney as a diversion from

the criminal justice system. The core mission of the Tarrant County Juvenile Services is service, not criminal prosecution. In its online Overview of Services, Tarrant County Juvenile Services states that:

Tarrant County Juvenile Services has developed programs and operations **with the goal of diverting youth from the juvenile justice system** at the earliest appropriate point. The Juvenile Court endorses this belief by striving to identify the least restrictive environment for the care and rehabilitation of children while assuring community safety. To this end, Tarrant County Juvenile Services has developed a range of community and home-based programs as additional options in solving the problem of juvenile crime.

-<https://www.tarrantcountytx.gov/content/main/en/juvenile-services/about-juvenile-services.html>; *see also In re J.L.C.*, No. 2-06-252-CV, 2007 WL 1168474, at *n 10 (Tex. App.—Fort Worth Apr. 19, 2007, no pet.) (mem. op. not designated for publication).

Nor is Juvenile Services made an arm of law enforcement merely by providing information to the juvenile court for disposition. In the event a petition leads to an adjudication of delinquency, at disposition, the local juvenile probation department is called upon to prepare predisposition social history reports detailing the juvenile's current offense, participation in programs, social history, home life, school behavior, attendance, and grades. *See* Tex. Fam. Code § 54.04(a); *see, e.g., Matter of N.T.*, No. 05-16-00821-CV, 2017 WL 4533798, at *1 (Tex. App.—Dallas Oct. 11, 2017, no pet.) (mem. op. not designated for publication); *In re R.W.R.*, No. 2-04-331-CV, 2005 WL 1838981, at *3 (Tex. App.—Fort Worth Aug. 4, 2005, no pet.) (mem. op. not designated for publication).

But fulfilling that mandate does not make Juvenile Services a law-enforcement partner. As with an adult probation department's presentence investigation and report, the juvenile probation department's report is generally accepted as one prepared by a neutral source of information for the judge's use in disposition. *Cf. Stringer v. State*, 309 S.W.3d 42, 48 (Tex. Crim. App. 2010) (probation officer is neutral, not an advocate); *Townes v. State*, 572 S.W.3d 767, 770 (Tex. App.—Houston [14th Dist.] 2019, pet. ref'd).

Reports to the Juvenile Court at Disposition May Contain Confidential Third-Party Information

Due process challenges to Family Code section 54.04's allowance of reports containing hearsay have been rebuffed. *See, e.g., In the Matter of A.F.*, 895 S.W.2d 481, 485-86 (Tex. App.—Austin 1995, no writ); *In the Matter of A.A.A.*, 528 S.W.2d 337, 341 (Tex. Civ. App.—Corpus Christi 1975, no writ) (affirming receipt into evidence of report containing information obtained after initial detention from physical and psychological testing and

investigation of the juvenile environment); *Tyler v. State*, 512 S.W.2d 46, 48 (Tex. Civ. App.—Beaumont 1974, no writ). In so holding, courts have observed that the purpose of section 54.04(b) “is to broaden, not contract, the pool of information upon which the court makes its decision.” *Matter of A.F.*, 895 S.W.2d at 485-86. In short, social history reports may legitimately incorporate or rely on other documents. See *In the Matter of J.A.W.*, 976 S.W.2d 260, 264-65 (Tex. App.—San Antonio 1998, no pet.); see also Dawson, Texas Juvenile Law, 9th ed., at 256-57.

That reliance on third-party information has created the problem addressed by this request for opinion. To be sure, Family Code section 58.007 provides access to the child’s attorney and the prosecuting attorney of the records of the juvenile probation department pertaining to the juvenile case. But the records at issue here are *not* the records of Juvenile Services but of third parties that have shared their confidential records with Juvenile Services. Thus, by obtaining the records, Juvenile Services has become responsible for the handling of privileged and confidential information such as mental health information, information protected by HIPAA, attorney/client privileged information, and attorney work product.

Other aspects of the Family Code reflect the ongoing confidentiality of such records. For example, Texas Family Code section 58.0052 provides for interagency sharing of non-educational records such as mental health records only for the limited purpose of coordinating and improving the care being provided to a multi-system youth (one receiving services from two or more juvenile service providers). See Tex. Fam. Code § 58.0052.

Similarly, the question of ongoing confidentiality of underlying documents is addressed by the Texas Juvenile Justice Department in its “Summary of Texas Family Code Provisions Regarding Juvenile Records in Texas” published in 2017. At page 13 of that publication, the Department cites Family Code section 58.106(b) and notes that “[t]he information that DPS may share is only the information in JJIS; DPS is not authorized to share the underlying document that contained the information.”

The Role of the Juvenile Court

In 2013, Family Code section 54.04 was amended to require that the juvenile court will provide the parties with access to the records it possesses and is relying upon before the disposition hearing:

(b) At the disposition hearing, the juvenile court, notwithstanding the Texas Rules of Evidence or Chapter 37, Code of Criminal Procedure, may consider written reports from probation officers, professional court employees, guardians ad litem appointed under Section 51.11(d), or professional

consultants in addition to the testimony of witnesses. On or before the second day before the date of the disposition hearing, the court **shall provide the attorney for the child and the prosecuting attorney with access to all written matter to be considered by the court in disposition.**

Tex. Fam. Code § 54.04(b) (emphasis added). Family Code section 54.04(b) goes on to note that the information provided to the court by Juvenile Services may be held in confidence, even from the juvenile's parent:

The court may order counsel not to reveal items to the child or the child's parent, guardian, or guardian ad litem if such disclosure would materially harm the treatment and rehabilitation of the child or would substantially decrease the likelihood of receiving information from the same or similar sources in the future.

Tex. Fam. Code § 54.04(b). That provision demonstrates a legislative recognition of the ongoing confidentiality that may adhere to the report and the information contained therein. *See Matter of R.S.*, No. 02-22-00165-CV, 2022 WL 17494602, at *4 (Tex. App.—Fort Worth Dec. 8, 2022, no pet.) (mem. op., not designated for publication) (noting that trial court also took judicial notice of the sealed report that included a victim statement, placement summary, and detailed description of R.S.'s background and the results of his psychological testing).

Obviously, most of the records at issue are the juvenile's and are being sought by that juvenile's attorney. And an exception to the privilege of confidentiality in a court or administrative proceeding exists in a criminal prosecution in which the patient is a victim, witness, or defendant. *See* Tex. Occ. Code § 159.003(a)(10). However, even for those types of records, Texas Occupations Code section 159.003(c) provides:

Records or communications are not discoverable under Subsection (a)(10) until the court in which the prosecution is pending makes an *in camera* determination as to the relevancy of the records or communications or any portion of the records or communications. That determination does not constitute a determination as to the admissibility of the information.

Tex. Occ. Code § 159.003(c). Thus, even though some of the records at issue are the juvenile's own, some judicial oversight of discovery is required.

SUMMARY

From the Tarrant County Criminal District Attorney's perspective, Tarrant County Juvenile Services, as the local juvenile probation department, is neither a state agency nor an agency in contract with the State for purposes of Article 39.14. Juvenile Services is analogous to CPS, which investigates child abuse and refers some, but not all, cases to the State for

criminal prosecution. The mere fact that an agency's duties may entail investigation of misconduct "does not automatically transform" an employee of such a department into law enforcement officers or state agents subject to the rules of criminal investigation and procedure. *Harm*, 183 S.W.3d at 407-08.

Nor is Juvenile Services a law enforcement agency. Unlike a police department, Juvenile Services has a broader mission than to enforce criminal law and investigate and gather evidence for criminal prosecutions. Indeed, its core mission, described above, is more aptly viewed as a bulwark against juveniles entering the criminal justice system. Thus, Juvenile Services is not a state agency for Article 39.14(a) purposes.

For that reason, rather than seeking the documents underlying a social history report via Article 39.14, the better course of action of the juvenile's attorney is to seek an order from the court directing Juvenile Services to provide underlying documents and written materials to the court for its *in camera* inspection. If the juvenile court determines the material is relevant to its disposition of the case, it will grant the parties access to the material as required by Family Code section 54.04(b).

Moreover, a child's attorney is not without other recourse. While discovery is governed by the Code of Criminal Procedure, a defendant in a juvenile proceeding may benefit from the broader civil rules for compulsory process. *See* Tex. Fam. Code § 51.17(a), (b). Under the Rules of Civil Procedure, a party may subpoena and receive documents directly from a nonparty. *See* Tex. R. Civ. P. 205.1(d).

We respectfully request your opinion regarding application of the law in the circumstances described above.

Respectfully submitted,

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