



August 5, 1999

Mr. Wayne Scott
Executive Director
Texas Department of Criminal Justice
P.O. Box 13084
Austin, Texas 78711

Open Records Decision No. 659

Re: Whether communications made in a victim-offender mediation session are confidential under section 154.073 of the Civil Practice and Remedies Code.
(ORQ-29)

Dear Mr. Scott:

On behalf of the Texas Department of Criminal Justice (the "department"), you ask whether communications made in a victim-offender mediation session are confidential under section 154.073 of the Civil Practice and Remedies Code in conjunction with the Public Information Act's section 552.101 of the Government Code. These communications include records of the victim-offender mediation such as the Affirmation Agreement and the videotape of the mediation.

The department's Victim Services Division provides and administers the victim-offender mediation program. The purpose of the victim-offender mediation is to "provide victims of . . . crime the opportunity to have a structured face-to-face meeting with their offender(s) in a secure, safe environment, in order to facilitate a healing, reconstruction/recovery process." Likewise, the victim-offender mediation provides an offender with the opportunity to realize the human impact of the crime upon the victim.

The mediation is initiated by the department at the request of a victim. Participation in the mediation is voluntary, and either the victim or offender may withdraw from participation at any time in the process. In addition, the mediator has discretion to terminate the mediation if he feels the process is no longer beneficial to either party. Before the victim and offender actually meet, each must be screened to ensure that mediation is appropriate for the particular parties involved, and each party must go through an initial "orientation phase" that prepares them for the face-to-face mediation session. In order to participate, the offender must admit guilt and take responsibility for the crime that is the subject of the mediation. The

department's staff decides if the mediation is appropriate in each case. At the conclusion of the mediation, the parties may memorialize any agreements and understandings by signing an Affirmation Agreement. The terms of the agreement may include a mutual commitment to crime prevention, providing community services, striving for criminal justice reform, participation in victim impact panels, specified use of audiotaped and videotaped recordings of the mediation session, and means of restitution.

A trained, volunteer mediator presides over the session and facilitates the discussion. The mediator is not a legal advisor and, therefore, does not provide legal advice to any party. Moreover, the mediator does not impose any solutions or expectations on the victim or offender.

In 1997, the Seventy-fifth Legislature enacted two provisions to facilitate victim-offender mediation when a victim or a victim's close relative or guardian requests mediation with an offender.¹ Article 26.13(g) of the Code of Criminal Procedure provides that "[b]efore accepting a plea of guilty or a plea of nolo contendere and on the request of a victim of the offense, the court may assist the victim and the defendant in participating in a victim-offender mediation program." Section 30 of article 42.18 of the Code of Criminal Procedure provides that the department's Pardons and Paroles Division shall cooperate and assist the victim when the division receives notification that the victim wishes to participate in victim-offender mediation with a person released to parole or mandatory supervision.² Finally, we note that one other statute references the use of victim-offender mediation in the criminal process. Section 11(a)(16) of article 42.12 of the Code of Criminal Procedure states that, with the consent of the victim of a misdemeanor offense or of any offense under Title 7 of the Penal Code, a judge may require a defendant to participate in victim-offender mediation as a condition of community supervision.

You ask whether the victim-offender mediation, as described above, is the type of mediation contemplated by chapter 154 of the Civil Practice and Remedies Code, and therefore, whether communications made during the victim-offender mediation are afforded the confidentiality of section 154.073. Chapter 154, the Texas Alternative Dispute Resolution

¹Act of May 29, 1997, 75th Leg., R.S., ch. 670, §§ 3-4, 1997 Tex. Gen. Laws 2269, 2270.

²Section 12.22 of Senate Bill 898 repealed article 42.18 of the Code of Criminal Procedure. Act of May 8, 1997, 75th Leg., R.S., ch. 165, § 12.22, 1997 Tex. Gen. Laws 327, 443. Article 42.18 was recodified as chapter 508 of the Government Code. *Id.* § 12.01, 1997 Tex. Gen. Laws 327, 415-38. This action was a non-substantive recodification. Section 1.02 of Senate Bill 898 provides that the "repeal of a statute by this Act does not affect an amendment, revision, or reenactment of the statute by the 75th Legislature, Regular Session, 1997. The amendment, revision, or reenactment is preserved and given effect as part of the code provision that revised the statute so amended, revised or reenacted." *Id.* § 1.02(a), 1997 Tex. Gen. Laws 327, 327. Thus, section 30 of article 42.18 is given effect despite the repeal and recodification of article 42.18. *See* Gov't Code § 311.031(c)

Procedures Act (the “ADR Act”), governs alternative dispute resolution procedures. The stated policy of the ADR Act is to encourage the peaceable resolution of disputes and the early settlement of pending litigation through voluntary settlement procedures. Civ. Prac. & Rem. Code § 154.002. A court may refer a pending dispute for resolution by an alternative dispute resolution procedure. Such an ADR procedure includes a nonjudicial and informally conducted forum for the voluntary settlement of citizens’ disputes through the intervention of an impartial third party or any of the alternative dispute resolution procedures described under this subchapter. *Id.* § 154.021(a)(3).

Section 154.023 recognizes mediation as an ADR procedure. “Mediation is a forum in which an impartial person, the mediator, facilitates communication between parties to promote reconciliation, settlement, or understanding among them.” *Id.* § 154.023(a). The other types of ADR procedures are the mini-trial, *id.* § 154.024; moderated settlement conference, *id.* § 154.025; summary jury trial, *id.* § 154.026; and arbitration, *id.* § 154.027. After reviewing chapter 154 in its entirety, we believe that the department’s victim-offender mediation is not “mediation” as contemplated by chapter 154. When read as a whole, it is apparent that chapter 154 contemplates the existence of a dispute that the parties want to resolve, and chapter 154 thereby establishes the various methods for resolution of the dispute. Indeed, the stated purpose of the chapter is “to encourage the peaceable resolution of disputes” and “the early settlement of pending litigation through voluntary settlement procedures.” *Id.* § 154.002. The individual provisions of chapter 154 also indicate that the parties must be attempting to resolve a dispute for the provisions to apply. *See, e.g., id.* §§ 154.021 (court may refer pending dispute for resolution by ADR procedure), .053 (impartial third party shall encourage and assist parties in reaching settlement of their dispute), .073(a) (communication relating to subject matter of any *civil or criminal dispute* made by participant in ADR procedure is confidential).

Victim-offender mediation provides a forum in which an impartial third party, the mediator, facilitates communication between a victim and an offender to promote reconciliation and understanding between them. A review of the relevant statutes and the department’s description of victim-offender mediation demonstrates that the parties in a victim-offender mediation are not attempting to resolve a pending criminal dispute. For example, in order to participate in the mediation, an offender must admit guilt or otherwise accept responsibility for the crime of record. Upon submission of the defendant’s plea of guilty or plea of nolo contendere, article 26.13(g) of the Code of Criminal Procedure permits a court to assist the victim and the defendant in participating in a victim-offender mediation. In addition, a judge may impose victim-offender mediation as a condition of probation. Code Crim. Proc. art. 42.12, § 11(a)(16). Lastly, before an offender is released to parole or mandatory supervision, the Pardons and Paroles Division must assist the victim in coordinating victim-offender mediation when the division receives such a request from the victim. *Id.* art. 42.18, § 30. Thus, in these situations, participation in the victim-offender mediation does not involve the resolution of a criminal dispute because, before mediation

commences, the offender has been adjudicated of the crime or the offender has admitted guilt or has accepted responsibility for the crime. In fact, section 30 of article 42.18 of the Code of Criminal Procedure expressly states that the Pardons and Paroles Division may not reward an offender for participation in the mediation by modifying conditions of release or the level of supervision. Moreover, the department's policy states that the "program is a personal process between victim and offender and is totally separate from and can have no bearing on an offender's particular judicial/appellate proceedings."

While we recognize the importance of the victim-offender mediation in providing emotional relief and healing to the victims and offenders, the program is not the type of "mediation" contemplated by chapter 154 of the Civil Practice and Remedies Code. Rather than resolving any disputes or settling any litigation between the parties, the purpose of the victim-offender mediation is to provide victims with an opportunity to confront the offender in order to facilitate a healing, recovery process. Another stated purpose of the victim-offender mediation is to "provide victims and offenders the opportunity for clearer understanding and personalization of the crimes' impact upon their lives." The mediation provision under section 154.023, when read in the context of chapter 154, envisions a forum in which an impartial third party facilitates communication between parties to promote the settlement of a dispute. Because the objective of the department's victim-offender mediation is to provide a means for the victims and offenders to therapeutically and emotionally cope with the aftermath of the commission of a crime rather than resolving any civil or criminal dispute, the victim-offender mediation does not fall within the auspices of chapter 154.³ Thus, any communications made during the victim-offender mediation are not afforded the confidentiality of section 154.073, which makes confidential communications and records made in an ADR procedure.

While the communications and records made in the department's victim-offender mediation are not confidential under section 154.073, given the subject matter and content of such communications, the information may nevertheless be excepted from public disclosure by common-law privacy as encompassed by section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses common-law privacy and excepts from disclosure private facts about an individual. *Industrial Found. v.*

³Judge James E. Klager, the judge of County Court at Law No. 4 in Nueces County, asserts that the criminal mediation process that Texas courts conduct is different from the department's victim-offender mediation. We note that there is some confusion in the terminology in that some of the published articles submitted to this office refer to the criminal dispute mediation as victim-offender mediation also. It appears that the criminal dispute mediation occurs prior to the adjudication of the offense, and the parties to the criminal dispute mediation are attempting to resolve a criminal dispute and arrive at a proper sanction for the offense. We agree that the criminal dispute mediation to which Judge Klager refers is different from the department's victim-offender mediation at issue here. This ruling is limited to the applicability of chapter 154 to the department's victim-offender mediation. We reserve the question of whether chapter 154 applies to criminal dispute mediation for future discussion.

Texas Indus. Accident Bd., 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Therefore, information may be withheld from the public when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Id.* at 685; Open Records Decision No. 611 at 1 (1992).

The types of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Industrial Found.*, 540 S.W.2d at 683. This office has found that the following types of information are excepted from required public disclosure under privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps), personal financial information not relating to the financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990), information concerning the intimate relations between individuals and their family members, *see* Open Records Decision No. 470 (1987), and identities of victims of sexual abuse or the detailed description of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982).

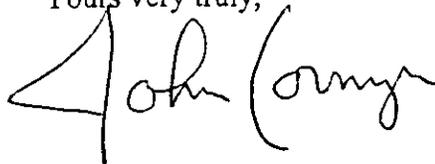
Under the second prong of the *Industrial Foundation* test, information is private if there is no legitimate public interest in its disclosure. 540 S.W.2d at 685. Generally, there is no legitimate public interest in disclosure of an individual's processing of her emotions in achieving healing and closure. Thus, records and communications made by the participants in the mediation may be protected by common-law privacy. However, whether certain information is excepted from public disclosure by privacy is determined on a case-by-case basis.⁴

⁴You indicate that, with the parties' prior consent, the department uses some of the information produced in the mediation for training purposes. The Public Information Act (the "act") states in several provisions that public information is available to "the people," "the public," and "any person." *See, e.g.*, Gov't Code §§ 552.001, .021, .221(a). Thus, the act deals primarily with the general public's access to information. The transfer of information within a governmental body is not a release to the public. A member of a governmental body, acting in her official capacity, is not a member of the public for purposes of access to information in the governmental body's possession. Thus, an authorized official may review records of the governmental body without implicating the act's prohibition against selective disclosure. *See* Open Records Decision Nos. 468 at 4 (1987) (governmental body does not release evaluations to the public by allowing employee to see her job evaluations), 464 at 5 (1987) (distribution of evaluations by university faculty members among faculty members does not waive exceptions to disclosure with respect to general public) (overruled on other grounds by Open Records Decision No. 615 (1993)). Accordingly, the department's use of the materials for training purposes is not a release to the public and does not waive the parties' privacy interests.

SUMMARY

The victim-offender mediation conducted by the Texas Department of Criminal Justice is not mediation as contemplated by chapter 154 of the Civil Practice and Remedies Code because the victim and offender are engaged in a healing process rather than attempting to resolve a dispute. Therefore, communications made during the victim-offender mediation are not confidential under section 154.073. However, the participants' communications and records of the victim-offender mediation may be protected from public disclosure by common-law privacy as encompassed by section 552.101 of the Government Code.

Yours very truly,

A handwritten signature in black ink that reads "John Cornyn". The signature is written in a cursive style with a large, stylized initial "J".

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