



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 4, 2009

Mr. Jay A. Cantrell
Attorney At Law
1101 Scott Avenue, Suite 6
Wichita Falls, Texas 76301-4660

OR2009-02858

Dear Mr. Cantrall:

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# 336283.

The City of Burkburnett (the "city"), which you represent, received two requests for information: one requestor asked for records and video pertaining to two named individuals and the other asked for two specified police reports. You state you do not have any responsive information for the requested video.¹ You claim that the submitted information is excepted from disclosure under sections 552.101 and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note, and you acknowledge, that the information submitted as Tab 2 is a law enforcement record of a juvenile that is generally confidential under section 58.007(c) of the Family Code. *See* Fam. Code § 58.007(c). In this instance, however, the first requestor is the father of the child listed as the arrestee in the report submitted at Tab 2. As such, the city may not withhold this report from this requestor under section 58.007(c) of the Family Code. *See id.* § 58.007(e) (providing that law enforcement records subject to section 58.007(c) may

¹We note that the Act does not require the district to release information that did not exist when it received this request, create responsive information, or obtain information that is not held by or on behalf of the district. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 534 at 2-3 (1989), 518 at 3 (1989), 452 at 3 (1986), 362 at 2 (1983).

be inspected or copied by the child's parent). We also note that section 58.007(j) provides that, notwithstanding section 58.007(e), any information that is excepted from required disclosure under Chapter 552, Government Code, or other law may still be withheld from disclosure. *See id.* § 58.007(j)(2). We will therefore address your other arguments against disclosure for Tab 2 as well as the information submitted as Tab 3. We will also address your arguments for the submitted information with regard to the second requestor.

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. Section 552.101 encompasses section 261.201 of the Family Code, which provides as follows:

(a) The following information is confidential, is not subject to public release under Chapter 552, Government Code, and may be disclosed only for purposes consistent with [the Family Code] and applicable federal or state law or under rules adopted by an investigating agency:

(1) a report of alleged or suspected abuse or neglect made under [chapter 261 of the Family Code] 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 [chapter 261 of the Family Code] or in providing services as a result of an investigation.

Fam. Code § 261.201(a). Upon review, we find that Tab 2 and Tab 3 consist of files, reports, records, communications or working papers used or developed in an investigation under chapter 261. *See id.* § 261.001(1)(E)(definition of child abuse includes indecency with a child under Penal Code section 21.11 and sexual assault or aggravated sexual assault under Penal Code sections 22.011 and 22.021); *see also id.* § 101.003(a) (defining "child" for purposes of this section as person under 18 years of age who is not and has not been married or who has not had the disabilities of minority removed for general purposes). Thus, we find that the information at issue is within the scope of section 261.201 of the Family Code. You have not indicated that the city's police department has adopted a rule that governs the release of this type of information; therefore, we assume that no such regulation exists. Given that assumption, we conclude that Tab 2 and Tab 3 are generally confidential under section 261.201 of the Family Code. *See Open Records Decision No. 440 at 2 (1986) (predecessor statute).* Accordingly, the city must withhold Tab 2 and Tab 3 from the

second requestor under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code.²

We note, however, that Tab 2 contains the first requestor's son's fingerprints. The public availability of biometric identifiers is governed by sections 560.001, 560.002, and 560.003 of the Government Code. Section 560.001 provides in part that "[i]n this chapter . . . '[b]iometric identifier' means a retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry." Gov't Code § 560.001(1). Section 560.003 provides that "[a] biometric identifier in the possession of a governmental body is exempt from disclosure under [the Act]." *Id.* § 560.003. Section 560.002 provides, however, that "[a] governmental body that possesses a biometric identifier of an individual . . . may not sell, lease, or otherwise disclose the biometric identifier to another person unless . . . the individual consents to the disclosure[.]" *Id.* § 560.002(1)(A). Sections 560.001, 560.002, and 560.003 are intended to protect the privacy of a living individual to whom a fingerprint or other biometric identifier pertains. To the extent the first requestor is the authorized representative of the individual whose fingerprints are at issue, he has a right of access to the information pursuant to section 560.002.

Generally, information used or developed in an investigation of child abuse under chapter 261 of the Family Code must be withheld in its entirety under section 261.201 of the Family Code. Thus, there is a conflict of laws between section 261.201 and section 560.002 of the Government Code. However, where information falls within both a general and a specific statutory provision, the specific provision prevails over the general. *See id.* § 311.025(a) (if statutes enacted at same or different sessions of legislature are irreconcilable, statute latest in date of enactment prevails); *Cuellar v. State*, 521 S.W.2d 277 (Tex. Crim. App.1975) (under well-established rule of statutory construction, specific statutory provisions prevail over general ones); Open Records Decision Nos. 598 (1991), 583 (1990), 451 (1986). In this instance, the public availability provision of section 560.002 of the Government Code is more specific than the general confidentiality provision in section 261.201 of the Family Code. Thus, section 560.002 more specifically governs the public availability of the submitted fingerprints and prevails over the more general confidentiality provisions of section 261.201. *See Lufkin v. City of Galveston*, 63 Tex. 437 (1885) (when two sections of an act apply, and one is general and the other is specific, then the specific controls); *see also* Gov't Code § 311.026 (where a general statutory provision conflicts with a specific provision, the specific provision prevails as an exception to the general provision). Therefore, to the extent the requestor is the authorized representative of the individual whose fingerprints are at issue, they must be released to him under section 560.002 of the Government Code. The city must withhold the rest of Tab 2 from the

²We note that if the Texas Department of Family and Protective Services has created a file on this alleged abuse, a parent of the allegedly abused child may have the statutory right to review that file. *See* Fam. Code § 261.201(g).

first requestor under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code.

Section 261.201 of the Family Code also provides that information encompassed by subsection (a) may be disclosed "for purposes consistent with [the Family Code] and applicable federal or state law." *Id.* § 261.201(a). Tab 3 contains polygraph information pertaining to the first requestor's wife. Access to information obtained during the course of a polygraph examination is governed by section 1703.306 of the Occupations Code, which is also encompassed by section 552.101, and constitutes "applicable state law" for purposes of section 261.201(a). Section 1703.306 of the Occupations Code provides in relevant part:

(a) A polygraph examiner, trainee, or employee of a polygraph examiner, or a person for whom a polygraph examination is conducted or an employee of the person, may not disclose information acquired from a polygraph examination to another person other than:

(1) the examinee or any other person specifically designated in writing by the examinee[.]

Occ. Code § 1703.306(a)(1). Thus, the city has the discretion to release the polygraph information of the first requestor's wife that we have marked pursuant to section 1703.306(a)(1) if the first requestor is his wife's authorized representative and if it determines that disclosure of this information is consistent with chapter 261 of the Family Code. *See* Open Records Decision No. 481 at 9 (1987) (predecessor to section 1703.306 permits, but does not require, examination results to be disclosed to examinees). If the city determines that disclosure of the polygraph information is not consistent with chapter 261 of the Family Code, then it must withhold this polygraph information, as well as the remaining documents in Tab 3, pursuant to section 552.101 of the Government Code in conjunction with section 261.201(a) of the Family Code.

In summary, the city must withhold Tabs 2 and 3 from the second requestor under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code. The city must also withhold Tabs 2 and 3 from the first requestor under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code; however, (1) to the extent the first requestor is the authorized representative of the individual whose fingerprints are at issue in Tab 2, the fingerprints must be released to him under section 560.002 of the Government Code, (2) and the city may release the polygraph information marked in Tab 3 under section 1703.306 of the Occupations Code to the first requestor if he is his wife's authorized representative and it determines that disclosure of this information is consistent with chapter 261 of the Family Code.³

³As our ruling is dispositive, we need not address your remaining arguments against disclosure.

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 http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Paige Savoie
Assistant Attorney General
Open Records Division

PS/eeg

Ref: ID# 336283

Enc. Submitted documents

cc: Requestors
(w/o enclosures)