



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

March 16, 2009

Ms. Claire Yancey
Assistant District Attorney
Denton County
P.O. Box 2850
Denton, Texas 76202

OR2009-03404

Dear Ms. Yancey:

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# 337368.

The Denton County Criminal District Attorney (the "district attorney") received a request for information pertaining to a specified case. You claim that information within the requested file is not subject to the Act under section 552.003(1)(B) of the Government Code as a record of the judiciary. You also claim that the requested information is excepted from disclosure under sections 552.101, 552.108, 552.130, and 552.147 of the Government Code.¹ We have considered your arguments and reviewed the submitted information.

You state that the information requested is maintained by the district attorney on behalf of the Denton County Grand Jury and is therefore not subject to the Act. *See* Gov't Code §§ 552.003(B), .0035(a); *see also* Open Records Decision No. 398 at 2 (1983) (grand jury is part of judiciary for purposes of the Act). This office has determined that a grand jury, for purposes of the Act, is a part of the judiciary, and therefore not subject to the Act. Open Records Decision No. 411 (1984). Further, records kept by a district attorney who is acting as an agent for a grand jury are considered records in the constructive possession of the

¹We note that although you initially raised sections 552.103, 552.107, and 552.111 of the Government Code, you have submitted no arguments in support of these exceptions. Therefore, we do not address sections 552.103, 552.107, or 552.111. *See* Gov't Code §§ 552.301 (e)(1)(A), .302.

grand jury, and therefore are also not subject to the Act. Open Records Decisions Nos. 513 (1988), 411, 398. *But see* ORD 513 at 4 (defining limits of judiciary exclusion). We find the situation here to be substantially similar to the situation we addressed in Open Records Decision No. 513. In that decision, a district attorney claimed that all of the information responsive to an open records request and contained in his investigation file was in the constructive possession of the grand jury because the information was held by the district attorney as an agent of the grand jury. The district attorney thus asserted that his entire investigative file was subject to the judiciary exclusion and outside the reach of the Act. In response to this argument, we stated:

Not all of the information at issue here can be deemed to be within the constructive possession of the grand jury. Your investigation began before any information was submitted to the grand jury. Moreover, the grand jury did not formally request or direct all of the district attorney's actions in this investigation. *See generally* Open Records Decision No. 398 (1983) (audit prepared at direction of grand jury). *Information obtained pursuant to a grand jury subpoena issued in connection with this investigation is within the grand jury's constructive possession. On the other hand, the fact that information collected or prepared by the district attorney is submitted to the grand jury, when taken alone, does not mean that the information is in the grand jury's constructive possession when the same information is also held by the district attorney.* Information not produced as a result of the grand jury's investigation may be protected from disclosure under one of [the Act's] exceptions, but it is not excluded from the reach of [the Act] by the judiciary exclusion. [emphasis added]

ORD 513 at 3. As explained above, we believe that only those portions of the responsive information "obtained pursuant to a grand jury subpoena issued in connection with [the] investigation" are within the grand jury's constructive possession and therefore subject to the judiciary exclusion and outside the reach of the Act. *Id.* We have no indication that the grand jury subpoenaed the submitted investigation files of the district attorney, and we do not believe release of this information implicates the confidentiality provision at article 20.02(a) of the Code of Criminal Procedure ("The proceedings of the grand jury shall be secret."). Nevertheless, to the extent the submitted information was obtained pursuant to a grand jury subpoena issued in connection with an investigation, the information is within the grand jury's constructive possession and is not subject to disclosure under the Act. To the extent the submitted information is not held by the district attorney as an agent of the grand jury, the information is subject to the Act and must be released unless it falls within an exception to disclosure.

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." 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, 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). We find that the submitted information consists of files, reports, records, communications, audiotapes, videotapes, or working papers used or developed in an investigation of alleged or suspected child abuse or neglect under chapter 261 of the Family Code. *See id.* § 261.001(1), (4) (defining “abuse” and “neglect” for purposes of Fam. Code ch. 261); *see also id.* § 101.003(a) (defining “child” as person under 18 years of age who is not and has not been married and who has not had the disabilities of minority removed for general purposes). You have not indicated that the district attorney 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 the submitted information is generally confidential under section 261.201 of the Family Code. *See Open Records Decision No. 440 at 2 (1986) (predecessor statute)*:

We note, however, the information contains medical records that pertain to the requestor’s child, which are governed under the Medical Practice Act (the “MPA”), subtitle B of title 3 of the Occupations Code. *See Occ. Code § 151.001*. Section 159.002 of the MPA provides, in part:

(a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient’s behalf, may not disclose the

information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Id. § 159.002(a)-(c). Information subject to the MPA includes both medical records and information obtained from those medical records. *See id.* §§ 159.002, .004; Open Records Decision No. 598 (1991). This office has concluded the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). We note medical records involving a minor may be released under the MPA on the parent's or legal guardian's signed, written consent, provided the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. Occ. Code §§ 159.004, .005.

Although the submitted information is generally confidential under section 261.201 of the Family Code, the MPA may provide the requestor with a right of access to the portion of the information consisting of his child's medical records, which we have marked. Therefore, there is a conflict between the provisions of section 261.201 of the Family Code and the MPA. Where general and specific statutes are in irreconcilable conflict, the specific provision typically prevails as an exception to the general provision unless the general provision was enacted later and there is clear evidence that the legislature intended the general provision to prevail. *See* Gov't Code § 311.026(b); *City of Lake Dallas v. Lake Cities Mun. Util. Auth.*, 555 S.W.2d 163, 168 (Tex. Civ. App.—Fort Worth 1977, writ ref'd n.r.e.). In this instance, although section 261.201 generally makes records of alleged child abuse or neglect confidential, the MPA specifically permits release of medical records to certain parties and in certain circumstances. We therefore conclude that, notwithstanding the provisions of section 261.201 of the Family Code, the district attorney must release the marked medical records if it receives consent from the requestor that complies with the MPA. The remaining information must be withheld under section 552.101 in conjunction with section 261.201 of the Family Code.² If the district attorney does not receive consent that complies with the MPA, then the district attorney must withhold the submitted information in its entirety under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code.

In summary, to the extent that the submitted information is held by the district attorney as an agent of the grand jury, such information is in the grand jury's constructive possession

²We note the requestor, as a parent of the child who is the subject of reported abuse or neglect, may have a right of access to certain abuse and neglect records maintained by the Texas Department of Family and Protective Services ("DFPS"). Section 261.201(g) of the Family Code provides that DFPS, upon request and subject to its own rules, "shall provide to the parent, managing conservator, or other legal representative of a child who is the subject of reported abuse or neglect information concerning the reported abuse or neglect that would otherwise be confidential under this section if [DFPS] has edited the information to protect the confidentiality of the identity of the person who made the report and any other person whose life or safety may be endangered by the disclosure." Fam. Code § 261.201(g).

and is not subject to disclosure under the Act. The remaining information must be withheld in its entirety under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code, unless the district attorney receives consent for the release of the marked medical records that complies with the MPA. As 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,



Jennifer Luttrall
Assistant Attorney General
Open Records Division

JL/eb

Ref: ID# 337368

Enc. Submitted documents

c: Requestor
(w/o enclosures)