



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 10, 2009

Mr. Charles H. Weir
Assistant City Attorney
City of San Antonio
P.O. Box 839966
San Antonio, Texas 78283-3966

OR2009-16018

Dear Mr. Weir:

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# 360990 (COSA File No. 2009-4204).

The San Antonio Police Department (the "department") received a request for information relating to a specified investigation. You claim 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 that one of the submitted documents, which we have marked, is not responsive as it does not appear to relate to the matter under investigation. The department need not release non-responsive information in response to this request, and this ruling will not address that information.

Next, we note that some of the submitted information may have been obtained pursuant to grand jury subpoenas. The judiciary is expressly excluded from the requirements of the Act. *See* Gov't Code § 552.003(1)(B). This office has determined that for the purposes of the Act, a grand jury is a part of the judiciary and is therefore not subject to the Act. *See* Open Records Decision No. 411 (1984). Moreover, records kept by another person or entity acting as an agent for a grand jury are considered to be records in the constructive possession of the grand jury and therefore are not subject to the Act. *See* Open Records Decisions Nos. 513 (1988), 398 (1983); *but see* ORD 513 at 4 (defining limits of judiciary exclusion). The fact

that information collected or prepared by another person or entity is submitted to the grand jury does not necessarily mean that such information is in the grand jury's constructive possession when the same information is also held in the other person's or entity's own capacity. Information held by another person or entity but not produced at the direction of the grand jury may well be protected under one of the Act's specific exceptions to disclosure, but such information is not excluded from the reach of the Act by the judiciary exclusion. *See* ORD 513. Thus, to the extent that the department has possession of any portion of the submitted information as an agent of the grand jury, such information is in the grand jury's constructive possession and is not subject to the Act. This decision does not address the public availability of such information. To the extent that the department does not have possession of the submitted information 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 public disclosure.

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 that other statutes make confidential. You raise section 552.101 in conjunction with section 261.201 of the Family Code, which provides in part:

(a) [T]he following information is confidential, is not subject to public release under [the Act] and may be disclosed only for purposes consistent with this 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 this chapter 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 this chapter or in providing services as a result of an investigation.

...

(k) Notwithstanding Subsection (a), an investigating agency, other than the [Texas Department of Family and Protective Services] or the Texas Youth Commission, on request, shall provide to the parent, managing conservator, or other legal representative of a child who is the subject of reported abuse or neglect, or to the child if the child is at least 18 years of age, information concerning the reported abuse or neglect that would otherwise be confidential under this section. The investigating agency shall withhold information under this subsection if the parent, managing conservator, or other legal

representative of the child requesting the information is alleged to have committed the abuse or neglect.

(l) Before a child or a parent, managing conservator, or other legal representative of a child may inspect or copy a record or file concerning the child under Subsection (k), the custodian of the record or file must redact:

(1) any personally identifiable information about a victim or witness under 18 years of age unless that victim or witness is:

(A) the child who is the subject of the report; or

(B) another child of the parent, managing conservator, or other legal representative requesting the information;

(2) any information that is excepted from required disclosure under [the Act], or other law; and

(3) the identity of the person who made the report.

Fam. Code § 261.201(a), (k), (l). You state the submitted information was used or developed in an investigation of alleged child abuse under chapter 261. *See id.* § 261.001(1), (4) (defining "abuse" for the purposes of chapter 261 of the Family Code); *see also id.* § 101.003(a) (defining "child" for purposes of section 261.201 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"). Upon review, we find that the submitted information is generally within the scope of section 261.201 of the Family Code.

In this instance, the requestor represents the parent of the child victim listed in the submitted information. Thus, ordinarily the requestor would have a right of access to the information concerning the child of the requestor's client pursuant to section 261.201(k). However, the submitted information reveals that requestor's client is also one of the individuals suspected of child abuse. Accordingly, the requestor does not have a right of access to the information pursuant to section 261.201(k). *See id.* You do not indicate that the department has adopted a rule that governs the release of this type of information. We therefore assume no such rule exists. Given that assumption, we conclude the submitted information is generally confidential under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code. *See Open Records Decision No. 440 at 2 (1986) (construing statutory predecessor to section 261.201).*

However, we note the submitted information contains medical records that pertain to the child of the requestor's client. These records are governed by 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 relevant 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 records. *See id.* §§ 159.002, .004; Open Records Decision No. 598 (1991). This office has determined that in governing access to a specific subset of information, the MPA prevails over the more general provisions of the Act. *See id.* (exceptions found in the Act cannot be invoked to deny access to medical records because access provisions of the MPA govern their release). This office has found when a file is created as the result of a hospital stay, all of the documents in the file relating to diagnosis and treatment constitute either physician-patient communications or “[r]ecords of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician.” Open Records Decision No. 546 (1990).

Medical records must be released upon the patient’s signed, written consent, provided that 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. Medical records pertaining to a deceased patient may only be released upon the signed consent of the deceased’s personal representative. *See id.* § 159.005(a)(5). Thus, such information may only be released in accordance with the MPA. *See* Open Records Decision No. 598 (1991).

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 the medical records, which we have marked, pertaining to her client’s child. 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 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 department must release the marked medical records if it receives consent from the requestor that complies with the MPA. Otherwise, the department must withhold the marked information pursuant to section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code.

We note the submitted information also includes information obtained from a polygraph examination. 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 of the Government Code 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. The polygraph information at issue pertains to the requestor's client. Thus, if the department determines that disclosure of the information is consistent with chapter 261 of the Family Code, then we find that the department has the discretion to release to the requestor the polygraph information of the requestor's client, which we have marked, pursuant to section 1703.306(a)(1). *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). With the exception of this information, the department must withhold the submitted information pursuant to section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code. However, if the department determines that disclosure of the polygraph information is not consistent with chapter 261 of the Family Code, then the department must withhold this information pursuant to section 552.101 of the Government Code in conjunction with section 261.201(a) of the Family Code.

In summary, any documents held by the department as agent of the grand jury are records of the judiciary and not subject to disclosure under the Act. Otherwise, the department must generally 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.¹ However, the department must release the marked medical records to the requestor in accordance with the MPA if it receives proper consent for their release. If the department determines that disclosure of the marked polygraph information is consistent with chapter 261 of the Family Code, the department has the discretion to release this information to the requestor pursuant to section 1703.306(a)(1) of the Occupations Code.²

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, toll free, at (888) 672-6787.

Sincerely,



Pamela Wissemann
Assistant Attorney General
Open Records Division

PFW/jb

Ref: ID# 360990

Enc. Submitted documents

c: Requestor
(w/o enclosures)

¹As our ruling on this issue is dispositive, we do not address your other argument against disclosure.

²We note that because the requestor may have a right of access to information that would otherwise be confidential in this instance, the department must again seek a decision from this office if it receives another request for the same information from another requestor.