



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 20, 2012

Mr. Robb D. Decker
Walsh, Anderson, Brown, Gallegos, and Green, P.C.
P.O. Box 460606
San Antonio, Texas 78246

OR2012-00934

Dear Mr. Decker:

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# 443580.

The Northside Independent School District (the “district”), which you represent, received a request for information pertaining to the requestor’s client. You state the district will release some of the requested information, but 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 representative sample of information.¹

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” This section encompasses information protected by other statutes. You assert some of the submitted information is excepted from disclosure under section 552.101 in conjunction with article 20.02 of the Code of Criminal Procedure. Article 20.02(a) provides “[t]he proceedings of the grand jury shall be secret.” Crim. Proc. Code art. 20.02(a). Article 20.02, however, does not define “proceedings” for purposes of subsection (a). Therefore, we have

¹We assume the “representative sample” of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than that submitted to this office.

reviewed case law for guidance and found that Texas courts have not often addressed the confidentiality of grand jury subpoenas under article 20.02. Nevertheless, the court in *In re Reed* addressed the issue of what constitutes “proceedings” for purposes of article 20.02(a) and stated that although the court was aware of the policy goals behind grand jury secrecy, the trial court did not err in determining the grand jury summonses at issue were not proceedings under article 20.02. *See In re Reed*, 227 S.W.3d 273, 276 (Tex. App.—San Antonio 2007, orig. proceeding). The court further stated that the term “proceedings” could “reasonably be understood as encompassing matters that take place before the grand jury, such as witness testimony and deliberations.” *Id.* at 276. The court also discussed that, unlike federal law, article 20.02 does not expressly make subpoenas confidential. *See id.*; FED. R. CRIM. P. 6(e)(6).

Subsequent to the ruling in *Reed*, the 80th Legislature, modeling federal law, added subsection (h) to article 20.02 to address grand jury subpoenas. *See* Crim. Proc. Code art. 20.02; *see also* FED. R. CRIM. P. 6(e)(6) (“Records, orders, and subpoenas relating to grand-jury proceedings must be kept under seal to the extent and as long as necessary to prevent the unauthorized disclosure of a matter occurring before a grand jury.”). Article 20.02(h) states that “[a] subpoena or summons relating to a grand jury proceeding or investigation must be kept secret to the extent and for as long as necessary to prevent the unauthorized disclosure of a matter before the grand jury.” Crim. Proc. Code art. 20.02(h). This provision, however, does not define or explain what factors constitute “necessary to prevent the unauthorized disclosure of a matter before the grand jury.” *Id.* Because article 20.02(h) is modeled on federal law, we reviewed federal case law for guidance on a definition or explanation of the factors that would constitute “necessary to prevent the unauthorized disclosure of a matter before the grand jury” for the purposes of keeping grand jury subpoenas secret. Our review of federal case law revealed that federal courts have ruled inconsistently on the issue of whether or not grand jury subpoenas must be kept secret. FED. R. CRIM. P. 6(e)(6) advisory committee’s note (stating federal case law has not consistently stated whether or not subpoenas are protected by rule 6(e)). Furthermore, even if we considered article 20.02 to be a confidentiality provision, information withheld under this statute would only be secret “for as long as necessary to prevent the unauthorized disclosure of a matter before the grand jury.” *Id.*

You have not submitted any arguments explaining how the matter upon which the submitted information was based is still “before the grand jury” to warrant keeping the information secret. Therefore, upon review of article 20.02 and related case law, it is not apparent, and you have not otherwise explained, how this provision makes any of the submitted information confidential. *See* Open Records Decision No. 478 (1987) (as general rule, statutory confidentiality requires express language making information confidential). Consequently, the department may not withhold any of the information under section 552.101 in conjunction with article 20.02.

You also assert the information at issue is confidential under section 531.1021 of the Government Code, which provides in relevant part the following:

(g) All information and materials subpoenaed or compiled by the [Office of the Inspector General of the Health and Human Services Commission (the “OIG”)²] in connection with an audit or investigation or by the office of the attorney general in connection with a Medicaid fraud investigation are confidential and not subject to disclosure under [the Act], and not subject to disclosure, discovery, subpoena, or other means of legal compulsion for their release to anyone other than the office or the attorney general or their employees or agents involved in the audit or investigation conducted by the office or the attorney general, except that this information may be disclosed to the state auditor’s office, law enforcement agencies, and other entities as permitted by other law.

(h) A person who receives information under Subsection (g) may disclose the information only in accordance with Subsection (g) and in a manner that is consistent with the authorized purpose for which the person first received the information.

Gov’t Code § 531.1021(g)-(h). Section 531.1021 is located in Subchapter C of Chapter 531 of the Government Code, titled “Medicaid and Other Health and Human Services Fraud, Abuse, or Overcharges.” The legislature’s recent amendment to section 531.1021(g) added express language stating information connected to investigations of Medicaid fraud is confidential. Section 531.102, also found in Subchapter C, further specifies the OIG “is responsible for the investigation of fraud and abuse in the provision of health and human services[.]” *Id.* § 531.102(a). Thus, Subchapter C addresses the responsibilities of the OIG in conducting investigations of Medicaid and other health and human services fraud and abuse. You have not explained how the submitted documents, which are law enforcement records of the district’s police department, consist of information or materials subpoenaed or compiled by the OIG in connection with an audit or investigation or by the office of the attorney general in connection with a Medicaid fraud investigation. *See id.* § 531.1021(g). Accordingly, you have not established the submitted information is confidential under section 531.1021, and the district may not withhold it under section 552.101 of the Government Code on that basis.

Section 552.101 also encompasses section 261.201 of the Family Code, which provides in relevant part as follows:

²We note the Health and Human Services Commission directly oversees the OIG.

(a) [T]he following information is confidential, is not subject to public release under Chapter 552, Government Code, 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.

Fam. Code § 261.201(a), (k). We note the district is not an agency authorized to conduct an investigation under chapter 261 of the Family Code. See *id.* § 261.103 (listing agencies that may conduct child abuse investigations). However, the district has submitted information pertaining to investigations of alleged or suspected child abuse or neglect by the district's police department. Upon review, we find the submitted information was 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 section 261.201 of Family Code). Accordingly, the submitted information is within the scope of section 261.201(a). Although the requestor represents a parent of the child victim listed in the submitted report, the report also reflects this parent was suspected of committing the alleged or suspected abuse or neglect. Therefore, we determine the requestor does not have a right of access to this report under section 261.201(k). See *id.* § 261.201(k). Thus, the submitted information is confidential under section 261.201 of the Family Code. See Open Records Decision No. 440 at 2 (1986) (predecessor statute).

However, some of the submitted information consists of medical records of the child victim, access to which is governed by Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. Section 159.002 of the MPA provides in part the following:

(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.

Occ. Code § 159.002(b)-(c). This office has concluded that, when a file is created as the result of a hospital stay, all the documents in the file that relate to diagnosis and treatment constitute either physician-patient communications or records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician. *See* Open Records Decision No. 546 (1990). Medical records must be released upon the patient'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 §§ 159.004-159.005. Section 159.002(c) also requires any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). Medical records may be released only as provided under the MPA. Open Records Decision No. 598 (1991).

The submitted documents contain medical records. We note medical records involving a minor may be released under the MPA with the parent's or legal guardian'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. *See* Occ. Code §§ 159.004-159.005. As a representative of the parent of the child whose medical records are at issue, the requestor may have a right of access to the marked medical records under the MPA. *Id.* § 159.005(a)(2). Thus, although the submitted information is confidential under section 261.201 of the Family Code, the MPA may provide the parent 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 confidentiality provisions of section 261.201(a) of the Family Code and the access provisions of 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 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.). Although section 261.201(a) generally makes records of alleged child abuse confidential, the MPA specifically permits release of medical records to certain parties and in certain circumstances. Therefore, we conclude, notwithstanding the provisions of section 261.201 of the Family Code, the district must release the marked medical records if it receives consent that complies with the MPA. The district must withhold the remaining information under section 552.101 of the Government Code in conjunction with section 261.201(a) of the Family Code. If the district does not receive consent that complies with the MPA, the district attorney must withhold the submitted information in its entirety under section 552.101 in conjunction with section 261.201(a).³

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,


James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/ag

Ref: ID# 443580

Enc. Submitted documents

c: Requestor
(w/o enclosures)

³As we are able to make this determination, we need not address your remaining arguments against disclosure.