



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

August 18, 2015

Ms. Ana Vieira Ayala  
Senior Attorney & Public Information Coordinator  
The University of Texas System  
Office of General Counsel  
201 West Seventh Street  
Austin, Texas 78701-2902

OR2015-17104

Dear Ms. Ayala:

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# 573999 (OGC# 161905).

The University of Texas at Austin (the "university") received a request for information held by the university's Texas Center for Actual Innocence (the "center") regarding a named individual's case. You state the university will release some information to the requestor. You also state the university has redacted some information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code.<sup>1</sup> You claim the submitted information is excepted from disclosure under sections 552.101 and 552.111 of the Government Code.<sup>2</sup> We have considered the exceptions you claim and reviewed the submitted information.

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<sup>1</sup>The United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office that FERPA does not permit state and local educational authorities to disclose to this office, without parental consent, unredacted, personally identifiable information contained in education records for the purpose of our review in the open records ruling process under the Act. The DOE has determined that FERPA determinations must be made by the educational authority in possession of the education records. We have posted a copy of the letter from the DOE to this office on the Attorney General's website: <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

<sup>2</sup>Although you raise Texas Rule of Civil Procedure 192.5, we note the proper exception to raise when asserting the attorney work product privilege in this instance is section 552.111 of the Government Code. *See* Open Records Decision Nos. 677 (2002).

Initially, we note you have marked portions of the submitted information as not responsive to the present request for information. This ruling does not address the public availability of non-responsive information, and the university need not release non-responsive information to the requestor.

Next, we note portions of the submitted information are subject to section 552.022 of the Government Code, which provides in relevant part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

...

(12) final opinions, including concurring and dissenting opinions, and orders issued in the adjudication of cases; [and]

...

(17) information that is also contained in a public court record[.]

Gov't Code § 552.022(a)(12), (17). The submitted information includes a final opinion of a court subject to section 552.022(a)(12) and court-filed documents subject to section 552.022(a)(17). Although the university raises section 552.101 of the Government Code in conjunction with common-law privacy for this information, we note common-law privacy is not applicable to information contained in public records. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 496 (1975) (action for invasion of privacy cannot be maintained where information is in public domain); *Star-Telegram, Inc. v. Walker*, 834 S.W.2d 54, 57 (Tex. 1992) (law cannot recall information once in public domain). Thus, the university may not withhold any portion of the information subject to section 552.022(a)(12) or section 552.022(a)(17) under section 552.101 in conjunction with common-law privacy. However, because section 552.101 in conjunction with section 261.201 of the Family Code and the doctrine of constitutional privacy can make information confidential under the Act, we will address your arguments under these provisions for the information subject to section 552.022. We will also address your arguments against disclosure of the remaining information.

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 section encompasses information made confidential by section 261.201 of the Family Code, which provides, in relevant part, as follows:

(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 [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 portions of the submitted information, which we have marked, consist of information used or developed in an investigation of alleged or suspected abuse under chapter 261 of the Family Code. Accordingly, this information falls within the scope of section 261.201 of the Family Code. *See id.* §§ 101.003(a) (defining “child” for the purposes of this section as a 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), 261.001(1) (defining “abuse” for purposes of chapter 261 of the Family Code). As we have no indication the investigating agency has adopted a rule governing the release of this type of information, we assume that no such regulation exists. Given that assumption, and based on our review, we conclude the information we have marked is confidential pursuant to section 261.201 of the Family Code, and the university must generally withhold it under section 552.101 of the Government Code on that basis.<sup>3</sup> However, we find the university has failed to demonstrate any of the remaining information is subject to section 261.201 of the Family Code, and the university may not withhold the remaining information under section 552.101 of the Government Code on that basis.

We note, however, the information subject to section 261.201 of the Family Code includes the named individual’s fingerprints, and the individual consented to release of certain information to the requestor. Section 560.003 of the Government Code provides, “[a] biometric identifier in the possession of a governmental body is exempt from disclosure under [the Act].” *Id.* § 560.003; *see id.* § 560.001(1) (“biometric identifier” means retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry). However, section 560.002 of the Government Code provides, “[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). Accordingly, we find a person or the person’s authorized representative has a right of access under section 560.002(1)(A) to that person’s biometric information. In

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<sup>3</sup>As our ruling is dispositive for this information, we need not address your remaining argument against its disclosure.

this instance, the requestor has a right of access to the named individual's fingerprints pursuant to section 560.002(1)(A). *See* Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning himself). Thus, there is a conflict between the confidentiality mandated under section 261.201 of the Family Code and the right of access provided to this requestor under section 560.002 of the Government Code.

Where general and specific statutes are in irreconcilable conflict, the specific provision typically prevails over 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, we find section 261.201 of the Family Code generally applies to information used or developed in an investigation of alleged child abuse or child neglect. Section 560.002, however, applies specifically to biometric identifier information. Accordingly, we find the right of access provided to this requestor under section 560.002 prevails over the general confidentiality of section 261.201 of the Family Code. Thus, the university must release the named individual's fingerprints to this requestor pursuant to section 560.002 of the Government Code.

Section 552.101 of the Government Code also encompasses the doctrine of constitutional privacy, which consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. Open Records Decision No. 455 at 4 (1987). The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected is narrower than that under the common law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (*citing Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)).

This office has applied privacy to protect certain information about incarcerated individuals. *See* Open Records Decision Nos. 430 (1985), 428 (1985), 185 (1978). In Open Records Decision No. 185, the information at issue was the identities of individuals who had corresponded with inmates. In that decision, our office found "the public's right to obtain an inmate's correspondence list is not sufficient to overcome the first amendment right of the inmate's correspondents to maintain communication with him free of the threat of public exposure." ORD 185 at 2 (*citing State v. Ellefson*, 224 S.E.2d 666 (S.C. 1976)). Implicit in this holding is the fact that an individual's association with an inmate may be intimate or embarrassing. In Open Records Decision Nos. 428 and 430, our office determined inmate visitor and mail logs that identify inmates and those who choose to visit or correspond with inmates are protected by constitutional privacy because people who correspond with inmates have a First Amendment right to do so that would be threatened if their names were released.

ORDs 430, 428. Further, we recognized inmates had a constitutional right to visit with outsiders and could also be threatened if their names were released. *See id.*; *see also* ORD 185. The rights of those individuals to anonymity were found to outweigh the public's interest in this information. *See* ORD 185; *see also* ORD 430 (list of inmate visitors protected by constitutional privacy of both inmate and visitors). The submitted information includes an inmate's correspondence. Accordingly, the university must withhold the information we have marked under section 552.101 of the Government Code in conjunction with constitutional privacy.<sup>4</sup> However, we find no portion of the remaining information falls within the zones of privacy or implicates an individual's privacy interests for purposes of constitutional privacy. Therefore, the university may not withhold any of the remaining information under section 552.101 of the Government Code on the basis of constitutional privacy.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683.

The remaining information pertains to a report of alleged sexual assault. In Open Records Decision No. 393 (1983), this office concluded generally, only information that either identifies or tends to identify a victim of sexual assault or other sex-related offense may be withheld under common-law privacy; however, because the identifying information was inextricably intertwined with other releasable information, the governmental body was required to withhold the entire report. ORD 393 at 2; *see* Open Records Decision No. 339 (1982); *see also* *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied) (identity of witnesses to and victims of sexual harassment was highly intimate or embarrassing information and public did not have a legitimate interest in such information); Open Records Decision No. 440 (1986) (detailed descriptions of serious sexual offenses must be withheld). The requestor in this case knows the identity of the alleged victim. We believe in this instance, withholding only identifying information from the requestor would not preserve the victim's common-law right to privacy. Therefore, we conclude the university must withhold the remaining information, which we have marked, in its entirety under section 552.101 of the Government Code in conjunction with common-law privacy.<sup>5</sup>

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<sup>4</sup>As our ruling is dispositive for this information, we need not address your remaining argument against its disclosure.

<sup>5</sup>As our ruling is dispositive for this information, we need not address your remaining argument against its disclosure.

In summary, the university must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code, constitutional privacy, and common-law privacy. However, the university must release the named individual's fingerprints pursuant to section 560.002 of the Government Code.<sup>6</sup> The university must release the remaining information.

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.texasattorneygeneral.gov/open/orl\\_ruling\\_info.shtml](http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml), 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Kristi L. Godden  
Assistant Attorney General  
Open Records Division

KLK/cz

Ref: ID# 573999

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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<sup>6</sup>The requestor has a right of access to the named individual's fingerprints the university is releasing pursuant to section 560.002 of the Government Code. *See* Gov't Code § 560.002. We note Open Records Decision No. 684 (2009) is a previous determination authorizing all governmental bodies to withhold certain categories of information, including fingerprints under section 552.101 of the Government Code in conjunction with section 560.003 of the Government Code, without the necessity of requesting an attorney general decision. Thus, if the university receives another request for this information from a different requestor, the university may redact the named individual's fingerprints without requesting a ruling from this office.