KEN PAXTON
ATTORNEY GENERAL OF TEXAS

September 24, 2018

The Honorable Sharen Wilson
Tarrant County Criminal District Attorney
401 West Belknap
Fort Worth, Texas 76196

Opinion No. KP-0213

Re: Obligations of a criminal district attorney under Code of Criminal Procedure article 39.14 to disclose to a defendant information obtained by the criminal district attorney during the performance of certain civil duties
(RQ-0215-KP)

Dear Ms. Wilson:

You ask several questions regarding the disclosure obligations of your office under article 39.14 of the Code of Criminal Procedure, which governs discovery in a criminal proceeding.[1] *See* TEX. CODE CRIM. PROC. art. 39.14. As background, you tell us that your office handles both civil and criminal matters.[2] *See* Request Letter at 1–2. You set forth three specific scenarios involving your office's civil representation of (1) individuals seeking protective orders under section 81.007 of the Family Code; (2) the Department of Family and Protective Services (the "Department") in parental termination proceedings brought under section 161.001 of the Family Code; and (3) a county official in a civil lawsuit brought by a former employee. *See id.* at 1–3. You explain that in all three scenarios, the same set of facts underlying the civil representation can later form the basis for a criminal complaint and prosecution by your office. *Id.* At the same time, you note that the civil representation may involve information protected by the attorney-client privilege or made confidential under statute, and you question whether such information would be subject to disclosure under article 39.14. *Id.* at 2–3. Your scenarios focus on subsections (a) and (h) of article 39.14, which provide in relevant part:

> (a) Subject to the restrictions provided by Section 264.408, Family Code, and Article 39.15 of this code, as soon as practicable after

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[1]*See* Letter from Honorable Sharen Wilson, Tarrant Cty. Crim. Dist. Att'y, to Honorable Ken Paxton, Tex. Att'y Gen. at 1–4 (Mar. 14, 2018), https://www.texasattorneygeneral.gov/opinion/requests-for-opinion-rqs ("Request Letter").

[2]Tarrant County has a criminal district attorney rather than a county attorney and a district attorney. TEX. CONST. art. V, § 21 (providing for the election of a county attorney only "for counties in which there is not a resident Criminal District Attorney"). In such instances, "[a] resident criminal district attorney acts in lieu of the county attorney and necessarily would perform the duties of the county attorney in both civil and criminal matters." *Neal v. Sheppard*, 209 S.W.2d 388, 390 (Tex. Civ. App.—Texarkana 1948, writ ref'd); *see also* TEX. GOV'T CODE § 44.320(b) (providing generally that the "criminal district attorney has all the powers, duties, and privileges in Tarrant County that are conferred by law on county and district attorneys").

> receiving a timely request from the defendant *the state* shall produce . . . any offense reports, any designated documents, papers, written or recorded statements of the defendant or a witness, including witness statements of law enforcement officers but not including the work product of counsel for *the state* in the case and their investigators and their notes or report, or any designated books, accounts, letters, photographs, or objects or other tangible things not otherwise privileged that constitute or contain evidence material to any matter involved in the action and that are in the possession, custody, or control of *the state* or any person under contract with *the state*. . . . The rights granted to the defendant under this article do not extend to written communications between *the state* and an agent, representative, or employee of *the state*. . . .
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> . . .
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> (h) Notwithstanding any other provision of this article, *the state* shall disclose to the defendant any exculpatory, impeachment, or mitigating document, item, or information in the possession, custody, or control of *the state* that tends to negate the guilt of the defendant or would tend to reduce the punishment for the offense charged.

TEX. CODE CRIM. PROC. art. 39.14(a), (h) (emphasis added). The duty of disclosure in article 39.14, by its terms, devolves upon "the State." *Id.* In connection with your second and third scenarios, you question the extent to which the civil attorneys in your office qualify as "the State," such that their knowledge of information may be imputed to the prosecutor for purposes of article 39.14. Request Letter at 1–3. Because this threshold question underlies all three scenarios, we address it first.

The duty of disclosure created under article 39.14 stems from the independent constitutional right of access to exculpatory evidence provided under the 1963 U.S. Supreme Court decision *Brady v. Maryland* and its progeny.[3] Texas courts generally recognize that article 39.14 "codif[ies] [the] State's affirmative duty under *Brady*." *Ex parte Vasquez*, 499 S.W.3d 602, 626 (Tex. App.—Houston [1st Dist.] 2016, pet. ref'd). Accordingly, we consider *Brady's* analysis instructive. In the context of the State's duty to disclose exculpatory material under *Brady*, a "prosecutor's office is an entity," and information in possession of one attorney "must be attributed" to the office as a whole. *Giglio v. United States*, 405 U.S. 150, 154 (1972). Prosecutors must not only disclose information personally known to them but also have "a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including

[3] *Brady* held that "the suppression by the prosecution of evidence favorable to the accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *see also United States v. Bagley*, 473 U.S. 667, 676 (1985) (determining that *Brady* includes exculpatory and impeachment evidence), *United States v. Agurs*, 427 U.S. 97, 110–11 (1976) (holding that the duty to disclose exculpatory evidence is not limited to cases in which the defense makes a request for the evidence).

the police." *Kyles v. Whitley*, 514 U.S. 419, 437 (1995). For purposes of *Brady*, "'the State' includes, in addition to the prosecutor, other lawyers and employees in his office and members of law enforcement connected to the investigation and prosecution of the case." *Ex parte Miles*, 359 S.W.3d 647, 665 (Tex. Crim. App. 2012); *see also United States v. Antone*, 603 F.2d 566, 570 (5th Cir. 1979) (finding that the knowledge of state agents cooperating with federal agents on a case "must be imputed to the federal team").[4] Thus, the judicial concept of a "prosecution team" under *Brady* generally provides that "the State" extends beyond the individual prosecutor to other members of his or her office and can include outside entities depending on the context and circumstances. *See Antone*, 603 F.2d at 570 (adopting a case-by-case analysis of the extent of interaction and cooperation between various entities working together on a case to determine due process requirements).

In the present context we are faced not with separate entities but, rather, a single prosecutor's office housing civil and criminal attorneys, each pursuing individual duties. At least one Texas appellate court rejected outright the notion that attorneys in separate divisions within a prosecutor's office could constitute nonmembers of the prosecution team, despite pursuing unrelated actions not known to the other divisions. *See Hall v. State*, 283 S.W.3d 137, 170–71 (Tex. App.—Austin 2009, pet. ref'd) (finding "no support" for the State's position that only the *Brady* materials known to employees in the division prosecuting the defendant must be disclosed). In the present scenario, an attorney's association with civil duties rather than criminal ones does not change the fact that he or she is a member of the prosecutor's office. And it remains the case that courts hold prosecutors to a high standard in their accountability for the due process obligations of their offices. *See Giglio*, 405 U.S. at 154 (stating that nondisclosure of *Brady* material, "whether [by] negligence or design . . . is the responsibility of the prosecutor"); *Ex parte Miles*, 359 S.W.3d at 665 (stating that the duty to disclose *Brady* material exists "[e]ven if the prosecutor was not personally aware of the evidence"). Given the lack of authority otherwise considering the "prosecution team" analysis within a single agency and the broad responsibility placed on prosecutors in a *Brady* due process context, a court would likely conclude that the knowledge of an assistant criminal district attorney is imputed to the prosecutor as "the State" for purposes of article 39.14 of the Code of Criminal Procedure regardless of internal division affiliation.

Next, we consider the effect of the attorney-client privilege[5] and statutory confidentiality provisions you identify on the disclosure obligations of subarticles (a) and (h) of article 39.14.

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[4]*See also State v. Moore*, 240 S.W.3d 324, 328 (Tex. App.—Austin 2007, pet. ref'd) (finding no basis to impute to the prosecutors any knowledge of an uninvolved and unrelated outside investigation of a witness by the Texas Attorney General's office).

[5]The attorney-client privilege generally protects only "confidential communications made to facilitate the rendition of professional legal services to the client." TEX. R. EVID. 503(b)(1). "A communication is 'confidential' if not intended to be disclosed to third persons other than those: (A) to whom the disclosure is made to further the rendition of professional legal services to the client; or (B) reasonably necessary to transmit the communication." *Id.* 503(a)(5). But "[n]ot all statements made by a client to an attorney are privileged." *Tex. Dep't of Mental Health & Mental Retardation v. Davis*, 775 S.W.2d 467, 472 (Tex. App.—Austin 1989, orig. proceeding). "Before a communication to an attorney will be protected, it must appear that the communication was made by a client seeking legal advice from a lawyer in his capacity as such," and "the communication must relate to the purpose for which the

Subarticle 39.14(a) requires the production of specified tangible items "that constitute or contain evidence material to any matter involved in the action and that are in the possession, custody, or control of the state" that are "not otherwise privileged."[6] TEX. CODE CRIM. PROC. art. 39.14(a). Thus, to the extent information obtained by the assistant criminal district attorney constitutes an item described by subarticle 39.14(a) but is protected by attorney-client privilege, the plain language of subarticle 39.14(a) would exempt its disclosure to the defendant.

Subarticle 39.14(h), however, contains no exception for privileged items. Instead, it applies to "any exculpatory, impeachment, or mitigating document, item, or information in the possession, custody, or control of the state that tends to negate the guilt of the defendant or would tend to reduce the punishment for the offense charged," and it applies "[n]otwithstanding any other provision" of article 39.14.[7] *Id.* art. 39.14(h). Prior to the Legislature's adoption[8] of subarticle (h) in 2013, the Texas Court of Criminal Appeals concluded that "the duty to reveal material exculpatory evidence as dictated by *Brady* overrides" an evidentiary privilege that would otherwise have protected documents from discovery under subarticle 39.14(a). *Ex parte Miles*, 359 S.W.3d at 670. Since subarticle 39.14(h)'s enactment, one court has twice acknowledged that the presence of exculpatory information in an otherwise privileged context triggers the obligations of subarticle 39.14(h). *See Bass v. State*, Nos. 09-16-00144-CR, 09-16-00145-CR, 2017 WL 3081099, at *2 (Tex. App.—Beaumont July 19, 2017, pet. ref'd) (mem. op., not designated for publication) (stating that "exculpatory information . . . would trigger the exception contained in subsection (h) of article 39.14"); *In re State*, Nos. 09-15-00192-CR, 09-15-00193 CR, 2015 WL 7566519, at *2 (Tex. App.—Beaumont Nov. 25, 2015, orig. proceeding) (mem. op., not designated for publication) (citing to 39.14(h) for the proposition that "[i]f a privilege applies, article 39.14(a) does not apply and discovery will only be required if the recording is exculpatory"). Given the plain language of the statute and the judicial recognition that evidentiary privileges can fall in the face of *Brady* material, a court would likely conclude that any exculpatory information obtained by an assistant criminal district attorney acting in a civil capacity that meets the requirements of subarticle 39.14(h) must be disclosed to the defendant, notwithstanding an attorney-client or other evidentiary privilege.

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advice is sought, and the proof, express or by circumstances, must indicate a desire in the client for confidence and secrecy." *Id.* at 472–73.

[6]The tangible items include "offense reports, any designated documents, papers, written or recorded statements of the defendant or a witness" (but not the work product, notes or report of the State's counsel or their investigators), "designated books, accounts, letters, photographs, or objects." TEX. CODE CRIM. PROC. art. 39.14(a). The duty to produce the items covered by subarticle 39.14(a) is triggered by "a timely request from the defendant." *Id.* The duty under subarticle (a) is also "[s]ubject to the restrictions provided by" section 264.408 of the Family Code and article 39.15 of the Code of Criminal Procedure, which concern the confidentiality of documents associated with child welfare services and the discovery of certain evidence that constitutes child pornography, respectively. *Id.* Thus, the actual scope of what must be produced will depend upon the specific request made by the defendant.

[7]Unlike the duty under subarticle 39.14(a), which applies only after receiving a request from a defendant and extends only to tangible items, the duty under subarticle 39.14(h) applies whether or not the defendant makes a request and extends broadly to "information" not necessarily contained in a document or other tangible item. *See id.* art. 39.14(h).

[8]*See* Act of May 14, 2013, 83d Leg., R.S., ch. 49, § 2, 2013 Tex. Gen. Laws, 106, 107 (codified at TEX. CODE CRIM. PROC. art. 39.14(h)).

With respect to statutory confidentiality, you identify section 261.201 of the Family Code, which pertains to certain information relating to the investigation of suspected child abuse or neglect—information you tell us that civil attorneys in your office may obtain while representing the Department in parental termination proceedings. Request Letter at 3. Section 261.201 provides that certain information "is confidential . . . 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." TEX. FAM. CODE § 261.201(a). Nonetheless, subsections 261.201(b) and (c) permit a court to disclose information made confidential under section 261.201 if it determines that the information is "essential to the administration of justice" and if certain other requirements, including in camera inspection, are met.[9] *Id.* § 261.201(b), (c). The duty of disclosure in subarticle 39.14(a) of the Code of Criminal Procedure, by its own terms, is "[s]ubject to the restrictions provided by Section 264.408 [of the] Family Code." TEX. CODE CRIM. PROC. art. 39.14(a). Section 264.408 of the Family Code provides that "[i]nformation related to the investigation of a report of abuse or neglect . . . is confidential as provided by Section 261.201." TEX. FAM. CODE § 264.408(b). Thus, to the extent that information obtained by a civil attorney in your office is confidential under section 261.201 of the Family Code, the duty of disclosure in subarticle 39.14(a) would not be triggered except pursuant to court order obtained under subsection 261.201(b) or (c).

Subarticle 39.14(h) contains no similar qualifying language. Yet, courts recognize "[t]he conflict that can arise between the State's need to keep information related to child abuse investigations confidential [and] a defendant's need for a fair trial" under *Brady*. *Fears v. State*, 479 S.W.3d 315, 329 (Tex. App.—Corpus Christi 2015, pet. ref'd). Both the United States Supreme Court and the Texas Court of Criminal Appeals have rejected the notion that *Brady* entitles a defendant to unlimited access to information from the State. *See Pennsylvania v. Ritchie*, 480 U.S. 39, 59 (1987), *Thomas v. State*, 837 S.W.2d 106, 113–14 (Tex. Crim. App. 1992). Instead, those courts have held that submission to an in camera inspection by a trial court protects a defendant's interest in a fair trial. *Ritchie*, 480 U.S. at 60, *Thomas*, 837 S.W.2d at 114. At least one Texas court noted that "section 261.201 provides for exactly the type of procedure approved in *Ritchie* and *Thomas*: an in camera inspection of the material by the trial judge, and an ongoing duty to disclose any confidential material that is relevant or becomes relevant during the course of the trial." *Fears*, 479 S.W.3d at 330. Thus, a court would likely conclude that any exculpatory information obtained by an assistant criminal district attorney that meets the requirements of subarticle 39.14(h) but that is made confidential by section 261.201 shall be disclosed only pursuant to court order obtained under subsection 261.201(b) or (c).

[9]A court may order disclosure under subsection 261.201(b) upon a motion and notice of hearing served on the investigating agency and interested parties if, after the hearing and an in camera review, "the court determines that the disclosure of the requested information is: (A) essential to the administration of justice; and (B) not likely to endanger the life or safety of" a child who is the subject of the report, the person who makes the report, or any other person participating in the investigation or providing care for the child. TEX. FAM. CODE § 261.201(b)(3). Likewise, a court may order disclosure under subsection 261.201(c) on its own motion at a properly noticed hearing, in writing or on the record in open court, if the court makes the same determination about the information as in subsection 261.201(b).

SUMMARY

A court would likely conclude, as one appellate court already has, that the knowledge of an assistant criminal district attorney is imputed to the prosecutor as "the State" for purposes of article 39.14 of the Code of Criminal Procedure regardless of internal division affiliation.

To the extent information provided to an assistant criminal district attorney acting in a civil capacity constitutes an item described by subarticle 39.14(a) but is protected by the attorney-client privilege, the plain language of subarticle (a) would exempt its disclosure to the defendant. However, a court would likely conclude that any exculpatory information meeting the requirements of subarticle 39.14(h) obtained by such an attorney must be disclosed to the defendant, notwithstanding any attorney-client or other evidentiary privilege.

To the extent that information obtained by an assistant criminal district attorney acting in a civil capacity is confidential under section 261.201 of the Family Code, any duty of disclosure in subarticle 39.14(a) of the Code of Criminal Procedure would not be triggered except pursuant to court order obtained under subsection 261.201(b) or (c). A court would likely conclude that any exculpatory information obtained by an assistant criminal district attorney that meets the requirements of subarticle 39.14(h) but that is made confidential by section 261.201 shall be disclosed only pursuant to court order obtained under subsection 261.201(b) or (c).

Very truly yours,

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