



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

October 21, 2019

The Honorable William James Dixon
Navarro County Criminal District Attorney
Navarro County Courthouse
300 West 3rd, Suite 301
Corsicana, Texas 75110

Opinion No. KP-0275

Re: Whether probable cause affidavits that may identify child victims may be released to the public upon a request made to a justice of the peace (RQ-0288-KP)

Dear Mr. Dixon:

You ask whether probable cause affidavits that are likely to identify child sex abuse victims may be released to the public upon a request made to a justice of the peace.¹ As background, you tell us the Corsicana Independent School District Police Department secured arrest warrants in four separate alleged sexual abuse cases involving a teacher by presenting probable cause affidavits to a justice of the peace acting as a magistrate. *See* Request Letter at 1–2. You state that the justice of the peace later received a records request from the media for the probable cause affidavits and, against the advice of your office, the justice of the peace released a redacted version from which you say “it was still possible to narrow down the child’s identity because of remaining un-redacted information.” *Id.* at 2. You identify various statutory provisions, including the Public Information Act, which you argue make the affidavits confidential and not subject to public disclosure. *See id.* at 2–5.

As a preliminary matter, while the Public Information Act (the “Act”) applies to “information that is written, produced, collected, assembled or maintained under a law or ordinance or in connection with the transaction of official business” by a governmental body, it expressly excludes the judiciary from its definition of “governmental body.” TEX. GOV’T CODE §§ 552.002(a)(1), .003(1)(B); *see also* Tex. Att’y Gen. ORD-25 (1974) (concluding that the Act’s predecessor did not apply to a justice of the peace). Instead, “[a]ccess to information collected, assembled, or maintained by or for the judiciary is governed by rules adopted by the Supreme Court of Texas or by other applicable laws and rules.” TEX. GOV’T CODE § 552.0035(a). Rules of the Texas Supreme Court governing public access to judicial records, in turn, directly address affidavits supporting arrest warrants, specifying that “access to [such information] is controlled by . . . a state or federal court rule, including a rule of civil or criminal procedure, appellate procedure or evidence[,] or . . . common law, court order, judicial decision, or another provision of law.”

¹*See* Letter from Honorable William James Dixon, Navarro Cty. Crim. Dist. Att’y, to Honorable Ken Paxton, Tex. Att’y Gen. at 1 (May 7, 2019), <https://www2.texasattorneygeneral.gov/opinion/requests-for-opinion-rqs> (“Request Letter”).

TEX. R. JUD. ADMIN. 12.3(c), *reprinted in* TEX. GOV'T CODE, tit. 2, subtit. F app. Accordingly, we look not to the Act but instead begin with the Code of Criminal Procedure.

Article 15.26 of the Code of Criminal Procedure addresses the right of an arrested defendant to know “under what authority the arrest is made.” TEX. CODE CRIM. PROC. art. 15.26. Among other provisions, it provides that an “arrest warrant, and any affidavit presented to the magistrate in support of the issuance of the warrant, is public information.” *Id.* (requiring that the magistrate’s clerk make copies available for public inspection “immediately when the warrant is executed”). At the same time, article 57.02 protects sexual assault victims by allowing them to use a pseudonym rather than the victim’s name “in all public files and records concerning the offense, including police summary reports, press releases, and records of judicial proceedings” by submitting a form to the law enforcement agency investigating the offense. *See id.* art. 57.02(b). Regarding child sexual assault victims, subarticle 57.02(h)² states in relevant part that

[e]xcept as required or permitted by other law or by court order, a public servant or other person who has access to or obtains the name, address, telephone number, or other identifying information of a victim younger than 17 years of age may not release or disclose the identifying information to any person who is not assisting in the investigation, prosecution, or defense of the case.

Id. art. 57.02(h).³ While generally prohibiting disclosure of identifying information regarding a child victim of sexual assault outside the confines of the case, this provision allows an exception to that prohibition when other law or a court order requires or permits disclosure of that information. We consider whether article 15.26 falls within that exception as other law that “requires or permits” the disclosure of identifying information regarding a child sex offense victim.

A court’s primary objective in construing statutes is to give effect to the Legislature’s intent. *Silguero v. CSL Plasma, Inc.*, No. 18-1022, 2019 WL 2668888, at *4 (Tex. June 28, 2019). In interpreting statutes, a court looks to the plain language. *Id.* at *5. Courts construe a statute “as a cohesive, contextual whole, accepting that [lawmakers] chose their words carefully, both in what they included and in what they excluded.” *Interest of A.L.M.-F.*, No. 17-0603, 2019 WL 1966623, at *4 (Tex. May 3, 2019) (citation omitted). Article 15.26 provides an arrested person the right to know the authority underlying his or her arrest. *See* TEX. CODE CRIM. PROC. art. 15.26. The provision directs a law enforcement officer to “inform the defendant of the offense charged and of the fact that a warrant has been issued” if the officer does not have the warrant in his possession at the time of the arrest and requires the officer in that instance to “show the warrant to the defendant as soon as possible,” if asked. *Id.* In connection with those duties, article 15.26 provides

²The Legislature repealed subarticle 57.02(h) and enacted article 58.105, effective January 1, 2021, as part of a nonsubstantive revision of certain portions of the Code of Criminal Procedure, including conforming amendments. *See* Act of May 21, 2019, 86th Leg., R.S., ch. 469, § 3.01(2), 2019 Tex. Sess. Law Serv. 1064, 1150 (to be codified at TEX. CODE CRIM. PROC. art. 58.105). Because this request arises prior to the effective date of article 58.105, we cite to article 57.02.

³Because the plain language of subarticle 57.02(h) does not restrict its application to instances in which a victim requests the use of a pseudonym, its provisions apply automatically to victims younger than 17 years of age. *See* TEX. CODE CRIM. PROC. art. 57.02(h).

than an “arrest warrant, and any affidavit presented to the magistrate in support of the issuance of the warrant, is public information.” *Id.* (requiring that the magistrate’s clerk make copies available for public inspection “immediately when the warrant is executed”). But nothing in the text of article 15.26 specifically directs the disclosure of any particular piece of information from the arrest warrant or supporting affidavit. Article 15.26 in fact makes no reference to the particular content such documents may contain. Because article 15.26 does not, on its face, expressly “require or permit” the disclosure of identifying information regarding a child sex offense victim, a court could conclude that it is not an exception under subarticle 57.02(h) as other law that compels the disclosure of that particular information.

This conclusion is supported by the doctrine of common-law privacy. See TEX. R. JUD. ADMIN. 12.3(c), *reprinted in* TEX. GOV’T CODE, tit. 2, subtit. F app. (providing that, in addition to the rules of criminal procedure, access to affidavits supporting arrest warrants can also be “controlled by . . . common law”). The doctrine protects information from disclosure when “(1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public.” *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The Texas Supreme Court includes information concerning sexual assault among the types of information considered intimate and embarrassing.⁴ *Id.* at 683. In addition, courts have recognized a disclosure exception for article 57.02 identifying information in the related due process context of indictments. As one court explained, in enacting article 57.02 “the Legislature sought to address and satisfy two competing interests: the defendant’s due process right to notice of the offense for which he was indicted; and, the victim’s interest in avoiding the embarrassment associated with a public pronouncement of the details of the alleged offense.” *Stevens v. State*, 891 S.W.2d 649, 651 (Tex. Crim. App. 1995) (holding that, “so long as the defendant’s due process right to notice is satisfied,” pseudonym cases are not subject to the fatal variance doctrine).⁵

Next, we examine the other exception to the prohibition on disclosure of identifying information of child sex offense victims in subarticle 57.02(h)—through a court order—and consider whether such an order could be made by a justice of the peace. Subarticle 57.02(g) states that “[a] court of competent jurisdiction may order the disclosure of a victim’s name, address, and telephone number only if the court finds that the information is essential in the trial of the defendant for the offense or the identity of the victim is in issue.” TEX. CODE CRIM. PROC. art. 57.02(g).⁶ A court must have jurisdiction over the type of offense to be a court of competent jurisdiction. *Ex parte Ulloa*, 514 S.W.3d 756, 759 (Tex. Crim. App. 2017). A justice of the peace has original

⁴If the information meets the first test, a court will presume the information is not of legitimate public concern unless it can be shown under the particular facts that the public has a legitimate interest in the information despite its private nature. *Indus. Found.*, 540 S.W.2d at 685. This office cannot engage in fact finding in an attorney general opinion.

⁵“As a general rule, a variance between the indictment and the evidence at trial is fatal to a conviction [because] Due Process guarantees the defendant notice of the charges against him.” *Stevens v. State*, 891 S.W.2d 649, 651 (Tex. Crim. App. 1995).

⁶This language permits a court to order the disclosure of only “name, address, and telephone number” and not also “other identifying information.” TEX. CODE CRIM. PROC. art. 57.02(g); *see also id.* art. 57.02(h) (prohibiting the disclosure of “name, address, telephone number, or other identifying information of a victim younger than 17 years of age”) (emphasis added).

jurisdiction in criminal cases punishable by a fine but not confinement. See TEX. CODE CRIM. PROC. art. 4.11(a); see also TEX. PENAL CODE § 12.23 (providing that a Class C misdemeanor is punishable by fine only). Thus, the ability of a justice of the peace to issue an order of disclosure pursuant to article 57.02(g) depends on the nature of the underlying offense.⁷

Assuming that no law or court order expressly requires the disclosure of identifying information regarding a child sexual assault victim in the case at hand, we must resolve the tension between a statute making probable cause affidavits public, article 15.26, and a statute expressly prohibiting the release or disclosure of identifying information which could be contained in the affidavits, subarticle 57.02(h). When an irreconcilable conflict exists between a general provision and a specific provision, “the specific provision will ordinarily prevail unless the general provision is the later enactment and the manifest intent is that the general provision prevail.” *Harris Cty. Appraisal Dist. v. Tex. Workforce Comm’n*, 519 S.W.3d 113, 122 (Tex. 2017). To the extent two statutes cannot be reconciled “and neither statute is more specific than the other, the later-enacted statute prevails.” *Dailing v. State*, 546 S.W.3d 438, 443 (Tex. App.—Houston [14th Dist.] 2018, no pet.); see also TEX. GOV’T CODE § 311.025. Article 15.26 applies broadly to the content of all arrest warrants and supporting affidavits, whereas subarticle 57.02(h) applies to particular information concerning a certain subset of persons. By the same token, subarticle 57.02(h) applies broadly to identifying information in all contexts, whereas article 15.26 is specific to arrest warrants and supporting affidavits. Thus, to the extent a conflict exists between these two statutes and neither is definitively more specific than the other, subarticle 57.02(h) is the later-enacted statute⁸ and would control, permitting one to redact identifying information regarding a child victim of alleged sexual assault from a probable cause affidavit.⁹ Given our conclusion, we do not reach the other statutory provisions you raise.

⁷You do not tell us the offense(s) charged against the teacher in the instant case. Generally speaking, however, sexual offenses against children are felony offenses. See, e.g., TEX. PENAL CODE §§ 21.02(h) (continuous sexual abuse of young child or children), 21.11(d) (indecenty with a child), 21.12(b) (improper relationship between educator and student), 22.011(a)(2) (sexual assault of a child).

⁸See Act of May 21, 2019, 86th Leg., R.S., ch. 469, § 1.07, art. 58.105, 2019 Tex. Sess. Law Serv. 1064, 1124 (to be codified at TEX. CODE CRIM. PROC. art. 58.105) (reenacting the substance of subarticle 57.02(h)); Act of May 28, 2003, 78th Leg., R.S., ch. 390, 2003 Tex. Gen. Laws 1631, 1631 (codified at TEX. CODE CRIM. PROC. art. 15.26).

⁹You tell us that the justice of the peace in the instant case redacted the probable cause affidavits prior to releasing them. Request Letter at 2. Whether they contained identifying information of a child sexual assault victim upon release is a separate question that we do not answer.

S U M M A R Y

Article 15.26 of the Code of Criminal Procedure makes probable cause affidavits public information, but a court could conclude that subarticle 57.02(h) prohibits the disclosure of identifying information regarding a child sex offense victim from the affidavits in this case by a justice of the peace without a court order. Whether a justice of the peace could issue such an order depends on the nature of the underlying offense. A court could conclude that the two statutes may be reconciled through redaction of the identifying information.

Very truly yours,

A handwritten signature in black ink that reads "Ken Paxton". The signature is written in a cursive, flowing style.

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