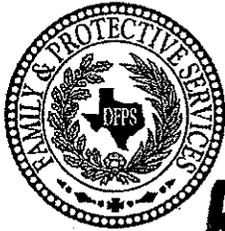


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OPINION COMMITTEE

OPEN RECORDS DIVISION

TEXAS DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES

RQ-0957-GA

COMMISSIONER
Anne Heiligenstein

March 15, 2011

FILE # MI-46707-11

I.D. # 46707

Honorable Greg Abbott
Attorney General
Attn: Opinion Committee
P.O. Box 12548
Austin, Texas 78711-2548

Via Certified Mail, Return Receipt Requested
No. 7001 0360 0003 2020 4161

RE: Is DFPS statutorily entitled to records from law enforcement agencies regarding investigations of child abuse and neglect when such request is made in conjunction with DFPS' legislatively-mandated investigation of child abuse and/or neglect?

Dear General Abbott:

Pursuant to Texas Family Code section 261.301(a), DFPS is required to investigate a report of child abuse or neglect allegedly committed by a person responsible for a child's care, custody, or welfare. During the course of such an investigation, Brett Martin, a Special Investigator with Child Protective Services (CPS), requested information from the City of McKinney's Police Department (City). A copy of Mr. Martin's January 7, 2011 request (using a form mandated by the City) is attached as Exhibit A.¹ Mr. Martin identified himself as a CPS Special Investigator and related that the purpose of the request was "State Entity – for investigative purpose under Family Code."

On January 24, 2011, the City referred Mr. Martin's request to the Open Records Division and indicated that information in its possession was not subject to release. See, Exhibit B.² The City indicated that the information requested by Mr. Martin concerns the City's investigation into the sexual abuse of a child. *Id.* at 2. In support of its objections, the City raised: (1) the confidentiality provisions at Family Code section 261.201 (incorporating the "other law" exception of section 552.101 of the Government Code); and, (2) the common-law privacy exception of the Texas Public Information Act (PIA).

Mr. Martin requested information from the City related to an investigation DFPS is statutorily obligated to undertake. While DFPS is contemporaneously filing a response to PIA Request No. 11-30196 with the Open Records Division and has asked that any decision be abated, DFPS is also asking for an AG Opinion regarding its access to the requested information in general. See, Exhibit C. It is DFPS' position that Mr. Martin's request was not a request for information under the PIA and that DFPS is entitled to the requested information as matter of law.

¹ Although the request was made in 2011, Mr. Martin's request inadvertently provides the year 2010.

² The City's request has been assigned Public Information Request No. 11-30196.

I. Law enforcement agencies are to assist DFPS in its investigations into reports of child abuse or neglect.

Pursuant to Texas Family Code section 261.301(a):

With assistance from the appropriate state or local law enforcement agency as provided by this section, [DFPS] or designated agency shall make a prompt and thorough investigation of a report of child abuse or neglect allegedly committed by a person responsible for a child's care, custody, or welfare.³

The Legislature's intended goal of a fully-cooperative approach between DFPS and law enforcement as to the detection and prevention of child abuse and neglect is further reflected in section 261.105 of the Family Code which obligates DFPS to notify the appropriate law enforcement agency of any report it receives concerning the suspected abuse or neglect of a child or a child's death from abuse or neglect and obligates law enforcement to immediately refer such reports to DFPS. Your office has specifically recognized the special relationship of cooperation imposed by the Family Code between law enforcement and DFPS. *See* Tex. Att'y Gen. Op. No. GA-0106 (2003).

As another example of the Legislature's desire to further the goal of investigating child abuse and neglect, the Legislature authorized the creation of child advocacy centers and multidisciplinary teams made up of professionals from agencies involved in the investigation or prosecution of child abuse cases; e.g., DFPS, law enforcement, and prosecuting attorneys. TEX. FAM. CODE §§ 264.402 *et seq.* Pursuant to section 264.403, state, county and local entities can enter into a memorandum of understanding to participate in the operation of a child advocacy center under which the parties are to agree to develop "a cooperative, team approach to investigating child abuse." *Id.* at § 264.403(b)(1). Members of the multidisciplinary team may share information with the center that is confidential under Section 261.201 as needed to provide services to the victim of child abuse or his family. *Id.* at § 264.408(c). And, while the "files, reports, records, communications, and working papers used or developed in providing services" are confidential and not subject to public release under Chapter 552 of the Government Code, they may be disclosed to DFPS and its employees, law enforcement agencies, prosecuting attorneys, medical professionals, and other state agencies that provide services to children and families. *Id.* at § 264.408(a)(1).

DFPS also contends that section 261.104 of the Family Code contemplates that law enforcement will share "pertinent information" with DFPS. Under 261.104, the contents of a report of abuse or neglect: (1) the name and address of the child; (2) the name and address of the person responsible for the care, custody, or welfare of the child; and, (3) any other pertinent information concerning the alleged or suspected abuse or neglect. DFPS contends that "any other pertinent

³ Emphasis added.

information” under section 261.104 necessarily includes any investigative information held by the City regarding the sexual assault of the child whom DFPS is also investigating.

II. While the Family Code protects against the release of confidential information to the general public, it does not prevent such release to DFPS for use in conducting an investigation.

In seeking an open records decision, the City cites to section 261.201(a) of the Texas Family Code under which:

[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.⁴

A review of the foregoing makes clear that the release of the information the City seeks to withhold is not only permissible, it is actually provided for under section 261.201. Given that DFPS is statutorily charged with investigating child abuse and neglect under the Family Code, release of confidential information under 261.201 is certainly consistent “for purposes” of the Family Code when made in conjunction with DFPS’ discharge of its statutory duty to investigate child abuse and neglect. DFPS contends that section 261.201(a) - as a matter of law - gives it access to the information the City seeks to withhold. Moreover, instead of authorizing the City to withhold the requested information from DFPS, section 261.201(a) is actually designed - in conjunction with other statutes of the Family Code - to permit the release of otherwise confidential information to authorized entities (such as DFPS) to further their legislatively-mandated duty to investigate child abuse and neglect. Section 261.201 should not operate to bar release of the City’s withheld information to DFPS.

Mr. Martin’s request to the City was in furtherance of the Legislature’s goal of administering justice. As the Texas Court of Criminal Appeals has noted, both DFPS and law enforcement have a role in investigating and protecting children from abuse and neglect:

⁴ Emphasis added.

For the most part, CPS caseworkers, who are investigating family placement and safety matters, and police officers, who are investigating criminal matters, run on separate parallel paths. Both are interested in gathering information. While police are collecting information for an arrest and criminal prosecution, CPS workers are investigating to find safe housing and protection for abused or neglected children.

Wilkerson v. State, 173 S.W.3d 521, 529 (Tex. Crim. App. 2005). While Mr. Martin's request would not affect the City's investigation into the alleged sexual abuse of a child, the City's records would provide valuable information to Mr. Martin as he conducts the investigation which the Legislature requires DFPS to conduct in order to protect and provide services to a child victim of abuse or neglect and his family.

If the City released its information to Mr. Martin, there would be no harm to those the Legislature sought to protect when it enacted section 261.201(a) of the Family Code. Furthermore, information obtained by Mr. Martin could not, in turn, be disclosed to the general public since it would be part of Mr. Martin's investigative working files and, as such, would not be available to the general public under section 261.201(a). Moreover, Mr. Martin is statutorily required to maintain the confidentiality of information obtained from the City and could be criminally prosecuted if he failed to do so. See, TEX. HUM. RES. CODE § 40.005(d) ("Except as otherwise provided, a person who is authorized to receive confidential information shall maintain its confidentiality and shall prevent disclosure of the information to a person who is not authorized to receive the information) and § 40.005(c) ("A person commits an offense if the person discloses without authorization confidential information contained in the department's records, papers, files, or communications. An offense under this subsection is a Class A misdemeanor.")

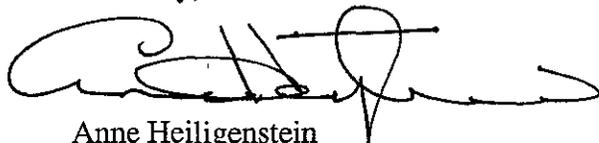
III. The requested information should not be withheld from DFPS under the common-law privacy exception.

The City also alleges that the common-law privacy exception recognized by the PIA protects the release of the withheld information. DFPS agrees that the general public is not entitled to the documents withheld by the City. However, DFPS contends that the common-law right of privacy exception cannot overcome DFPS's legislatively-recognized right to information. See, *Russell v. Texas Dept. of Human Resources*, 746 S.W.2d 510 (Tex. App.--Texarkana 1988)("[DFPS] had a legal duty to investigate the sexual abuse report under Tex. Fam. Code Ann. [§ 261.201]. There is no constitutionally mandated right to privacy which would prohibit such an inquiry."). Furthermore, as noted above, there is no risk to the privacy of the individuals identified in the City's records in light of DFPS and Mr. Martin's obligation to maintain the confidentiality of information obtained from the City.

In closing, while DFPS agrees that information the City seeks to withhold is not subject to disclosure to the general public, recognized exceptions exist. As law enforcement is obligated to assist DFPS in its investigations, DFPS is entitled to the information Mr. Martin requested as a matter of law and such request is not subject to the PIA. Family Code section 261.201 explicitly authorizes the release of confidential information for purposes consistent with the Family Code; i.e., DFPS' investigation. The Family Code's explicit mandate of cooperation between law enforcement and DFPS is specifically aimed at a joint venture to find and prevent child abuse. If you conclude that Mr. Martin's request is one that should be made under the PIA, then DFPS' discharge of its statutory duty to investigate child abuse and neglect under the Family Code gives rise to an exception for the release of the information and the common-law privacy exception cannot defeat DFPS's right to the information.

DFPS asks that you conclude that it is statutorily entitled to records from law enforcement agencies regarding investigations of child abuse and neglect when such request is made in conjunction with DFPS' legislatively-mandated investigation of child abuse and/or neglect.

Sincerely,



Anne Heiligenstein
Commissioner
Texas Department of Family and Protective Services

xc: Mr. B. Chase Griffith
Attorney at Law
Brown & Hofmeister, L.L.P.
740 East Campbell Road, Suite 800
Richardson, Texas 75081
Via Facsimile Transmission at 214/747-6111

ORA#10-3276



REQUEST FOR PUBLIC RECORDS

CONTACT: Records & Information Coordinator, 972-547-2793

FORM SUBMISSION:

- Complete the form then save it to your computer.
- For faxing or mailing, print the completed form from your computer.
 - o E-MAIL: orr@mckinneytexas.org
 - o FAX: (972) 547-2792
 - o MAIL: McKinney Police Department
2200 Taylor Burk Drive
McKinney, TX 75071

JAN 07 2011 10:25

Date: 1/07/10
 Name: Brett Martin - Special Investigator CPS
 Address: 2205 Los Rios Blvd.
 City: McKinney State: Tx Zip Code: 75094
 Phone: (972) 633-6762 E-mail address: brett.martin@dfps.state.tx.us

Information requested under the Texas Open Records Act, Texas Government Code, Chapter 552. Please be specific or clarification will be required.

Case #: _____ and/or Call For Service #: _____



- 2.
- 3.

Copies will be \$.10 for each page up to 50 pages. For 50 or more pages, the charge shall be \$.10 for each page plus personnel time. (Standard size copies, nonstandard size copies are more) (Per Texas Administrative Code; General Services Commission, Chapter 111, Subchapter C, Rule §111.63)

- Active records must exist; no compiling or creation will be made.
- Information requiring extensive research will be charged \$15.00 per hour.
- Do you wish to be notified of the estimated time for research? Yes No
- Are you willing to pay for the necessary time to research this request? Yes No ; if no, please explain:

State Entity - for investigative purpose under Family Code.

The McKinney Police Department will strive to furnish all information that is approved within ten (10) working days depending upon the workload of employees and complexity of items requested.

For Office Use:

Approved by: _____ Date: _____

Date available for review or pickup _____ Notified _____ AGO Request _____

Copies picked up by: _____ Cost: \$ _____



BROWN & HOFMEISTER, L.L.P.

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Richardson, Texas 75081

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Telecopier: (214) 747-6111
www.bhlaw.net

January 24, 2011

Honorable Greg Abbott
Attorney General
Open Records Division
P.O. Box 12548
Austin, TX 78711-2548

VIA CERTIFIED MAIL,
RETURN RECEIPT REQUESTED
7008 2810 0000 5664 8144

Re: Request for Public Information Opinion
Brett Martin

Dear General Abbott:

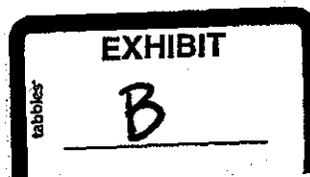
As an attorney who represents the City of McKinney, Texas, I would like to request a Public Information Opinion regarding the release of the following documentation. On January 7, 2011, the City received a Public Information Request from Brett Martin for information related to a specific address. The City was closed on January 17, 2011 for Dr. Martin Luther King, Jr. Day. Therefore, this request is timely. The Public Information Request is attached hereto as **Exhibit A**. By copy of this letter, some responsive documents were released to the requestor. The City objects to the release of the enclosed information based upon the common law privacy exception of the Texas Public Information Act. See Texas Government Code §552.101. The City further objects to the release of the information based the "other law" exception incorporating Texas Family Code § 261.201 under the Public Information Act. See Texas Government Code §552.101. A copy of the documents responsive to the request is attached hereto as **Exhibit B**.

While the City recognizes that most records may be sent to Texas government agencies via an authorized interagency transfer of information, the City seeks a Public Information Opinion regarding the enclosed sensitive information in an abundance of caution.

INVESTIGATION OF REPORT OF CHILD ABUSE OR NEGLECT

Section 552.101 of the Texas Government Code specifically excepts from disclosure information made confidential by other statutes. Section 261.201 of the Texas Family Code reads as follows:

- (a) The 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.

The information related to the attached concerns investigations into sexual abuse of a child. Therefore, the City believes that the enclosed information is confidential and may not be released. See Open Records Decision No. 587 (1991).

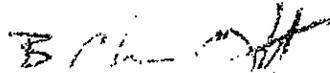
552.101 – Common Law Privacy Information

Section 552.101 of the Texas Government Code excepts from public disclosure information “considered confidential by law, either constitutional, statutory, or by judicial decision.” TEX. GOV'T CODE ANN. § 552.101 (Vernon 2004). Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy. Generally, the common-law privacy protects information 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 public has no legitimate interest in the information. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The types of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683.

Consequently, the City requests a ruling from your office that the information related to the specified case and contained within *Exhibit B* be withheld pursuant to section 552.101 of the Texas Government Code and the common-law right of privacy.

For the reasons stated herein, the City of McKinney respectfully submits that the records requested are not subject to required public disclosure. Please do not hesitate to contact me at the address or telephone number listed above should you have any additional questions or comments.

Sincerely,



B. Chase Griffith

BCG/sg

Enclosures

January 24, 2011
Page 3

cc w/o enclosures:

Heather Moody, McKinney Police Department
Brett Martin, Requestor



TEXAS DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES

COMMISSIONER
Anne Heiligenstein

March 15, 2011

Honorable Greg Abbott
Attorney General
Open Records Division
P.O. Box 12548
Austin, Texas 78711-2548

*Via Certified Mail, Return Receipt Requested
No. 7001 0360 0003 2020 4154*

RE: Public Information Request No. 11-30196

Dear General Abbott:

The Texas Department of Family and Protective Services (DFPS) submits this letter in response to the City of McKinney's (City's) pending request for an open records decision. DFPS does not consider this particular matter to be an open records issue in that DFPS is not required to request information from law enforcement under the Texas Public Information Act (PIA). Instead, DFPS contends that it is entitled to the withheld documents under express authority granted it by the Family Code, namely sections 261.104, 261.105, 261.201, and 261.301.

DFPS has requested an opinion from the Attorney General's Opinion Division that the information it has requested is available to DFPS as a matter of law and respectfully requests that the Open Records Division abate the City's pending request until the matter of DFPS's right to the information is resolved. A copy of that request is attached as Exhibit A. To the extent that the Open Records Division cannot abate the pending PIA Request, then DFPS responds to the City's contentions as follows:

I. DFPS' Request for Information from the City.

On January 7, 2011, Brett Martin, a special investigator with DFPS' Child Protective Services (CPS) Division, made a request for information from the City's Police Department. See Exhibit B. Mr. Martin requested information during his investigation of a referral DFPS received alleging child abuse. Using the form mandated by the City, Mr. Martin identified himself as a "Special Investigator CPS" and related that the purpose of the request was "State Entity – for investigative purpose under Family Code."

On January 24, 2011, the City requested that your office issue an opinion as to whether certain information in its possession is subject to release. See, Exhibit C. The City indicates that, while it recognizes that most records may be sent to Texas government agencies via an authorized interagency transfer of information, it is seeking a PIA decision in an abundance of caution.



II. The Issue

In its request, the City asks the Honorable Attorney General to address whether the City's investigation regarding the sexual abuse of a child is confidential and not subject to release. Relying on Family Code section 261.201, and the common-law privacy exception of the PIA, the City contends that documents in its possession are confidential, not only to the general public, but also to DFPS. DFPS will address each contention to establish that it is indeed entitled to the withheld material.

A. The City has entered into a Memorandum of Understanding with DFPS applicable to the requested information.

The City has effectively recognized that DFPS has a right to shared information above and beyond the general public. DFPS and the City of McKinney, along with a number of other entities and cities, entered into an interagency agreement concerning the investigation of child abuse in May 2010. See, Exhibit D. That agreement provides that the signatories agree to work collaboratively to, *inter alia*:

[provide] a cooperative team approach to investigating child abuse cases and providing services in a manner that insures client confidentiality, but allows the sharing of relevant information consistent with legal, ethical, and professional standards of practice as stipulated in the Texas Family Code.

The Legislature authorized the creation of child advocacy centers and multidisciplinary teams made up of professionals from agencies involved in the investigation or prosecution of child abuse cases; e.g., DFPS, law enforcement, and prosecuting attorneys. TEX. FAM. CODE §§ 264.402 *et seq.* Members of the multidisciplinary team may share information with the center that is confidential under Section 261.201 as needed to provide services to the victim of child abuse or his family. *Id.* at § 264.408(c). And, while the "files, reports, records, communications, and working papers used or developed in providing services" are confidential and not subject to public release under Chapter 552 of the Government Code, they may be disclosed to DFPS and its employees, law enforcement agencies, prosecuting attorneys, medical professionals, and other state agencies that provide services to children and families. *Id.* at § 264.408(a)(1).

B. While the City's investigative materials are confidential and protected from public disclosure, they are available to DFPS for purposes consistent with Texas Family Code provisions without the need to request the records under the PIA.

It is generally true that Family Code section 261.201 prevents the release of "a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report" and "the files, reports, records, communications, audiotapes, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation." TEX. FAM. CODE § 261.201(a). But section 261.201(a) goes on to provide that such information "may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency...". Thus, this provision gives DFPS access to the information the City is withholding.

Section 261.201(a) makes clear that the release of the information the City seeks to withhold is not only permissible, it is actually provided for under section 261.201. Given that DFPS is statutorily charged with investigating child abuse and neglect under the Family Code, release of confidential information under 261.201 is certainly consistent "for purposes" of the Family Code when made in conjunction with DFPS' discharge of its statutory duty to investigate child abuse and neglect. DFPS contends that section 261.201(a) - as a matter of law - gives it access to the information the City seeks to withhold. Moreover, instead of authorizing the City to withhold the requested information from DFPS, section 261.201(a) is actually designed - in conjunction with other statutes of the Family Code - to permit the release of otherwise confidential information to authorized entities (such as DFPS) to further their legislatively-mandated duty to investigate child abuse and neglect. Section 261.201 should not operate to bar release of the City's withheld information to DFPS.

C. Law enforcement agencies are to assist DFPS in its investigations into reports of child abuse or neglect.

The Legislature specifically provides in Family Code section 261.301 that DFPS is the state agency required to investigate a report of child abuse "with assistance from the appropriate state or local law enforcement agency." TEX. FAM. CODE § 261.301(a). But the statute does not end there. Section 261.301 also specifically requires that state and local law enforcement assist DFPS in its investigation of child abuse. TEX. FAM. CODE § 261.301(a). *See also* TEX. FAM. CODE § 261.105(a) (reports received by a law enforcement agency alleging child abuse by a person responsible for a child's care, custody, or welfare "shall be referred immediately to DFPS or the designated agency."). The Legislature's intended goal of a fully-cooperative approach to the detection and prevention of child abuse is further reflected as DFPS in turn is required to notify the appropriate law enforcement agency of any report it receives concerning the suspected abuse or neglect of a child or a child's death from abuse or neglect. TEX. FAM. CODE § 261.105(b). Your office has specifically recognized the special relationship of cooperation imposed by the Family Code between law enforcement and DFPS. *See* Tex. Att'y Gen. Op. No. GA-0106 (2003).

DFPS also contends that section 261.104 of the Family Code contemplates that law enforcement will share "pertinent information" with DFPS. Under 261.104, the contents of a report of abuse or neglect: (1) the name and address of the child; (2) the name and address of the person responsible for the care, custody, or welfare of the child; and, (3) any other pertinent information concerning the alleged or suspected abuse or neglect. DFPS contends that "any other pertinent information" under section 261.104 necessarily includes any investigative information held by the City regarding the sexual assault of the child whom DFPS is also investigating.

D. The requested information should not be withheld from DFPS under the common-law privacy exception.

The City has also asserted that the common-law privacy exception recognized by the PIA protects the release of the withheld information. DFPS agrees that the general public is not entitled to the documents withheld by the City. DFPS contends that the common-law right of privacy exception

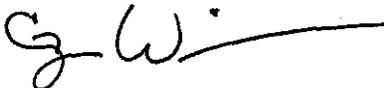
cannot overcome DFPS's legislatively-recognized right to information. See, *Russell v. Texas Dept. of Human Resources*, 746 S.W.2d 510 (Tex. App.--Texarkana 1988)("[DFPS] had a legal duty to investigate the sexual abuse report under Tex. Fam. Code Ann. [§ 261.201]. There is no constitutionally mandated right to privacy which would prohibit such an inquiry."). Furthermore, as noted above, there is no risk to the privacy of the individuals identified in the City's records in light of DFPS and Mr. Martin's obligation to maintain the confidentiality of information obtained from the City.

III. Conclusion.

A review of the foregoing makes clear that release of the withheld information is not only permissible, but actually provided for, under section 261.201. DFPS is statutorily charged with investigating child abuse and neglect under the Family Code and Mr. Martin's request for information from the City is certainly consistent "for purposes" of the Family Code when made in conjunction with DFPS's discharge of its statutory duty to investigate child abuse and neglect. The provision the City suggests shields the withheld information is actually designed - in conjunction with other statutes of the Family Code - to permit the release of otherwise confidential information to authorized entities to further the legislatively mandated duty of DFPS to investigate child abuse and neglect. As Mr. Martin's request was made pursuant to a lawful and required investigation, neither Family Code section 261.201 nor common-law privacy issues should operate to bar release of the withheld information.

In this particular case, the withheld information should be released to the DFPS. DFPS respectfully asks that your office issue a decision finding that DFPS is entitled to the withheld information.

Sincerely,



Gerry Williams
General Counsel, Texas Department of Family and Protective Services

xc: Mr. B. Chase Griffith
Attorney at Law
Brown & Hofmeister, L.L.P.
740 East Campbell Road, Suite 800
Richardson, Texas 75081
Via Facsimile Transmission at 214/747-6111