



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 10, 2004

Ms. Patricia J. Acosta
Assistant District Attorney
34th Judicial District
500 East San Antonio Street, 2nd Floor
El Paso, Texas 79901-2420

OR2004-1845

Dear Ms. Acosta:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 197490.

The Office of the District Attorney, 34th Judicial District (the "district attorney") received a request for information relating to cause number 990D04668. Although you state that some of the responsive information has been released, you claim that the remainder of the requested information is excepted from disclosure under sections 552.101, 552.103 and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

First, we address the requestor's contention that the district attorney failed to timely request a decision from this office. *See* Gov't Code §§ 552.301 (the governmental body must ask for an attorney general's decision and state the exceptions that apply not later than the 10th business day after the date of receiving the written request), .302 (a governmental body's failure to comply with section 552.301 results in the legal presumption that the information is public and must be released). However, even if the district attorney failed to request a decision in compliance with section 552.301 of the Government Code, the applicability of section 552.101 constitutes a compelling reason to withhold information from disclosure. *See* Open Records Decision No. 150 (1977) (presumption of openness overcome by a showing that the information is made confidential by another source of law or affects third party interests).

Section 552.101 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. Section 261.201(a) of the Family Code provides 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, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

Because the information at issue relates to an allegation of indecency with a child, this information is within the scope of section 261.201 of the Family Code. You have not indicated that the district attorney has adopted a rule that governs the release of this type of information. You state that you allowed the requestor to review the requested case file pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963). The requestor contends that he reviewed the case file pursuant to the district attorney's open file policy and not pursuant to *Brady*. Regardless of whether the review was pursuant to *Brady*, the information at issue is confidential under section 261.201 of the Family Code and that confidentiality is not waived by the previous review. *See* Open Records Decision No. 454 (1986) (if a governmental body releases information because it reasonably concludes that it is constitutionally required to do so, the decision to release is not voluntary, but one compelled by law, and therefore under such circumstances, the governmental body doesn't waive its confidentiality claims). *See generally* Open Records Decision No. 490 (1988) (protection for information deemed confidential by law is not ordinarily waived through "selective disclosure").

We also note that the submitted information includes two complaint affidavits. The Seventy-eighth Legislature amended article 15.26 of the Code of Criminal Procedure, which became effective September 1, 2003. Article 15.26 states "[t]he arrest warrant, and any affidavit presented to the magistrate in support of the issuance of the warrant, is public information." Crim. Proc. Code art. 15.26.

Generally, information used or developed in an investigation of child abuse under chapter 261 of the Family Code must be withheld in its entirety under section 261.201. Thus, there is a conflict of laws between section 261.201 and article 15.26. However, where information falls within both a general and a specific statutory provision, the specific

provision prevails over the general. *See Cuellar v. State*, 521 S.W.2d 277 (Tex. Crim. App. 1975) (under well-established rule of statutory construction, specific statutory provisions prevail over general ones); Open Records Decision Nos. 598 (1991), 583 (1990), 451 (1986). We find that the public availability provision in article 15.26 of the Code of Criminal Procedure is more specific than the general confidentiality provision in section 261.201. Thus, article 15.26 more specifically governs the public availability of the submitted complaint affidavits and prevails over the more general confidentiality provision in section 261.201. *See Lufkin v. City of Galveston*, 63 Tex. 437 (1885) (when two sections of an act apply, and one is general and the other is specific, then the specific controls); *see also* Gov't Code § 311.026 (where a general statutory provision conflicts with a specific provision, the specific provision prevails as an exception to the general provision). Therefore, if the complaint affidavits were presented to a magistrate in support of the issuance of arrest warrants, the district attorney must release this information to the requestor pursuant to article 15.26 of the Code of Criminal Procedure and withhold the remaining information under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code. If the complaint affidavits were not presented to a magistrate in support of the issuance of arrest warrants, the district attorney must withhold all of the information at issue under section 552.101 in conjunction with section 261.201.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Melissa Vela-Martinez
Assistant Attorney General
Open Records Division

MVM/sdk

Ref: ID# 197490

Enc. Submitted documents

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(w/o enclosures)