



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 20, 2010

Ms. Jennifer C. Cohen
Assistant General Counsel
Texas Department of Public Safety
Box 4087
Austin, Texas 78773-0001

OR2010-00855

Dear Ms. Cohen:

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# 367559 (DPS No. 09-2166).

The Texas Department of Public Safety (the "department") received a request for information pertaining to a specified polygraph examination of the requestor's client. You claim that the submitted information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted information. We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. This exception encompasses information that other statutes make confidential. You raise section 552.101 in conjunction with section 261.201 of the Family Code, which provides in part:

- (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 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.

Fam. Code § 261.201(a). You assert that the submitted information pertains to an investigation of alleged or suspected child abuse and consists of information used or developed in the investigation. *See id.* § 261.001(1)(E) (definition of child abuse includes sexual assault under Penal Code section 22.011); *see also* Penal Code § 22.011(c)(1) (defining “child” for purposes of Penal Code section 22.011). The requestor contends that the submitted information is not subject to section 261.201 because the polygraph examination was conducted as part of an administrative internal affairs investigation conducted by the Montgomery County Sheriff’s Department and not as part of the criminal investigation into the child abuse allegations that was conducted by the Conroe Police Department. Whether or not the requested information was used or developed in an investigation under chapter 261 is a question of fact. This office cannot resolve factual disputes in the ruling process. *See* Open Records Decision Nos. 592 at 2 (1991), 552 at 4 (1990), 435 at 4 (1986). Where fact issues are not resolvable as a matter of law, we must rely on the facts alleged to us by the governmental body requesting our decision, or upon those facts that are discernible from the documents submitted for our inspection. *See* ORD 552 (1990). Thus, based on the department’s representation that the submitted information was used in an investigation under chapter 261, we find that the submitted information is generally within the scope of section 261.201 of the Family Code. However, section 261.201 of the Family Code also provides that information encompassed by subsection (a) may be disclosed “for purposes consistent with [the Family Code] and applicable federal or state law.” Fam. Code § 261.201(a).

As you acknowledge, the submitted information consists of polygraph information. Such records are governed by section 1703.306 of the Occupations Code, which is also encompassed by section 552.101 of the Government Code, and constitutes “applicable state law” for purposes of section 261.201(a). Section 1703.306 provides in part:

(a) A polygraph examiner, trainee, or employee of a polygraph examiner, or a person for whom a polygraph examination is conducted or an employee of the person, may not disclose information acquired from a polygraph examination to another person other than:

(1) the examinee or any other person specifically designated in writing by the examinee[.]

Occ. Code § 1703.306. The submitted information consists of information that was acquired from a polygraph examination, the requestor is the attorney of the polygraph examinee, and the department has received a written designation by the examinee pursuant to section 1703.306(a)(1). Thus, if the department determines that disclosure of the information is consistent with chapter 261 of the Family Code, then we find that the department has the discretion to release the polygraph information to this requestor pursuant to section 1703.306(a)(1). *See* Open Records Decision No. 481 at 9 (1987) (predecessor to section 1703.306 permits, but does not require, examination results to be disclosed to examinees). However, if the department determines that disclosure of the polygraph information is not consistent with chapter 261 of the Family Code, then the department must withhold the submitted information in its entirety pursuant to section 552.101 of the Government Code in conjunction with section 261.201(a) of the Family Code.

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.oag.state.tx.us/open/index_orl.php, 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 must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Laura Ream Lemus
Assistant Attorney General
Open Records Division

LRL/eb

Ref: ID# 367559

Enc. Submitted documents

c: Requestor
(w/o enclosures)