



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

November 9, 2012

Mr. Nathan L. Brown  
Assistant City Attorney  
City of El Paso  
2 Civic Center Plaza, 9th Floor  
El Paso, Texas 79901

OR2012-18089

Dear Mr. Brown:

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# 470628.

The El Paso Police Department (the "department") received a request for the polygraph test done in connection with a specified case. You claim the requested information is excepted from disclosure under section 552.101 of the Government Code. We have considered the claimed exception and reviewed the submitted information.

Initially, we note most of the information you have submitted is not responsive to the instant request, which seeks only the polygraph test. This ruling does not address the public availability of the non-responsive information, nor is the department required to release non-responsive information in response to this request.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses information made confidential by other statutes, such as section 261.201 of the Family Code. Section 261.201 provides, in relevant part:

(a) [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.

Fam. Code § 261.201(a). Upon review, we agree the responsive information was used or developed in an investigation under chapter 261. *See id.* § 261.001(1)(E) (definition of child abuse includes indecency with a child under Penal Code section 21.11); *see also* Penal Code § 22.11(a) (defining “child” for purposes of Penal Code section 21.11 as a person younger than 17 years of age). Therefore, this information is within the scope of section 261.201. You do not indicate the department has adopted a rule governing the release of this type of information; therefore, we assume no such regulation exists. Given that assumption, we conclude the responsive information is generally confidential pursuant to section 261.201(a) of the Family Code. However, section 261.201(a) of the Family Code also provides information encompassed by that section may be disclosed “for purposes consistent with [the Family Code] and applicable federal or state law [.]” Fam. Code § 261.201(a).

The responsive information consists of a polygraph examination, access to which is governed by section 1703.306 of the Occupations Code. Section 1703.306 constitutes “applicable state law” for purposes of section 261.201(a). Section 1703.306(a)(1) provides as follows:

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(a)(1). We have marked the polygraph examination information at issue. The requestor is the polygraph examinee. Thus, if the department determines disclosure of the polygraph information is consistent with chapter 261 of the Family Code, then the department has the discretion to release the marked information 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). Although you also raise section 552.101 of the Government Code in conjunction with common-law privacy for this information, a specific statutory right of access prevails over the common law. *Collins v. Tex Mall, L.P.*, 297 S.W.3d 409, 415 (Tex. App.—Fort Worth 2009, no pet.) (statutory provision controls and preempts common law only when statute directly conflicts with common law principle); *CenterPoint Energy Houston Elec. LLC v. Harris County Toll Rd.*, 436 F.3d 541, 544 (5th Cir. 2006) (common law controls only where there is no conflicting or controlling statutory law). However, if the department determines disclosure of the polygraph information is not consistent with chapter 261 of the Family Code, then the department may not provide the polygraph information to the requestor under section 1703.306(a)(1) of the Occupations Code, but instead must withhold it in its entirety under section 552.101 of the Government Code in conjunction with section 261.201 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](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,



Misty Haberer Barham  
Assistant Attorney General  
Open Records Division

MHB/som

Ref: ID# 470628

Enc. Submitted documents

c: Requestor  
(w/o enclosures)