



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 16, 2013

Ms. M. Ann Montgomery-Moran
Assistant Ellis County & District Attorney
County of Ellis
109 South Jackson
Waxahachie, Texas 75165

OR2013-14349

Dear Ms. Montgomery-Moran:

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# 497953.

The Ellis County and District Attorney's Office (the "district attorney's office") received a request for the case file on the requestor's client. The district attorney's office claims the requested information is excepted from disclosure under sections 552.101 and 552.108 of the Government Code. We have considered the claimed exceptions and reviewed the submitted information.

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 section encompasses information protected by other statutes. Section 261.201(a) of the Family Code provides as follows:

[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 the requested information was used or developed in an investigation under chapter 261. *See id.* §§ 101.003(a) (defining “child” for purposes of section 261.201), 261.001(1) (defining “abuse” for purposes of section 261.201 of Family Code). Upon review, we find the information is within the scope of section 261.201 of the Family Code. You do not indicate the district attorney’s office has adopted a rule that governs the release of this type of information. Therefore, we assume no such rule exists. Given that assumption, we conclude the submitted information is confidential under section 261.201(a) of the Family Code and the district attorney’s office must withhold it from release under section 552.101 of the Government Code on that ground.¹ *See Open Records Decision No. 440 at 2 (1986) (predecessor statute).*

However, the submitted information contains a fingerprint of the requestor’s client. Section 560.003 of the Government Code provides “[a] biometric identifier in the possession of a governmental body is exempt from disclosure under [the Act].” Gov’t Code § 560.003; *see id.* § 560.001(1) (“biometric identifier” means retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry). Section 560.002 also provides, however, that “[a] governmental body that possesses a biometric identifier of an individual . . . may not sell, lease, or otherwise disclose the biometric identifier to another person unless . . . the individual consents to the disclosure[.]” *Id.* § 560.002(1)(A). Accordingly, we find a person, or the person’s authorized representative, has a right of access under section 560.002(1)(A) to that person’s biometric information. Thus, the requestor has a right of access to her client’s fingerprint under section 560.002(1)(A). *See Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning himself).*

Although the submitted information is confidential under section 261.201(a) of the Family Code, section 560.002(1)(A) of the Government Code provides the requestor with a right of access to her client’s fingerprint. Therefore, there is a conflict between the confidentiality provision of section 261.201(a) and the right-of-access provision of section 560.002(1)(A). Where general and specific statutes are in irreconcilable conflict, the specific provision typically prevails as an exception to the general provision, unless the general provision was enacted later and there is clear evidence the legislature intended the general provision to prevail. *See Gov’t Code § 311.026(b); City of Lake Dallas v. Lake Cities Mun. Util. Auth.*, 555 S.W.2d 163, 168 (Tex. Civ. App.—Fort Worth 1977, writ ref’d n.r.e.). Although section 261.201(a) makes records of alleged child abuse confidential, section 560.002(1)(A)

¹As our ruling is dispositive, we do not address your other arguments to withhold this information.

specifically permits release of fingerprints to certain parties. Therefore, we conclude the district attorney's office may not withhold the marked fingerprint from this requestor under section 261.201(a). Although you also assert the fingerprint is excepted from release pursuant to section 552.108 of the Government Code, the exceptions in the Act cannot impinge on a statutory right of access to information. *See* Open Records Decision No. 613 at 4 (1993); *see also id.* No. 451 (1986) (specific statutory right of access provisions overcome general exceptions to disclosure under the Act). Further, statutory access provisions generally prevail over the common law. *See 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 it directly conflicts with common-law principle); *see also Cash Am. Intern. Inc. v. Bennett*, 35 S.W.3d 12, 16 (Tex. 2000) (statute depriving person of common-law right will not be extended beyond its plain meaning or applied to cases not clearly within its purview). Therefore, we do not address your arguments under section 552.101 in conjunction with common-law privacy and section 552.108 of the Government Code for the fingerprint at issue. However, you also raise section 552.101 in conjunction with constitutional privacy for the fingerprint. Under the Supremacy Clause of the United States Constitution, the United States Constitution and duly-enacted federal statutes are “the supreme law of the Land,” and states have a responsibility to enforce federal law. *See* U.S. Const., art. VI, cl. 2; *Howlett v. Rose*, 496 U.S. 356, 367-69 (1990). As a federal law, constitutional privacy preempts any conflicting state provisions, including section 560.002 of the Government Code. *See Equal Employment Opportunity Comm’n v. City of Orange, Tex.*, 905 F. Supp. 381, 382 (E.D. Tex. 1995) (federal law prevails over inconsistent provision of state law). Thus, we will address your argument under section 552.101 in conjunction with constitutional privacy for the fingerprint at issue.

Section 552.101 of the Government Code also encompasses the doctrine of constitutional privacy, which consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. Open Records Decision No. 455 at 4 (1987). The first type protects an individual's autonomy within “zones of privacy” which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The information must concern the “most intimate aspects of human affairs.” *Id.* at 5; *see Ramie v. City of Hedwig Village*, 765 F.2d 490 (5th Cir. 1985). Upon review, we find you have failed to demonstrate the marked fingerprint falls within the zones of privacy or implicates an individual's privacy interests for the purposes of constitutional privacy. Thus, the department may not withhold the marked fingerprint under section 552.101 in conjunction with constitutional privacy. Therefore, the district attorney's office must

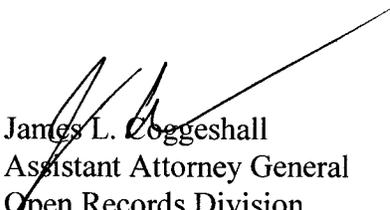
release the fingerprint of the requestor's client, which we have marked, pursuant to section 560.002(1)(A) of the Government Code.²

To conclude, the district attorney's office must release the fingerprint we have marked pursuant to section 560.002(1)(A) of the Government Code. The district attorney's office must withhold the remaining information under 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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/tch

Ref: ID# 497953

Enc. Submitted documents

c: Requestor
(w/o enclosures)

²Because the requestor has a statutory right of access to the information being released, the district attorney's office must again seek a decision from this office if it receives another request for the same information from another requestor.