



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 8, 2014

Ms. Stephanie Walker
Legal Assistant, Civil Division
Comal County Criminal District Attorney's Office
150 North Seguin Avenue, Suite 307
New Braunfels, Texas 78130-5161

OR2014-13839

Dear Ms. Walker:

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# 532748 (File No. 14-OR-065).

The Comal County Sheriff's Office (the "sheriff's office") received a request for a specified forensic interview. You claim 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 representative sample of information.¹

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, including section 261.201 of the Family Code, which provides:

(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 [the Family Code] and applicable federal or state law or under rules adopted by an investigating agency:

¹We assume the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than that submitted to this office.

(1) a report of alleged or suspected abuse or neglect made under [chapter 261 of the Family Code] 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 [chapter 261 of the Family Code] or in providing services as a result of an investigation.

...

(k) Notwithstanding Subsection (a), an investigating agency, other than the [Texas Department of Family and Protective Services] or the Texas Youth Commission, on request, shall provide to the parent, managing conservator, or other legal representative of a child who is the subject of reported abuse or neglect, or to the child if the child is at least 18 years of age, information concerning the reported abuse or neglect that would otherwise be confidential under this section. The investigating agency shall withhold information under this subsection if the parent, managing conservator, or other legal representative of the child requesting the information is alleged to have committed the abuse or neglect.

(l) Before a child or a parent, managing conservator, or other legal representative of a child may inspect or copy a record or file concerning the child under Subsection (k), the custodian of the record or file must redact:

...

(2) any information that is excepted from required disclosure under [the Act], or other law[.]

Fam. Code § 261.201(a), (k), (l)(2). We find the submitted information was used or developed in an investigation of alleged or suspected child abuse under chapter 261 of the Family Code, so as to be generally confidential under section 261.201. *See id.* §§ 261.001(1) (definition of “abuse” for purposes of chapter 261 of the Family Code); 101.003(a) (defining “child” for purposes of section 261.201 as person under 18 years of age who is not and has not been married or who has not had the disabilities of minority removed for general purposes). In this instance, however, the requestor is a parent of the victim of the alleged or suspected child abuse and is not accused of committing the abuse. Therefore, pursuant to section 261.201(k) of the Family Code, the submitted information may not be withheld from this requestor under section 552.101 of the Government Code on the basis of section 261.201(a). *See id.* § 261.201(k). Section 261.201(l)(2) provides that any information excepted from disclosure under the Act or other law must be withheld. *See id.* § 261.201(l)(2). Thus, we will address the sheriff’s office’s arguments against disclosure.

Section 552.101 of the Government Code also encompasses the common-law right to privacy, which protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be met. *Id.* at 681-82. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683.

In Open Records Decision No. 393 (1983), this office concluded generally, only information that either identifies or tends to identify a victim of sexual assault or other sex-related offense may be withheld under common-law privacy; however, because the identifying information was inextricably intertwined with other releasable information, the governmental body was required to withhold the entire report. ORD 393 at 2; *see* Open Records Decision No. 339 (1982); *see also Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied) (identity of witnesses to and victims of sexual harassment was highly intimate or embarrassing information and public did not have a legitimate interest in such information); Open Records Decision No. 440 (1986) (detailed descriptions of serious sexual offenses must be withheld). Further, where the requestor knows the identity of the victim, the entire report must be withheld to protect the victim's privacy.

You seek to withhold the entirety of the submitted information under section 552.101 in conjunction with common-law privacy. However, in this instance, the requestor is the parent of the minor child whose privacy interests are at issue, and the requestor has a right of access to the submitted information pursuant to section 552.023 of the Government Code. *See* Gov't Code § 552.023(a) (person or person's authorized representative has special right of access to information held by governmental body that relates to person and that is protected from public disclosure by laws intended to protect person's privacy interests); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning herself). Accordingly, the sheriff's office may not withhold any of the submitted information under section 552.101 of the Government Code in conjunction with common-law privacy.

You also raise section 552.101 of the Government Code in conjunction with article 38.45 of the Code of Criminal Procedure, which provides, in relevant part:

(a) During the course of a criminal hearing or proceeding, the court may not make available or allow to be made available for copying or dissemination to the public property or material:

(1) that constitutes child pornography, as described by Section 43.26(a)(1), Penal Code;

(2) the promotion or possession of which is prohibited under Section 43.261, Penal Code; or

(3) that is described by Section 2 or 5, Article 38.071, of this code.

(b) The court shall place property or material described by Subsection (a) under seal of the court on conclusion of the criminal hearing or proceeding.

Crim. Proc. Code art. 38.45(a), (b). Accordingly, article 38.45 sets forth restrictions placed on a court with regard to the dissemination of evidence in a criminal hearing or proceeding. We note the submitted information in this instance consists of a video recording that was created during the sheriff's office's investigation. The sheriff's office received the present request for information and maintains the requested video recording. The restrictions on a court's release of information under article 38.45 do not apply to the sheriff's office's release of information requested under the Act. Therefore, we find article 38.45 is not applicable to the submitted information, and no portion of the information may be withheld on this basis.

You also raise section 552.101 of the Government Code in conjunction with article 39.15 of the Code of Criminal Procedure, which provides, in relevant part:

(a) In the manner provided by this article, a court shall allow discovery under Article 39.14 of property or material:

...

(3) that is described by Section 2 or 5, Article 38.071, of this code.

(b) Property or material described by Subsection (a) must remain in the care, custody, or control of the court or the state as provided by Article 38.45.

(c) A court shall deny any request by a defendant to copy, photograph, duplicate, or otherwise reproduce any property or material described by Subsection (a), provided that the state makes the property or material reasonably available to the defendant.

Id. art. 39.15(a)(3), (b), (c). Article 39.15 addresses discovery procedures for evidence depicting or describing abuse of or sexual conduct by a child or minor. However, we note the Act differs in purpose from statutes and procedural rules providing for discovery in judicial proceedings. *See* Gov't Code §§ 552.005 (Act does not affect scope of civil discovery), .0055 (subpoena duces tecum or request for discovery issued in compliance with statute or rule of civil or criminal procedure is not considered to be request for information under the Act). The discovery process is a process through which parties to litigation can obtain information pertaining to the litigation. A public information request under the Act is a process in which any individual may request information from a governmental body. Thus, the discovery process has no bearing on the availability of information requested under the Act. Additionally, we find article 39.15 of the Code of Criminal Procedure does not

make information confidential for purposes of the Act. Open Records Decision No. 658 at 4 (1998) (stating statutory confidentiality provision must be express, and a confidentiality requirement will not be implied from statutory structure), 478 at 2 (1987) (statutory confidentiality requires express language making certain information confidential or stating information shall not be released to public). Therefore, the sheriff's office may not withhold any of the submitted information under section 552.101 of the Government Code in conjunction with article 39.15 of the Code of Criminal Procedure. As you raise no further exceptions to disclosure, the sheriff's office must release the submitted information to this requestor.²

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,



Megan G. Holloway
Assistant Attorney General
Open Records Division

MGH/akg

Ref: ID# 532748

Enc. Submitted documents

c: Requestor
(w/o enclosures)

²We note the requestor has a special right of access to the information being released. *See* Fam. Code § 261.201(k).