OFFICE of the ATTORNEY GENERAL
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May 16, 2003

Mr. Gary L. Johnson
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Texas Department of Criminal Justice
209 West 14th Street, Suite 500
Austin, Texas 78701

Open Records Decision No. 679

Re: Whether section 2(c) of article 4512g-1, Vernon's Annotated Revised Civil Statutes, requires the Dallas Police Department to release an offense report of an investigation of an incident of child abuse that is confidential under section 261.201(a)(2) of the Family Code to a community supervision and corrections department officer.(ORQ-63).

Dear Mr. Johnson:

You ask whether the Dallas Police Department (the "Department") may release a copy of a certain offense report that concerns an allegation of sexual abuse of a child to an officer of a community supervision and corrections department ("CSCD").

I. Background

In Open Records Letter Ruling 2227 (2002), this office determined that the requested offense report is deemed confidential under section 261.201 of the Family Code and therefore not subject to disclosure to the CSCD officer.[1] Section 261.201 governs the confidentiality and disclosure of records used or developed in an investigation of child abuse and neglect. *See* TEX. FAM. CODE ANN. § 261.201(a)(2) (Vernon 2002) (making confidential files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in investigation of alleged or suspected abuse or neglect made under Family Code chapter 261 unless court orders release in certain circumstances). You agree that

[1] *See* Tex. Att'y Gen. ORLR-2227 (2002). This office also determined that the interagency transfer doctrine is not applicable in this situation. *See id.* The doctrine does not apply to permit an interagency transfer of confidential information where a statute, such as section 261.201, enumerates specific entities to which the release of confidential information is authorized and the potential receiving governmental body is not among the statute's enumerated entities. *See* Op. Tex. Att'y Gen. Nos. DM-353 (1995) at 4 n.6, JM-590 (1986) at 4-5; Tex. Att'y Gen. ORD-655 (1997).

section 261.201 generally would make the offense report confidential when requested by a member of the public. *See id.* §§ 261.001, 261.201(a); *see also Coachman v. State*, 692 S.W.2d 940 (Tex. App.–Houston [1st Dist.] 1985, pet. ref'd). But you argue that the Department may nevertheless release the offense report to a CSCD officer pursuant to article 4512g-1 of Vernon's Annotated Revised Civil Statutes, a provision relating to the interagency exchange of information regarding sex offenders.

The Seventy-eighth Legislature amended article 4512g-1, effective April 10, 2003. *See* Act of March 28, 2003, 78th Leg., R.S., S.B. 519, § 5 (to be codified at TEX. REV. CIV. STAT. ANN. art. 4512g-1, §§ 2-4); S.J. OF TEX., 78th Leg., R.S. 972 (2003). Under the 2003 amendment, the sharing of information about sex offender treatment is now mandatory and no longer discretionary. *See id.* The bill amends section 2(c) of article 4512g-1 to read as follows:

> (c) A local law enforcement authority, on request or in the normal course of official business, shall release information concerning the treatment of a sex offender to:
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> (1) another law enforcement authority;
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> (2) a criminal justice agency; or
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> (3) a person described by Section 4 of this article.

Id.; *see* TEX. CODE CRIM. PROC. ANN. arts. 42.12, § 9(m) (Vernon Supp. 2003) (defining "sex offender"), 60.01(6) (defining "criminal justice agency"), 62.01(2) (defining "local law enforcement authority").[2] Section 2(c) requires a local law enforcement agency to release "information concerning the treatment of a sex offender" to the listed entities and persons on request or in the normal course of official business.[3] Act of March 28, 2003, 78th Leg., R.S., S.B. 519, § 5 (to be codified at TEX. REV. CIV. STAT. ANN. art. 4512g-1, §§ 2-4).

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[2]The persons described by section 4 include those who are licensed or certified in this state to provide mental health or medical services, including a physician, psychiatrist, psychologist, licensed professional counselor, licensed marriage and family therapist, or certified social worker who, while licensed or certified, provides or provided mental health or medical services for the rehabilitation of sex offenders. TEX. REV. CIV. STAT. ANN. art. 4512g-1, § 4 (Vernon Supp. 2003).

[3]A person who is authorized by article 4512g-1 to release or obtain information may do so only for the administration of criminal justice. *See* TEX. REV. CIV. STAT. ANN. art. 4512g-1, § 3 (Vernon Supp. 2003); TEX. CODE CRIM. PROC. ANN. art. 60.01 (Vernon Supp. 2003) (defining "administration of criminal justice").

We understand that the requestor is the CSCD officer whom a judge appointed to supervise the offender in the requested offense report.[4] You state that CSCD officers need access to all available information about the offenders they supervise, particularly sex offenders.[5] We consider whether "information concerning the treatment of a sex offender" includes an offense report of a child abuse investigation that is confidential under section 261.201 of the Family Code.[6]

II. Analysis

Our objective when we construe a statute is to determine and give effect to the legislature's intent. *See* TEX. GOV'T CODE ANN. § 312.005 (Vernon 1998); *Crown Life Ins. v. Casteel*, 22 S.W.3d 378, 383 (Tex. 2000). We accomplish that purpose, first, by looking to the plain and common meaning of the statute's words. *See* TEX. GOV'T CODE ANN. § 312.002(a) (Vernon 1998); *Liberty Mut. Ins.* v. *Garrison Contractors,* 966 S.W.2d 482, 484 (Tex. 1998). When a word is used with reference to a particular trade or subject matter, the word will be given the meaning used by experts in that trade or subject matter. TEX. GOV'T CODE ANN. § 312.002(b) (Vernon 1998).

The word "concerning" is commonly understood to mean "in reference to, regarding." WEBSTER'S II NEW COLLEGE DICTIONARY 232 (2001). "Treatment" ordinarily means "the

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[4]A community supervision officer is a person appointed or employed under section 76.004 of the Government Code to supervise defendants placed on community supervision. *See* TEX. CODE CRIM. PROC. ANN. art. 42.12, § 2(3) (Vernon Supp. 2003).

[5]A CSCD officer's right to information about the sex offender treatment of the offender under his or her supervision is specifically covered by section 493.017 of the Government Code. A CSCD officer has a right to obtain very limited information about the treatment of the sex offender he supervises. A sex offender correction program that provides counseling to a sex offender must report to the offender's supervising officer the number of sessions attended and the reason counseling is terminated. TEX. GOV'T CODE ANN. § 493.017(a) (Vernon 1998); *see also* TEX. CODE CRIM. PROC. ANN. art. 42.12, § 13B (Vernon Supp. 2003) (concerning defendants placed on community supervision for sexual offenses against children). Section 493.017 does not authorize the CSCD to obtain other information concerning the offender's treatment. In addition, a judge by order may direct that any information and records that are not privileged and that are relevant to a presentence investigation required by subsection (a) or (k) of section 9 be released to a CSCD officer conducting a presentence investigation of a defendant under subsection (i) or (k) of section 9. TEX. CODE CRIM. PROC. ANN. art. 42.12, § 9(j) (Vernon Supp. 2003).

[6]As an alternate argument, you contend that section 2(c) applies to a subset of the information in the offense report. You suggest that section 2(c) would require the department to release to a CSCD officer a sex offender treatment record "embodied in the offense report." Section 261.201(a)(2) makes confidential "the files, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation." TEX. FAM CODE ANN. § 261.201(a)(2) (Vernon 2002). Thus, assuming that the offense report includes a record of the treatment of a sex offender within the meaning of article 4512g-1, that record nevertheless is confidential under section 261.201 if it was "used or developed in an investigation under" chapter 261 of the Family Code. *See* Tex. Att'y Gen. ORD-440 (1986). Our question for consideration assumes that the entire contents of the offense report was used or developed in the investigation of child abuse.

act or manner of treating; medical application of remedies so as to effect a cure; therapy." *Id.* at 1174. In addition, we note that the rules of the Texas Interagency Council on Sex Offenders Treatment do not define "treatment of a sex offender," but list eleven methods of effective therapy for the treatment and modification of sexual deviancy. *See* 22 TEX. ADMIN. CODE § 810.64 (2003). "Sex offender" is defined by statute as a person who has been convicted or has entered a plea of guilty or nolo contendere for one of various Penal Code provisions for sex offenses. *See* TEX. CODE CRIM. PROC. ANN. art. 42.12, § 9(m) (Vernon Supp. 2003).

To be sure, the commission of a sexual offense is deviant behavior for which a sex offender receives treatment. However, we do not believe the ordinary meaning of the phrase "information concerning the treatment of a sex offender" can be stretched so far as to encompass a law enforcement agency's offense report of the sexual assault of a child. An offender's treatment begins when a judge orders it after the offender is placed on community supervision. *See id.* art. 42.12, § 13B (requiring judge to order psychological counseling sessions for sex offenders if judge grants community supervision and the victim is a child). Only a person licensed or certified in this state to provide mental health or medical services can provide treatment to a sex offender for sexual deviancy. *See* TEX. REV. CIV. STAT. ANN. art. 4413(51), § 1(7) (Vernon Supp. 2003) (defining "sex offender treatment provider" as a person, licensed or certified to practice in this state, who provides mental health or medical services for rehabilitation of sex offenders, including a physician, psychiatrist, psychologist, licensed professional counselor, licensed marriage and family therapist, or certified social worker). A sex offender's treatment consists of mental health or medical services for rehabilitation such as evaluation, diagnosis, therapy, and counseling aimed at modifying his deviant behavior. *See* 22 TEX. ADMIN. CODE §§ 810.63-.64 (2003). Thus, applying a plain meaning construction of the words, "information concerning the treatment of a sex offender" would include such records as those created by a sex offender treatment provider that pertain to the offender's psychological assessment, diagnosis, counseling and other therapy techniques for modification of sexual deviant behavior.

In contrast, an offense report is a law enforcement record that documents a law enforcement agency's efforts to investigate and solve a crime. The report typically consists of information about the arrested person, details of the arrest, booking information, the location of the crime, the identification of the complainant, a detailed description of the offense, victim and witness statements, investigative techniques, and criminal history records. *See Houston Chronicle Publ'g v. City of Houston,* 531 S.W.2d 177 (Tex. Civ. App.–Houston [14th Dist.] 1975, *writ ref'd n.r.e.,* 536 S.W.2d 559 (Tex. 1976) (per curiam). A law enforcement officer lacks the necessary training and licensing of a sex offender treatment provider and thus cannot assess, diagnose, counsel or provide effective therapy to an offender. *See* TEX. REV. CIV. STAT. ANN. art. 4413(51), § 2(7) (Vernon Supp. 2003). Thus, because the focus of an offense report is a law enforcement agency's investigation of the offense rather than the psychological counseling and rehabilitation of the offender, we

find that an offense report does not fall within the plain meaning of "information concerning the treatment of a sex offender."

You suggest that this strict construction renders section 2(c) of article 4512g-1 meaningless because law enforcement authorities do not provide therapy to sex offenders. While we find that an offense report is not "information concerning the treatment of a sex offender," it is nevertheless possible for a law enforcement agency to possess a record concerning a sex offender's treatment. Moreover, we find support for our construction of section 2(c) when we consider other indicators of the legislature's intent: section 2(a) of article 4512g-1, the existing law specifically pertaining to child abuse reports, and the legislative history of article 4512g-1. *See Crown Life Ins. v. Casteel*, 22 S.W.3d at 383 (in determining legislative intent, court looks to language of statute, its legislative history, and consequences that would flow from alternate constructions).

In interpreting a statute, we may consider textual aids for any insight they may shed on how the legislature intended that their words be interpreted, looking at the entire act, and not a single section in isolation. *Fitzgerald v. Advanced Spine Fixation Sys.*, 996 S.W.2d 864 (Tex. 1999). We look to section 2(a) of article 4512g-1. Like section 2(c), section 2(a) pertains to the exchange of information concerning the treatment of sex offenders. Section 2(a) of article 4512g-1 requires various mental health care providers to release sex offender treatment information to specified entities and persons:

> (a) Notwithstanding Chapter 611, Health and Safety Code, or Chapter 159, Occupations Code, a person described by Section 4 of this article, on request or in the normal course of official business, shall release information concerning the treatment of a sex offender to:
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> (1) a criminal justice agency;
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> (2) a local law enforcement authority; or
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> (3) any other person descried by Section 4 of this article.

Act of March 28, 2003, 78th Leg., R.S., S.B. 519, § 5 (to be codified at TEX. REV. CIV. STAT. ANN. art. 4512g-1, §§ 2-4). Unlike section 2(c), however, section 2(a) contains the proviso, "[n]otwithstanding Chapter 611, Health and Safety Code, or Chapter 159, Occupations Code." *Id.* Chapter 611 generally makes confidential records of the treatment of a patient by a mental health professional. Chapter 159 generally makes confidential the records of the treatment of a patient by a physician. By this proviso, the legislature has indicated that it intends the exchange of information under section 2(a) to occur despite the applicability of these confidentiality statutes. Thus, the "notwithstanding" proviso causes section 2(a) to override the statutory confidentiality set forth by those specific provisions.

In contrast, section 2(c) contains no such proviso for information made confidential under chapter 261 of the Family Code. Had the legislature intended section 2(c) to authorize a law enforcement agency to release child abuse records that are deemed confidential under other statutory law, we believe it would have expressed that intent in the statute as it did for the statutorily-confidential treatment records exchanged under section 2(a) of the statute. Therefore, because section 2(c) contains no proviso for chapter 261 records, we do not believe the legislature intended section 2(c) to defeat the confidentiality of section 261.201. *See Southwestern Bell Tel. v. Pub. Util. Comm'n of Tex.*, 79 S.W.3d 226 (Tex. App.–Austin 2002, no pet.) (legislative intent can be inferred from omission of provision).[7]

Moreover, given the extensive protections for such records that exist in current law, we cannot conclude that the legislature intended to require the disclosure of child abuse records in section 2(c), without specific reference to chapter 261 of the Family Code. *See Cameron v. City of Waco*, 8 S.W.2d 249, 252 (Tex. Civ. App.–Waco 1928, no pet.) (court will consider state of law at time of its enactment). Section 261.201 of the Family Code sets out a detailed procedure under which child abuse and neglect records may be released. After a motion requesting the release of the information is filed in court, notice is served on the investigating agency and other interested parties, and a hearing is conducted with an in-camera review of the requested records, a court may order disclosure of confidential information only after making two determinations. The court must first determine that the disclosure is essential to the administration of justice. The court must also determine that the disclosure is not likely to endanger the life or safety of four individuals: the child who is the subject of the report of alleged or suspected abuse or neglect; the person who made the report; any person who participates in the investigation of the reported abuse or neglect; and a person who provides care for the child. TEX. FAM. CODE ANN. § 261.201(b) (Vernon 2002); *see Coachman,* 692 S.W.2d at 945 ("In the absence of a showing of necessity, the confidential nature of child abuse case reports should be maintained."); *see also* TEX. FAM. CODE ANN. § 261.201(c) (procedure for court on its own motion to order disclosure of confidential records). These judicial precautions would be meaningless with regard to records exchanged under section 2(c) if a law enforcement agency must release a child abuse report "on request" and "in the ordinary course of business." *See* Act of March 28, 2003, 78th Leg., R.S., S.B. 519, § 5 (to be codified at TEX. REV. CIV. STAT. ANN. art. 4512g-1, § 2); S.J. OF TEX., 78th Leg., R.S. 972 (2003). Given the numerous precautionary steps a court must take before allowing the disclosure of child abuse and

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[7]We note that section 2(c) would require a local law enforcement authority to release to the listed entities and persons information concerning the treatment of a sex offender that does not consist of a confidential child abuse or neglect report but that could be excepted from disclosure under one of the Public Information Act's discretionary exceptions, such as section 552.103 or 552.108 of the Government Code. *See* Op. Tex. Att'y. Gen. DM-146 (1992) (statutes which govern access to specific information prevail over generally applicable Public Information Act); *see also* Tex. Att'y Gen. ORD-451 (1986) (specific statute affirmatively requiring release of information prevails over litigation exception).

neglect records, we would expect more specific direction from the legislature when requiring interagency exchange of information concerning sex offender treatment than one finds in section 2(c).

In addition, the legislative history of article 4512g-1 contains no indication whatsoever that the legislature intended to change the law with regard to the confidentiality and disclosure of child abuse and neglect records. Nor does the history contain any reference to offense reports or child abuse and neglect records. Article 4512g-1 became law as part of Senate Bill 149 enacted by the Seventy-fourth Legislature in 1995. *See* Act of May 19, 1995, 74th Leg., R.S., ch. 257, § 2, 1995 Tex. Gen. Laws 2194, 2195-96. During the public hearing on the committee substitute of the bill, the Senate sponsor of the bill, Senator Shapiro, spoke in general terms of the need for treatment providers and law enforcement agencies to be able to share information about sex offenders:

> In our study, . . . we came to a very serious conclusion that there was not any information sharing that was allowed between treatment providers, law enforcement, community supervisors, corrections department officers, and parole officers when they had a client who was a sex offender. This was very cumbersome, this was very difficult and certainly shows there was no continuity from one entity to another. We believe very much that it is very important that these individuals who deal with the perpetrator be able to communicate with each other on a regular basis about this individual. This sharing of information will only be allowed in the administration of criminal justice. It will now give treatment providers, law enforcement, community supervisors, corrections department officers as well as parole officers the ability to share information about the sex offenders that they are working with.

Hearing on S.B. 149 Before the Senate Comm. on Criminal Justice, 74th Leg., R.S. (Mar. 16, 1995) (tape available from Senate Staff Services Office).

Likewise, the 2003 amendment does not mention offense reports or child abuse and neglect records. The purpose of this recent amendment, which mandates the sharing of information under article 4512g-1 and other statutes, is explained in the House Corrections Committee Report analysis of the legislation:

> The federal Health Insurance Portability and Accountability Act of 1996 grants to patients considerable control over their health care records. When a patient is also an inmate, the regulations account for this situation, but once

> an inmate is released from custody, their full rights under HIIPAA come into play. Criminal justice agencies are very concerned about having to obtain authorizations from offenders in order to share protected health information on topics such as substance abuse treatment and sex offender treatment. There are three state statutes that permit, but do not require, information sharing on criminal justice clientele. If those statutes are made mandatory, information sharing without authorization will be permitted under the HIPAA regulations, specifically 45 CFR sec. 164.512(a), which permits the use or disclosure of protected health information where it is "required by law."

HOUSE COMM. ON CORRECTIONS, BILL ANALYSIS, Tex. S.B. 519, 78th Leg., R.S. (2003). Thus, the legislature mandated the exchange of health information that had been permitted under the former law because the HIPAA regulations would otherwise forbid the exchange without the patient's authorization unless it is "required by law." The information to be exchanged is "protected health information." Again, here, and elsewhere in the legislative history of Senate Bill 519, the commentary is silent as to the effect of the legislation on child abuse and neglect records. *See* SENATE COMM. ON CRIM. JUSTICE, BILL ANALYSIS, Tex. S.B. 519, 78th Leg., R.S. (2003).

III. Conclusion

The legislature has specifically addressed the confidentiality and disclosure of child abuse records in section 261.201 of the Family Code. By enacting section 2(c) of article 4512g-1 without a specific reference to section 261.201, the legislature did not expressly amend that confidentiality as it did for other statutorily-confidential records that are exchanged under the statute. These legislative actions as well as the legislative history of article 4512g-1 support our conclusion that the plain meaning of the phrase "information concerning the treatment of a sex offender" does not include a law enforcement agency's offense report of an incident of child abuse. We therefore conclude that section 2(c) does not require the department to release the requested offense report to a CSCD officer.

SUMMARY

Section 2(c) of article 4512g-1 of Vernon's Annotated Revised Civil Statutes does not permit the Department to release a record made confidential by section 261.201 of the Family Code to a community supervision and corrections department officer. Therefore, the Dallas Police Department must not release the record to a CSCD officer.

Yours very truly,

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