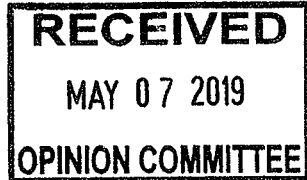




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Sent Via Email Transmission Only to opinion.committee@oag.texas.gov

Honorable Ken Paxton
Office of the Attorney General
Attention Opinion Committee
P.O. Box 12548
Austin, Texas 78711-2548

RE: REQUESTS TO MAKE PUBLIC PROBABLE CAUSE AFFIDAVITS IN CHILD SEXUAL ABUSE CASES.

Dear Sir:

I am writing to request that your office provide an opinion regarding whether probable cause affidavits which are likely to identify child sex-abuse victims may be released to the public upon a request made to a Justice of the Peace¹. Specifically, we seek clarification on an apparent contradiction in the law regarding warrant affidavit releases and provisions of the Family Code and Code of Criminal Procedure which prohibit identification of a child victim. We also seek guidance over whether a non-attorney Justice of the Peace is qualified to determine whether a disclosure under TEX. FAM. CODE § 261.201 is permissible.

I. The Instant Matter.

On April 13, 2019, the Corsicana Independent School District Police Department (hereinafter CISD-PD) filed for warrants in four separate sexual abuse cases involving one teacher. At the time, the CISD-PD maintained an open investigation relating to several other victims.

¹ Our position is that the information requested is neither information under the Texas Public Information Act nor a Judicial Record under Rules of Judicial Information, Rule 12.

The non-attorney Justice of the Peace who magistrates the defendant received a records request from the media for the probable cause affidavits. Against the advice of our office, she released a redacted probable cause affidavit, but it was still possible to narrow down the child's identity because of remaining un-redacted information. Her analysis of TEX. GOV'T CODE § 552 and TEX. CODE CRIM. P. art 15.26 was that it controlled over the identity protection requirements of the Texas Family Code and Texas Code of Criminal Procedure, as well as the exemptions enumerated in the Public Information Act. There was no official hearing on the matter. There is an extremely small pool of children who were in this teacher's class at the specific times alleged in the affidavits. It is possible and indeed easy to identify them from the affidavits.

CISD-PD is continuing to investigate and identify more victims. There is a possibility that several more arrests and affidavits will be generated. We anticipate additional records requests once these arrests are made. We seek guidance regarding which law controls and whether a Justice of the Peace is properly qualified to make the determination.

II. The Current State of the Law

TEX. FAM. CODE § 261.201 states in relevant part:

(a) Except as provided by Section 261.203, the 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.

(b) A court may order the disclosure of information that is confidential under this section if:

- (1) a motion has been filed with the court requesting the release of the information;
- (2) a notice of hearing has been served on the investigating agency and all other interested parties; and
- (3) after hearing and an in camera review of the requested information, the court determines that the disclosure of the requested information is:
 - (A) essential to the administration of justice; and
 - (B) not likely to endanger the life or safety of:

- (i) a child who is the subject of the report of alleged or suspected abuse or neglect;
- (ii) a person who makes a report of alleged or suspected abuse or neglect; or
- (iii) any other person who participates in an investigation of reported abuse or neglect or who provides care for the child.

TEX. CODE CRIM. P. art 57.02(h) states in relevant part:

Except as required or permitted by other law or by court order, a public servant or other person who has access to or obtains the name, address, telephone number, or other identifying information of a victim younger than 17 years of age may not release or disclose the identifying information to any person who is not assisting in the investigation, prosecution, or defense of the case.

The conflict arises under TEX. CODE CRIM. P. art 15.26, which provides in part as follows:

The arrest warrant, and any affidavit presented to the magistrate in support of the issuance of the warrant, is public information, and beginning immediately when the warrant is executed the magistrate's clerk shall make a copy of the warrant and the affidavit available for public inspection in the clerk's office during normal business hours. (Emphasis added.)

The above provisions are critical to the analysis of whether the probable cause affidavits in a child abuse case are subject to public disclosure when in the possession of a judge. In light of the statutory provisions that keep such information confidential and the constitutional rights of the victims and families involved, it is asserted that that answer to that inquiry is that the information is confidential.

III. Our office's analysis and request for guidance

Last year, your office issued Op. Tex. Att'y Gen. No. KP-0213 (2018) which reconciled statutory requirements to protect a child's identity with the State's disclosure requirements under the current iteration of TEX. CODE CRIM. P. art. 39.14. Your office recommended an in-camera hearing in those circumstances². The

2. Nonetheless, §§ 261.201 (b)-(c) permit a court to disclose information made confidential under section 261.201 if it determines that the information is "essential to the administration of justice" and if certain other requirements, including in camera inspection, are met. The duty of disclosure in TEX. CODE CRIM. P. art. 39.14 by its own terms is "[s]ubject to the restrictions provided by Section 264.408 [of the] Family Code." Further, Tex. Fam. Code § 264.408 provides that "[i]nformation related to the investigation of a report of abuse or neglect . . . is confidential as provided by Section 261.201." Thus,

importance of this opinion is that your office has opined that in the context of the Code of Criminal Procedure, a court ruling should be pursued prior to disclosure of information determined confidential under TEX. FAM. CODE § 261.201. The same analysis should apply in the context of the issue presented.

There are constitutional rights that must be considered in this matter. The right to the public to access court records is clearly recognized³. The countervailing constitution rights are those of the victims and the families of the victims⁴. A logical nexus should exist between the rape victim's identity, or the private facts disclosed about the victim, and the general subject matter of the crime. *Ross v. Midwest Communications, Inc.*, 870 F.2d 271, 274 (5th Cir. 1989), *cert. denied*, 493 U.S. 935, 107 L. Ed. 2d 316, 110 S. Ct. 326; *Anonsen v. Donahue*, 857 S.W.2d 700, 704 (Tex. App.—Houston[1st Dist.] 1993, writ denied), *cert. denied*, 128 L. Ed. 2d 865, 114 S. Ct. 2135 (1994).

The population of a third grade class in Corsicana, Texas, is extremely small as compared to the population of a major metropolitan area. Disclosure of the school, the teacher, and time of the suspected criminal activity make it relatively easy to identify the victims. The detrimental impact of the defendant's actions on the victims and their families is devastating enough without the release of information that is highly highly intimate and involve embarrassing facts about a these persons' private affairs such that its release would be highly objectionable to a reasonable person. The intimate details of these alleged crimes are not a legitimate public concern. The identity of the defendant, the alleged crime, and the time frame of the allegations are sufficient to satisfy any public concern.

In the instance where information falls within the purview of two statutes, a general and a specific provision, the specific provision will govern over the general. *Cuellar v. State*, 521 S.W. 2d 277 (Tex. Crim. App. 1975). In this case, Art. 15.26 is the general provision. It governs the release of affidavits of all alleged crimes. The confidentiality of the information within the provisions of TEX. FAM. CODE § 261.201 is specific, and its language is broad. The confidential information is, "the files, reports, records, communications, audiotapes, videotapes, and working papers used

to the extent that information obtained by a civil attorney in your office is confidential under section TEX. FAM. CODE § 261.201, the duty of disclosure in 39.14 (a) would not be triggered except pursuant to court order obtained under subsection 261.201 (b) or (c). KP-0213 (2018), at page 5.

3. *Ashpole v. Millard*, 778 S.W.2d 169, 170 (Tex. App.—Houston [1st Dist.] 1989, no writ) held that the public has right to inspect and copy judicial records subject to court's inherent power to control public access to its records.

4. The right to personal privacy was first articulated in 1890, in an article arguing that the "right to be let alone" is as much a part of personal liberty as the right to be free from physical restraint and the right to possess property. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193 (1890). The concept has since been incorporated into a common-law tort in Texas and serves to protect individuals from invasion of privacy. *Billings v. Atkinson*, 489 S.W.2d 858, 859-60 (Tex. 1973). *Star-Telegram, Inc. v. Doe*, 915 S.W.2d 471, 473, (Tex., 1995 Tex.)

or developed in an investigation under this chapter or in providing services as a result of an investigation." The subject probable cause affidavits are the records and working papers developed in an investigation of child abuse. As such, our analysis indicates that a probable cause affidavit alleging child abuse is confidential and not subject to public disclosure unless so ordered by a court of competent jurisdiction.

TEX. CODE CRIM. P. art. 15.26 renders such affidavits "public information." Accordingly, our position is that the affidavits are subject to the exemptions of disclosure provided in the TEX. GOV'T CODE § 552. In applying those exemptions, the subject information in the probable cause affidavits is not subject to public disclosure under TEX. GOV'T CODE §§552.101 and 552.108. Under §552.101, the information is not subject to disclosure under the victims' and their families' constitutional right to privacy, TEX. FAM. CODE § 261.201, and TEX. CODE CRIM. P. art 57.02(h). The release of the information will interfere with the ongoing investigation and prosecution of the criminal charges. Such detailed disclosure will dissuade other victims from coming forward, fearing the exposure of their identity.

The Justice of the Peace asserts that the requirements of TEX. GOV'T CODE § 552.021 combined with the record-keeping requirements of TEX. CODE CRIM. P. art. 15.26 require the release of warrants and supporting affidavits on request. But a justice court is not a court of competent jurisdiction to decide the release of confidential information under TEX. FAM. CODE § 261.201. A court is defined for purposes of Title 5 of the Family Code as, "the district court, juvenile court having the same jurisdiction as a district court, or other court expressly given jurisdiction of a suit affecting the parent-child relationship." See TEX. FAM. CODE §101.008. Clearly a justice court does not have the jurisdiction to release the subject affidavits under § 261.201.

I respectfully request that your office provide guidance regarding whether the specific identity protections in the Act, the Family Code and Code of Criminal Procedure control over the more general disclosure requirements of the Act. I further respectfully request guidance over whether a District Judge must make the determination, or whether a Justice of the Peace is qualified.

Regards



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