



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

August 18, 2015

Mr. Daniel Ortiz
Assistant City Attorney
City of El Paso
Office of the City Attorney
P.O. Box 1890
El Paso, Texas 79950-1890

OR2015-17109

Dear Mr. Ortiz:

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# 575983 (Reference No. 15-1026-6272).

The El Paso Police Department (the "department") received a request for information regarding a named individual, including information regarding a specified arrest of the named individual. 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 information.

Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person, and (2) 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 satisfied. *Id.* at 681-82. This office has found a compilation of an individual's criminal history is highly embarrassing information, the publication of which would be highly objectionable to a reasonable person. *Cf. United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 764 (1989) (when considering prong regarding

individual's privacy interest, court recognized distinction between public records found in courthouse files and local police stations and compiled summary of information and noted that individual has significant privacy interest in compilation of one's criminal history). Furthermore, we find a compilation of a private citizen's criminal history is generally not of legitimate concern to the public. However, information that refers to an individual solely as a victim, witness, or involved person is not a compilation of the individual's criminal history and may not be withheld under section 552.101 on that basis.

The present request, in part, seeks all reports pertaining to a named individual. This aspect of the request requires the department to compile the named individual's criminal history and implicates the privacy of the named individual. Therefore, to the extent the department maintains law enforcement records, other than information pertaining to the specified arrest, listing the named individual as a suspect, arrestee, or criminal defendant, the department generally must withhold such information under section 552.101 of the Government Code in conjunction with common-law privacy.

We note the department has submitted documents relating to the incident specified by the requestor. Additionally, the department has submitted information that does not list the named individual as a suspect, arrestee, or criminal defendant. This information does not consist of a compilation of the named individual's criminal history, and the department may not withhold it under section 552.101 of the Government Code in conjunction with common-law privacy on that basis. Accordingly, we will address the applicability of other exceptions to disclosure of this information.

Section 552.101 of the Government Code also encompasses information made confidential by section 261.201 of the Family Code, which provides, in relevant part, as follows:

(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 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 [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.

Fam. Code § 261.201(a). Report number 14-105827 consists of information used or developed in an investigation of alleged or suspected neglect under chapter 261 of the Family

Code. Accordingly, this information falls within the scope of section 261.201 of the Family Code. *See id.* §§ 101.003(a) (defining “child” for the purposes of this section as a 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), 261.001(4) (defining “neglect” for purposes of chapter 261 of the Family Code). As we have no indication the department has adopted a rule governing the release of this type of information, we assume that no such regulation exists. Given that assumption, and based on our review, we conclude report number 14-105827 is confidential pursuant to section 261.201 of the Family Code, and the department must withhold it under section 552.101 of the Government Code on that basis.¹

Section 552.101 of the Government Code also encompasses section 58.007 of the Family Code, which makes confidential juvenile law enforcement records relating to conduct that occurred on or after September 1, 1997. *See id.* § 58.007(c). Section 58.007 provides, in relevant part, the following:

(c) Except as provided by Subsection (d), law enforcement records and files concerning a child and information stored, by electronic means or otherwise, concerning the child from which a record or file could be generated may not be disclosed to the public and shall be:

- (1) if maintained on paper or microfilm, kept separate from adult files and records;
- (2) if maintained electronically in the same computer system as records or files relating to adults, be accessible under controls that are separate and distinct from controls to access electronic data concerning adults; and
- (3) maintained on a local basis only and not sent to a central state or federal depository, except as provided by Subchapters B, D, and E.

Id. § 58.007(c). Upon review, we find report number 14-360210 involves alleged juvenile delinquent conduct that occurred after September 1, 1997. *See id.* §§ 51.02(2) (for purposes of section 58.007(c), “child” means a person who is ten years of age or older and under seventeen years of age when the conduct occurred), .03(a) (defining “delinquent conduct”). The exceptions in section 58.007 do not appear to apply. Therefore, the department generally

¹As our ruling is dispositive for this information, we need not address your argument against its disclosure. Additionally, as the information subject to section 261.201 of the Family Code does not contain the criminal history record information (“CHRI”) of the named individual, we need not address whether the requestor, as a recruiter with the United States Army (the “Army”), has a right of access to this information pursuant to federal law. *See* 5 U.S.C. § 9101(b)(1), (c).

must withhold report number 14-360210 under section 552.101 of the Government Code in conjunction with section 58.007(c) of the Family Code.

We note, in this instance, the requestor is a representative from the Army, and the requestor states the named individual is a potential enlistee in the Army. The United States Department of Defense (the “DoD”) is authorized to perform background investigations of persons seeking acceptance or retention in the armed services. *See* 5 U.S.C. § 9101(b)(1)(C); *see also id.* § 9101(a)(6)(A) (DoD is a covered agency for purposes of section 9101). The Army has a right to the CHRI of state and local criminal justice agencies when its investigation is conducted with the consent of the individual being investigated. *See id.* § 9101(b)(1), (c); *see also* 10 U.S.C. § 111(b)(6) (DoD includes the Department of the Army. CHRI is defined as “information collected by criminal justice agencies on individuals consisting of identifiable descriptions and notations of arrests, indictments, informations, or other formal criminal charges, and any disposition arising therefrom, sentencing, correction supervision, and release” but does not include “identification information such as fingerprint records to the extent that such information does not indicate involvement in the criminal justice system” or “records of a State or locality sealed pursuant to law from access by State and local criminal justice agencies of that State or locality.” 5 U.S.C. § 9101(a)(2).

Federal law provides the Army’s right of access to CHRI preempts state law. *Id.* § 9101(b)(4) (section 9101 “shall apply notwithstanding any other provision of law . . . of any State”). We conclude the Army’s potential right of access under federal law preempts the state confidentiality provisions you claim. *See English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990) (noting state law is preempted to extent it actually conflicts with federal law); *see also La. Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 369, (1986) (noting federal agency acting within scope of its congressionally delegated authority may preempt state regulation). Federal law, however, also provides the Army’s right of access is contingent on the request being made for eligibility or retention purposes, and on receiving written consent from the individual under investigation for the release of such CHRI. *See* 5 U.S.C. § 9101(c).

In this instance, the requestor states the request was made for enlistment eligibility purposes. However, we have no indication the individual under investigation provided the Army with a signed authorization for the release of the information at issue. Accordingly, if the requestor provides signed written consent for release from the individual being investigated, then the department must release CHRI pertaining to the named individual from report number 14-360210 and, to the extent it exists, from any other law enforcement records maintained by the department listing the named individual as a suspect, arrestee, or criminal defendant. *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 statute directly conflicts with common-law principle); *CenterPoint Energy Houston Elec. LLC v. Harris County Toll Rd. Auth.*, 436 F.3d 541, 544 (5th Cir. 2006) (common law controls only where there is no conflicting or controlling statutory law).

In summary, to the extent the department maintains law enforcement records, other than information pertaining to the specified arrest, listing the named individual as a suspect, arrestee, or criminal defendant, the department generally must withhold such information under section 552.101 of the Government Code in conjunction with common-law privacy. The department must withhold report number 14-105827 under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code. The department generally must withhold report number 14-360210 under section 552.101 in conjunction with section 58.007 of the Family Code. If the requestor provides signed written consent for release from the individual being investigated, then pursuant to section 9101 of title 5 of the United States Code, the department must release CHRI pertaining to the named individual from report number 14-360210 and, to the extent it exists, from any other law enforcement records maintained by the department listing the named individual as a suspect, arrestee, or criminal defendant.

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,



Kristi L. Godden
Assistant Attorney General
Open Records Division

KLG/cz

Ref: ID# 575983

Enc. Submitted documents

c: Requestor
(w/o enclosures)