



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

December 13, 2016

Ms. Linda Pemberton
Paralegal
City of Killeen
P. O. Box 1329
Killeen, Texas 76540

OR2016-27559

Dear Ms. Pemberton:

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# 637477 (Ref. Nos. W020386 and W020419).

The City of Killeen (the "city") received two requests for information pertaining to a specified incident. You claim the submitted information is excepted from disclosure under section 552.108 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Section 552.108(a)(2) of the Government Code excepts from disclosure information concerning an investigation that did not result in conviction or deferred adjudication. *See* Gov't Code § 552.108(a)(2). A governmental body claiming section 552.108(a)(2) must demonstrate the requested information relates to a criminal investigation that concluded in a final result other than a conviction or deferred adjudication. *See id.* § 552.301(e)(1)(A) (governmental body must provide comments explaining why exceptions raised should apply to information requested). You state the submitted information pertains to a concluded investigation that did not result in a conviction or deferred adjudication. Based on this representation and our review, we agree section 552.108(a)(2) is applicable to the submitted information.

However, section 552.108 does not except from disclosure basic information about an arrested person, an arrest, or a crime. *Id.* § 552.108(c). Basic information refers to the basic

“front-page” offense and arrest information held to be public in *Houston Chronicle Publishing Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref’d n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). See Open Records Decision No. 127 (1976) (summarizing types of information considered to be basic information). Thus, with the exception of the basic information, which must be released, the city may generally withhold the submitted information under section 552.108(a)(2) of the Government Code.

However, we note both requestors are representatives of the United States Army. The first requestor states she is a representative of the Office of the Staff Judge Advocate of the United States Army.¹ Section 411.089(a) of the Government Code provides “[a] criminal justice agency is entitled to obtain from the [Texas Department of Public Safety (“DPS”)] any criminal history record information [(“CHRI”)] maintained by [DPS] about a person.” See Gov’t Code § 411.089(a). In addition, section 411.087(a)(2) of the Government Code provides the following:

(a) [A] person, agency, department, political subdivision, or other entity that is authorized by this subchapter or Subchapter E-1 to obtain from [DPS] CHRI maintained by [DPS] that relates to another person is authorized to:

...

(2) obtain from any other criminal justice agency in this state [CHRI] maintained by that criminal justice agency that relates to that person.

Id. § 411.087(a)(2). CHRI is defined as “information collected about a person by a criminal justice agency that consists of identifiable descriptions and notations of arrests, detentions, indictments, informations, and other formal criminal charges and their dispositions.” See *id.* § 411.082(2). However, a criminal justice agency that receives CHRI from another criminal justice agency pursuant to section 411.087(a)(2) may only receive such information for a criminal justice purpose. See *id.* §§ 411.083(c), .087(b); see also Open Records Decision No. 655 (1997) (discussing limitations on release of criminal history record information). Thus, to the extent the requestors represent a “criminal justice agency,” the requestors are authorized to obtain CHRI from the city pursuant to section 411.087(a)(2) of the Government Code, but only for a criminal justice purpose. See Gov’t Code §§ 411.083(c), .087(a)(2).

A “criminal justice agency” is defined in part as “a federal or state agency that is engaged in the administration of criminal justice under a statute or executive order and that allocates a substantial portion of its annual budget to the administration of criminal justice[.]” *Id.*

¹When referring to the first requestor, this office is referring to the requestor from the request for information received by the city on September 22, 2016. When referring to the second requestor, this office is referring to the requestor from the request for information received by the city on September 27, 2016.

§ 411.082(3)(A). “Administration of criminal justice” has the meaning assigned to it by article 60.01 of the Code of Criminal Procedure. *See id.* § 411.082(1). Article 60.01 of the Code of Criminal Procedure defines “administration of criminal justice” as the “performance of any of the following activities: detection, apprehension, detention, pretrial release, post-trial release, prosecution, adjudication, correctional supervision, or rehabilitation of an offender. The term includes criminal identification activities and the collection, storage, and dissemination of [CHRI].” Crim. Proc. Code art. 60.01(1).

In this case, as noted above, the first requestor is a representative of the Office of Staff Judge Advocate. Further, the first requestor states she was assigned the investigation of the incident at issue. Thus, the city must make available to the first requestor any CHRI from the documents that shows the type of allegation made and whether there was an arrest, information, indictment, detention, conviction, or other formal charges and their dispositions under section 411.089 of the Government Code. While the city seeks to withhold the submitted information under section 552.108 of the Government Code, a specific statutory right of access overcomes general exceptions to disclosure in the Act. *See* Open Records Decision Nos. 613 at 4 (1993) (exceptions in Act cannot impinge on statutory right of access to information), 451 (1986) (specific statutory right of access provisions overcome general exceptions to disclosure under the Act). Therefore, except for the CHRI and basic information, which must be released, the city may withhold the remaining information from the first requestor under section 552.108(a)(2) of the Government Code.

However, we cannot determine whether the second requestor is a representative of a criminal justice agency or whether he intends to use the CHRI for a criminal justice purpose. Accordingly, we must rule conditionally. If the city determines the second requestor is requesting the information on behalf of a criminal justice agency for purposes of chapter 411 of the Government Code and determines the second requestor seeks the CHRI for a criminal justice purpose, we conclude the city must make available to the second requestor any CHRI from the documents that shows the type of allegation made and whether there was an arrest, information, indictment, detention, conviction, or other formal charges and their dispositions. *See* Open Records Decision No. 451 (1986) (specific statutory right of access provisions overcome general exceptions to disclosure under the Act). In that instance, except for the basic information, which must be released, the city may withhold the remaining information under section 552.108(a)(2) of the Government Code. However, if the city determines the second requestor is not a representative of a criminal justice agency for purposes of chapter 411 of the Government Code or does not seek access to the information at issue for a criminal justice purpose, then the second requestor does not have a right of access to the submitted CHRI pursuant to chapter 411.

Alternatively, the second requestor, as a representative of the United States Army, may have a right of access to some of the information at issue under federal law. 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)(A)(iii); *see also id.* § 9101(a)(6)(A) (DoD is a covered agency for purposes of section 9101). The Army has a right to the criminal history record information (“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 laws. *Id.* § 9101(b)(4) (section 9101 “shall apply notwithstanding any other provision of law . . . of any State”). Thus, we conclude the Army’s right of access under federal law preempts section 552.108 of the Government Code. *See English v. General Elec. Co.*, 496 U.S. 72, 79 (1990) (noting that 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 a 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, it is unclear whether the second request is for retention purposes. Further, we are unable to determine whether the individual whose information is at issue provided the second requestor with a signed authorization for the release of the information at issue. Accordingly, if the request was for retention purposes and the Army provides a signed written consent for release from the individual whose information is at issue, then the city must release CHRI from the submitted information to the second requestor. In that case, with the exception of basic information, which must be released, the city may withhold the remaining information from the second requestor under section 552.108(a)(2) of the Government Code. However, if the second request was not made for retention purposes or the Army does not provide a signed written consent for release, then, with the exception of basic information, which must be released, the city may withhold the submitted information from the second requestor under section 552.108(a)(2) of the Government Code.

In summary, the city must make available to the first requestor any CHRI from the documents that shows the type of allegation made and whether there was an arrest, information, indictment, detention, conviction, or other formal charges and their dispositions under section 411.089 of the Government Code and basic information. Except for basic information, the city may withhold the remaining information from the first requestor under

section 552.108(a)(2). If the city determines the second requestor is requesting the information on behalf of a criminal justice agency for purposes of chapter 411 of the Government Code and determines the second requestor seeks the CHRI for a criminal justice purpose, we conclude the city must also make the CHRI and basic information available to the second requestor and withhold the remaining information under section 552.108(a)(2). Alternatively, if the second request was made for retention purposes and if the Army provided a signed written consent for release from the individual whose information is at issue, the city must release CHRI from the submitted information to the second requestor and, with the exception of basic information, the city may withhold the remaining information from the second requestor under section 552.108(a)(2) of the Government Code. However, if the second requestor does not have a right of access, then, with the exception of basic information, the city may withhold the submitted information from the second requestor under section 552.108(a)(2) of the Government Code. Any remaining information must be released.

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,



Emily Kunst
Assistant Attorney General
Open Records Division

EK/eb

Ref: ID# 637477

Enc. Submitted documents

c: 2 Requestors
(w/o enclosures)