



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

December 13, 2017

Ms. Delietrice Henry  
Open Records Assistant  
City of Plano  
P.O. Box 860358  
Plano, Texas 75086-0358

OR2017-28266

Dear Ms. Henry:

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# 687922 (ORR# MURJ100417; ORR# SINA100517).

The Plano Police Department (the "department") received two requests for information pertaining to a specified arrest. You indicate the department does not have information responsive to portions of the requests.<sup>1</sup> You claim the submitted information is excepted from disclosure under sections 552.101 and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>2</sup>

Section 552.101 of the Government Code excepts from disclosure "information that is considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses information protected by other statutes, such as section 261.201 of the Family Code, which provides, in relevant part:

(a) [T]he following information is confidential, is not subject to public release under [the Act], and may be disclosed only for purposes consistent

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<sup>1</sup>The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

<sup>2</sup>We 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 that those records contain substantially different types of information than that submitted to this office.

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). Upon review, 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. *See id.* § 261.001(1) (defining “abuse” for purposes of chapter 261 of the Family Code); *see also id.* § 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). Therefore, we find the submitted information is subject to chapter 261 of the Family Code. As you do not indicate the department having adopted a rule that governs the release of this type of information, we assume no such regulation exists. Given that assumption, we conclude the submitted information is generally confidential pursuant to section 261.201 of the Family Code.

We note the first requestor is a representative of the United States Army (the “Army”) Reserve Careers Division (“ARCD”) and the individual who is the subject of the report at issue is enlisted in the Army Reserves. 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). ARCD has a right to the criminal history record information of state and local criminal justice agencies when it receives the consent of the individual being investigated for release of such information. *See id.* § 9101(b)(1), (c); *see also* 10 U.S.C. § 111(b)(6) (DoD includes the Department of the Army). Section 9101 of the United States Code defines criminal history record information 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.” 5 U.S.C. § 9101(a)(2). Further, criminal history record information as defined by section 9101 “includes those records of a State or locality sealed pursuant to law if such records are accessible by State and local criminal justice agencies for the purpose of conducting background checks.” *Id.*

Federal law provides ARCD's right of access to criminal history record information preempts state confidentiality provisions. *Id.* § 9101(b)(4) (section 9101 "shall apply notwithstanding any other provision of law . . . of any State"). We conclude ARCD's right of access under federal law preempts section 261.201 of the Family Code, as well as 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). However, federal law also provides ARCD'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 criminal history record information. *See* 5 U.S.C. § 9101(c).

In this instance, it is unclear if the individual under investigation is seeking retention in the armed services and if the first request is for retention purposes. Further, we have no indication the individual under investigation provided ARCD with a signed authorization for the release of the information at issue. Nevertheless, if the first request was for retention purposes and if ARCD provides a signed written consent for release from the individual being investigated, then the department must release criminal history record information as defined by section 9101 from the submitted information to the first requestor, and must withhold the remaining information under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code. If the first request was not made for retention purposes, or if ARCD does not provide a written consent for release, then the department must withhold the submitted information in its entirety from the first requestor under section 552.101 in conjunction with section 261.201 of the Family Code.

Additionally, we note the second requestor is a special agent for the Army's Criminal Investigation Command ("CID") and may have a right of access to some of the information at issue. Section 261.201(a) provides information encompassed by subsection (a) may be disclosed "for purposes consistent with [the Family Code] and applicable federal or state law." Fam. Code § 261.201(a). Chapter 411 of the Government Code constitutes "applicable state law" in this instance. Section 411.089(a) of the Government Code provides "[a] criminal justice agency is entitled to obtain from the [Department of Public Safety ("DPS")] any criminal history record information maintained by [DPS] about a person." Gov't Code § 411.089(a). In addition, section 411.087(a) of the Government Code provides, in pertinent part:

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

...

(2) obtain from any other criminal justice agency in this state criminal history record information maintained by that criminal justice agency that relates to that person.

*Id.* § 411.087(a)(2). Section 411.082 of the Government Code defines criminal history record information 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 criminal history record information as defined by section 411.082 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 second requestor represents a “criminal justice agency,” the requestor is authorized to obtain criminal history record information as defined by section 411.082 from the department 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.* § 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 criminal history record information.” *Crim. Proc. Code art. 60.01(1).*

In this case, as noted above, the second requestor is representative of CID. We cannot determine whether he is a representative of a criminal justice agency, or whether he intends to use the criminal history record information at issue for a criminal justice purpose. Accordingly, we must rule conditionally. If the department determines the second requestor is requesting the information on behalf of a criminal justice agency for purposes of chapter 411 of the Government Code, seeks the criminal history record information for a criminal justice purpose, and intends to use the information at issue for purposes consistent with the Family Code, we conclude the department must make available to the second requestor any criminal history record information as defined by section 411.082 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. Although you also seek to withhold the information at issue under section 552.108 of the Government Code, we note a specific statutory right of access prevails over the general exceptions to disclosure found in the Act, such as section 552.108. *See Open Records Decision No. 451 (1986)* (specific statutory right of access provisions overcome general exceptions to disclosure under the Act). In that instance, the department must withhold the

remaining submitted information from the second requestor under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code. However, if the department 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 and for purposes consistent with the Family Code, then the department must withhold the submitted information in its entirety from the second requestor under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code.<sup>3</sup>

In summary, if the first request was for retention purposes and if ARCD provides a signed written consent for release from the individual being investigated, then the department must release criminal history record information as defined by section 9101 of title 5 of the United States Code from the submitted information to the first requestor, and must withhold the remaining information under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code. However, if the first request was not made for retention purposes, or if ARCD does not provide a written consent for release, then the department must withhold the submitted information in its entirety from the first requestor under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code. If the department determines the second requestor is a representative of a criminal justice agency for purposes of chapter 411 of the Government Code and seeks access to the information at issue for a criminal justice purpose and for purposes consistent with the Family Code, the department must make available to the second requestor any criminal history record information as defined by section 411.082 of the Government Code 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; and the department must withhold the remaining submitted information from the second requestor under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code. However, if the department 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 and for purposes consistent with the Family Code, then the department must withhold the submitted information in its entirety from the second requestor under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code.

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.

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<sup>3</sup>In either instance, as our ruling is dispositive, we need not address your remaining argument against disclosure of the submitted information.

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](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,



Debbie K. Lee  
Assistant Attorney General  
Open Records Division

DKL/som

Ref: ID# 687922

Enc. Submitted documents

c: 2 Requestors  
(w/o enclosures)