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ATTORNEY GENERAL OF TEXAS

March 26, 2019

Ms. June B. Harden
Assistant Attorney General
Assistant Public Information Coordinator
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

OR2019-08263

Dear Ms. Harden:

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# 755898 (PIR# 19-51124).

The Office of the Attorney General (the "OAG") received a request for information pertaining to a specified arrest. The OAG states it will release basic information in accordance with section 552.108(c) of the Government Code. *See* Gov't Code § 552.108(c). The OAG claims the remaining requested information is excepted from disclosure under section 552.108 of the Government Code. We have considered the claimed exception and reviewed the submitted representative sample of information.¹ We have also received and considered the comments submitted on behalf of the requestor. *See id.* § 552.304 (interested party may submit written comments regarding availability of requested information).

Section 552.108(a)(1) of the Government Code excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection,

¹We 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.

investigation, or prosecution of crime[.]” *Id.* § 552.108(a)(1). A governmental body claiming section 552.108(a)(1) must explain how and why the release of the requested information would interfere with law enforcement. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). The OAG asserts the information at issue relates to an active criminal investigation being conducted by the OAG’s Criminal Investigations Division and release of the information at issue would interfere with the OAG’s investigative interests. Based on the OAG’s representation, we conclude the release of the information at issue would interfere with the detection, investigation, or prosecution of crime. *See Houston Chronicle Publ’g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975) (court delineates law enforcement interests that are present in active cases), *writ ref’d n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). Thus, section 552.108(a)(1) is applicable to the information at issue. Therefore, the OAG may generally withhold the information at issue under section 552.108(a)(1) of the Government Code.

However, we note the requestor is a representative of the United States Army (the “Army”) and, thus, may have a right of access to some of the information at issue. 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 requestor represents a “criminal justice agency,” the requestor is authorized to obtain CHRI from the OAG 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 66.001 of the Code of Criminal Procedure. *See id.* § 411.082(1). Article 66.001 of the Code of Criminal Procedure defines “administration of criminal justice” as “the 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. 66.001(1).*

However, we cannot determine whether the 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 OAG determines the requestor is requesting the information on behalf of a criminal justice agency for purposes of chapter 411 of the Government Code and determines the requestor seeks the CHRI for a criminal justice purpose, we conclude the OAG must make available to the 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, the OAG may withhold the remaining information at issue under section 552.108(a)(1) of the Government Code. However, if the OAG determines the 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 requestor does not have a right of access to the submitted CHRI pursuant to chapter 411.

Alternatively, the requestor, as a representative of the 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 if such records are accessible by State and local criminal justice agencies for the purpose of conducting background checks.” 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 request is for retention purposes. Further, we are unable to determine whether the individual whose information is at issue provided the 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 OAG must release CHRI from the information at issue to the requestor. In that case, the OAG may withhold the remaining information at issue from the requestor under section 552.108(a)(1) of the Government Code. However, if the request was not made for retention purposes or the Army does not provide a signed written consent for release, then, the OAG may withhold the remaining information at issue from the requestor under section 552.108(a)(1) of the Government Code.

In summary, if the OAG determines the requestor is requesting the information on behalf of a criminal justice agency for purposes of chapter 411 of the Government Code and determines the requestor seeks the CHRI for a criminal justice purpose, we conclude the OAG must make the CHRI available to the requestor and withhold the remaining information at issue under section 552.108(a)(1) of the Government Code. Alternatively, if the 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 OAG must release CHRI from the information at issue to the requestor and the OAG may withhold the remaining information at issue under section 552.108(a)(1) of the Government Code. However, if the requestor does not have a right of access, then, the OAG may withhold the remaining information at issue from the requestor under section 552.108(a)(1) of the Government 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.

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,



Matthew Taylor
Assistant Attorney General
Open Records Division

MHT/jxd

Ref: ID# 755898

Enc. Submitted documents

c: Requestor
(w/o enclosures)