



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

December 17, 2019

Mr. Evan D. Reed
Assistant City Attorney
City of El Paso
P.O.Box 1890
El Paso, Texas 79950-1890

OR2019-35634

Dear Mr. Reed:

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# 802254 (Reference No. 19-1026-10791).

The El Paso Police Department (the "department") received a request for a specified incident report. You state you will release some information. 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) 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: (1) release of the information would interfere with the detection, investigation, or prosecution of crime[.]" Gov't Code § 552.108(a)(1). A governmental body claiming section 552.108(a)(1) must explain how and why the release of the information at issue 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, 710 (Tex. 1977). The department states the submitted information relates to a pending criminal investigation or prosecution. Based on this representation, we conclude the release of this information 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, 186-87 (Tex. Civ. App.—Houston [14th Dist.] 1975) (delineating law enforcement interests present in active cases), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976).

Section 552.108 does not except from disclosure basic information about an arrested person, an arrest, or a crime. Gov't Code § 552.108(c). Basic information refers to the information held to be public in *Houston Chronicle*. See 531 S.W.2d at 186-88; Open Records Decision No. 127 at 3-4 (1976) (summarizing types of information deemed public by *Houston Chronicle*). Thus, with the exception of basic information, the department may generally withhold the submitted information under section 552.108(a)(1) of the Government Code.

However, the requestor is a representative of the United States Army (the "Army"). 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 pertaining to the named individual 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).

We are unable to 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 department determines the requestor is requesting the information on behalf of a criminal justice agency for purposes of chapter 411 of the Government Code and seeks the CHRI for a criminal justice purpose, then the department must release the CHRI pertaining to the named individual. *See* Open Records Decision No. 451 (1986) (specific statutory right of access provisions overcome general exceptions to disclosure under the Act). However, if the department determines the requestor either 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 may have a right of access to the CHRI of the named individual 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 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”); *see English v. General Elec. Co.*, 496 U.S. 72, 79 (1990) (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) (federal agency acting within scope of its congressionally delegated authority may preempt state regulation). However, federal law 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).

It is unclear whether the request is for retention purposes and whether the named individual provided the requestor with a signed authorization for the release of the CHRI.

Accordingly, we must rule conditionally. If the request was for retention purposes and the Army provides a signed written consent for release from the named individual, then the department must release the named individual's CHRI. However, if the request was not made for retention purposes or the Army does not provide a signed written consent for release, then the requestor does not have a right of access to the CHRI at issue pursuant to federal law.

In summary, with the exception of basic information, which the department must release, the city may generally withhold the submitted information under section 552.108(a)(1) of the Government Code. However, the department must release the CHRI pertaining to the named individual if either (1) the department determines the requestor is requesting the information on behalf of a criminal justice agency for purposes of chapter 411 of the Government Code and he seeks the CHRI for a criminal justice purpose, or (2) the request was made for retention purposes and the Army provides a signed written consent for release from the named individual.

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 <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,



Paige Lay
Assistant Attorney General
Open Records Division

PL/mo

Ref: ID# 802254

Enc. Submitted documents

c: Requestor
(w/o enclosures)