



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

December 16, 2020

Ms. Debra L. Goetz
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P.O. Box 3725
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OR2020-31488

Dear Ms. Goetz:

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# 858327 (ORR# M002498).

The McAllen Independent School District (the "district"), which you represent, received a request for all records from the district's police department (the "department") involving a named individual. 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 information.

Section 552.101 of the Government Code excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses the doctrine of 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. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. 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. U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 764 (1989) (finding significant privacy interest in compilation of individual's criminal history by recognizing distinction between public records found in courthouse files and local police stations and compiled

summary of criminal history information). Furthermore, we find a compilation of a private citizen's criminal history is generally not of legitimate concern to the public.

Upon review, we find the present request requires the district to compile unspecified law enforcement records concerning the named individual. Therefore, to the extent the district maintains law enforcement records depicting the named individual as a suspect, arrestee, or criminal defendant, the district must generally withhold such information under section 552.101 in conjunction with common-law privacy. However, we understand the requestor is a recruiter for the United States Marine Corps (the "USMC"), and the named individual is a potential enlistee in the USMC. The United States Department of Defense (the "DoD") is authorized to perform background investigations of persons seeking to enlist to determine the eligibility of applicants for acceptance into 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 USMC 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 Department of the Navy). 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 USMC's right of access to CHRI preempts state confidentiality provisions. *Id.* § 9101(b)(4) (section 9101 "shall apply notwithstanding any other provision of law of any State"). The USMC's right of access under federal law prevails over a claim under common-law privacy. *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); *see also 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). However, federal law also provides the USMC's right of access is contingent on receiving written consent from the individual under investigation for the release of such CHRI. *See* 5 U.S.C. § 9101(c), (b)(1)(A)(iii). Thus, if the USMC provides a signed written consent for release from the individual whose information is at issue, then the district must release the CHRI at issue, to the extent it exists. In that situation, we will consider whether the information at issue is otherwise excepted from disclosure. However, if the USMC does not provide a signed written consent for release from the individual, then the district may not release any CHRI, to the extent it exists. Nevertheless, we note you have submitted information that does not list the named individual as a suspect, arrestee, or criminal defendant. This information does not implicate the privacy interest of the named individual and thus, is not part of a criminal history compilation and may not be withheld under section 552.101 in conjunction with common-law privacy on that basis. Accordingly, we will consider whether the information at issue is otherwise excepted from disclosure.

Section 552.101 of the Government Code also encompasses section 58.008 of the Family Code, which provides, in part:

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

(1) if maintained on paper or microfilm, kept separate from adult records;

(2) if maintained electronically in the same computer system as adult records, accessible only under controls that are separate and distinct from the 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 Subsection (c) or Subchapter B, D, or E.

Fam. Code § 58.008(b); *see also id.* § 51.03(a) (defining “delinquent conduct” for purposes of title 3 of Family Code). Section 58.008(b) is applicable to records of juvenile conduct that occurred before, on, or after September 1, 2017. *See* Act of May 28, 2017, 85th Leg., R.S., ch. 746, § 22. The juvenile must have been at least 10 years old and less than 17 years of age when the conduct occurred. *See* Fam. Code § 51.02(2) (defining “child” for purposes of title 3 of Family Code). The submitted information involves juvenile offenders, so as to fall within the scope of section 58.008(b). It does not appear any of the exceptions in section 58.008 apply. Accordingly, the district must generally withhold the submitted information under section 552.101 of the Government Code in conjunction with section 58.008(b) of the Family Code.

Section 552.101 of the Government Code also encompasses 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 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 this chapter 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 this chapter or in providing services as a result of an investigation.

Id. § 261.201(a). The submitted information was used or developed in investigations of alleged or suspected child abuse by the department. *See id.* §§ 101.003(a) (defining “child” for purposes of this section 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), 261.001(1) (defining “abuse” for purposes of chapter 261 of the Family Code). Accordingly, the information is within the scope of section 261.201 of the Family Code. The district does not indicate the department has adopted a rule that governs the release of this type of information, and therefore we assume no such regulation exists. Given that assumption, we find the submitted information is also generally confidential pursuant to section 261.201 of the Family Code.

However, as noted above, we understand the requestor is a recruiter for the USMC and we understand the named individual is a potential enlistee in the USMC. As noted above, the DoD is authorized to perform background investigations of persons seeking to enlist to determine the eligibility of applicants for acceptance into armed services. *See* 5 U.S.C. § 9101(b)(1)(A)(iii); *see also id.* § 9101(a)(6)(A). In addition, the USMC 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). Federal law provides the USMC’s right of access to CHRI preempts state confidentiality provisions. *Id.* § 9101(b)(4). Thus, we conclude the USMC’s right of access under federal law preempts sections 58.008 and 261.201 of the Family Code, section 552.108 of the Government Code, and common-law privacy. *See English v. General Elec. Co.*, 496 U.S. 72, 79 (1990) (state law 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, as noted above, federal law also provides the USMC’s right of access is contingent on receiving written consent from the individual under investigation for the release of such CHRI. *See* 5 U.S.C. § 9101(c), (b)(1)(A)(iii).

Although the requestor indicates he is a recruiter for the USMC, we are unable to determine whether the individual at issue provided the USMC with a signed authorization for the release of the information at issue. Accordingly, we rule conditionally. If the requestor provides a signed written consent for release of CHRI from the individual at issue, then the district must release CHRI pertaining to the individual at issue and withhold the remaining information under section 552.101 of the Government Code in conjunction with sections 261.201(a) and 58.008(b) of the Family Code. However, if the requestor does not provide a written consent for release of the information, then the district is not required to release CHRI pertaining to the individual at issue on that ground and must withhold the submitted information in its entirety under section 552.101 of the Government Code in conjunction with sections 261.201(a) and 58.008(b) of the Family Code.

In summary, to the extent the district maintains unspecified law enforcement records depicting the individual at issue as a suspect, arrestee, or criminal defendant and the named individual did not provide the USMC with a signed written consent for the release of CHRI from the information at issue, the district must withhold such information under section 552.101 in conjunction with common-law privacy. If the requestor provides a signed written consent for release of CHRI from the individual at issue, then the district must

release CHRI pertaining to the individual at issue and withhold the remaining information under section 552.101 of the Government Code in conjunction with sections 261.201(a) and 58.008(b) of the Family Code. If the requestor does not provide a written consent for release of the information, the district must withhold the submitted information in its entirety under section 552.101 of the Government Code in conjunction with sections 261.201(a) and 58.008(b) of the Family Code.

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,

Deborah Southerland
Assistant Attorney General
Open Records Division

DS/mo

Ref: ID# 858327

Enc. Submitted documents

c: Requestor
(w/o enclosures)