



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

March 17, 2022

Mr. Joe R. Zapata  
Administration Supervisor  
Houston Police Department  
1200 Travis, 10th Floor  
Houston, Texas 77002-6000

OR2022-07905

Dear Mr. Zapata:

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# 936401 (ORR# P023085).

The Houston Police Department (the "department") received a request for information pertaining to a named individual, including a specified report. You claim the submitted information is excepted from disclosure under section 552.142 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Section 552.142 of the Government Code is applicable to records of certain deferred adjudications. You explain, and have provided documentation reflecting, an order of nondisclosure was issued pursuant to former section 411.081(d) of the Government Code. You assert this order applies to the submitted information. We understand the submitted order of nondisclosure was issued prior to September 1, 2015. Although section 552.142 of the Government Code was amended in 2015 by the 84th Legislature, an order of nondisclosure issued pursuant to former section 411.081(d) prior to September 1, 2015, is subject to the former version of section 552.142, which was continued in effect for that purpose. *See* Act of May 27, 2015, 84th Leg., R.S., ch. 1279, § 32. Thus, we will address your argument under the former version of section 552.142 of the Government Code, which provides as follows:

- (a) Information is excepted from [required public disclosure] if an order of nondisclosure with respect to the information has been issued under [former] Section 411.081(d).

...

(b) A person who is the subject of information that is excepted from [required public disclosure] under this section may deny the occurrence of the arrest and prosecution to which the information relates and the exception of the information under this section, unless the information is being used against the person in a subsequent criminal proceeding.

Act of June 1, 2003, 78th Leg., R.S., ch. 1236, § 5, amended by Act of May 27, 2015, 84th Leg., R.S., ch. 1279, §§ 26-27 (current version at Gov't Code § 552.142). We note, although Senate Bill 1902 amended and redesignated former subsections 411.081(d) through (i) of the Government Code, the former versions of these subsections were continued in effect for that purpose. *See* Act of May 27, 2015, 84th Leg., R.S., ch. 1279, § 32. Former section 411.081(d) of the Government Code authorizes a person placed on deferred adjudication for certain offenses to petition the court for an order of nondisclosure, which prohibits criminal justice agencies from disclosing to the public criminal history record information (“CHRI”) related to the offense giving rise to the deferred adjudication. *See* Act of June 1, 2003, 84th Leg., R.S., ch. 1236, § 3, amended by Act of May 27, 2015, 84th Leg., R.S., ch. 1279, § 4 (current version at Gov't Code § 411.0725(b)-(e)). Under this provision, a criminal justice agency may only disclose CHRI that is the subject of the order to other criminal justice agencies, for criminal justice or regulatory purposes; non-criminal justice agencies listed in former section 411.081(i); or the person who is the subject of the order. *See* Act of June 1, 2003, 84th Leg., R.S., ch. 1236, § 3 (amended 2015). Upon review, we find the submitted information is generally subject to former section 552.142 of the Government Code.

However, we note the requestor is a recruiter for the United States Army (the “Army”) and the suspect in the submitted report is a potential enlistee. 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 the armed services. *See* 5 U.S.C. § 9101(b)(1)(C); *see also id.* § 9101(a)(6)(A) (DoD is covered agency for purposes of section 9101). The Army 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) (DoD includes Department of 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 of the individual in the criminal justice system.” 5 U.S.C. § 9101(a)(2). The term includes “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 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 the

state law you claim. *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 also provides the Army'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). In this instance, the Army has provided written consent from the individual named in the request. Therefore, the department must release CHRI pertaining to the named individual to this requestor and must withhold the remaining information under former section 552.142 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 <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,

Michelle Garza  
Assistant Attorney General  
Open Records Division

MRG/be

Ref: ID# 936401

Enc. Submitted documents

c: Requestor  
(w/o enclosures)