



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

September 13, 2013

Mr. David V. Overcash  
Counsel for the City of Anna  
Wolfe, Tidwell & McCoy, L.L.P.  
2591 Dallas Parkway, Suite 205  
Frisco, Texas 75034

OR2013-15990

Dear Mr. Overcash:

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# 499202 (City's File No. C03029PIR20130620-01).

The City of Anna (the "city"), which you represent, received a request for all information related to a named individual, including information related to two specified incidents. You state the city has released some information to the requestor. 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. Additionally, this office has found 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) (when considering prong regarding individual's privacy interest, court recognized distinction between public records found in courthouse files and local police stations and compiled summary of information and noted that individual has significant privacy interest in compilation of one's criminal history). Furthermore, we find a compilation of a private citizen's criminal history is generally not of legitimate concern to the public.

The present request, in part, seeks all records pertaining to a named individual. We note you have submitted information that does not list the named individual as a suspect, arrestee, or criminal defendant and is not part of a compilation of an individual's criminal history. However, the portion of the request that seeks all records pertaining to a named individual requires the city to compile the named individual's criminal history, thus implicating the named individual's right to privacy. Therefore, to the extent the city maintains law enforcement records depicting the named individual as a suspect, arrestee, or criminal defendant, this information is generally confidential under section 552.101 in conjunction with common-law privacy.

We note, however, the requestor is an investigator with United States Investigative Services ("USIS") who requests the information at issue as part of a background investigation for a national security or public trust employment position. We also note that USIS is under contract to perform investigations on behalf of the United States Office of Personnel Management ("OPM"). OPM is authorized to perform background investigations of prospective federal employees to ensure applicants have not broken the law or engaged in other conduct making them ineligible for federal employment. *See Mittleman v. Office of Pers. Mgmt.*, 76 F.3d 1240, 1243 (D.C. Cir. 1996); *see also* 5 U.S.C. §§ 3301 (president may prescribe regulations for admission of individuals into civil service), 1304 (investigations conducted by OPM), 1104 (president may delegate personnel management functions to OPM); 5 C.F.R. pts. 731, 732, 736 (authorizing OPM to investigate applicants for federal employment). OPM is subject to Executive Order Number 10, 450, which provides, "[t]he appointment of each civilian officer or employee in any department or agency of the Government shall be made subject to investigation." Exec. Order No. 10, 450, § 3, 18 Fed. Reg. 2489 (Apr. 27, 1953), reprinted as amended in 5 U.S.C. § 7311 (2000). While the scope of the investigation depends on the relation of the employment to national security, "in no event shall the investigation include less than a national agency check (including a check for the fingerprint files of the Federal Bureau of Investigation), and written inquiries to appropriate local law enforcement agencies[.]" *Id.*

OPM has a right of access to the criminal history record information ("CHRI") of state and local criminal justice agencies when it receives the consent of the individual being investigated for release of such information. *See* 5 U.S.C. § 9101(b)(1), (c). 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 it 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.” *Id.* § 9101(a)(2). Furthermore, federal law provides OPM’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 requestor has submitted written consent from the individual under investigation for the release of that individual’s CHRI. Accordingly, we conclude the requestor has a right of access to CHRI held by the city regarding the individual under investigation. In addition, we conclude such a right of access under federal law preempts the city’s claims under Texas law. *See English v. General Elec. Co.*, 496 U.S. 72, 79 (1990) (noting state law is preempted to extent it actually conflicts with federal law); *see also Louisiana Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 369 (1986) (noting that federal agency acting within scope of its congressionally delegated authority may preempt state regulation). Therefore, the city must release any CHRI relating to the individual under investigation to this requestor.

We next address your arguments against disclosure for the submitted information that does not list the named individual as a suspect, arrestee, or criminal defendant. Section 552.108(a)(2) 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 . . . it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication[.]” Gov’t Code § 552.108(a)(2). Section 552.108(a)(2) is applicable only if the information at issue relates to a concluded criminal case that did not result in a conviction or deferred adjudication. A governmental body that claims an exception to disclosure under section 552.108 must reasonably explain how and why this exception is applicable to the information the governmental body seeks to withhold. *See id.* § 552.301(e)(1)(A). You state case number 12-000385 pertains to a concluded criminal investigation that did not result in conviction or deferred adjudication. Based on this representation and our review, we conclude the city may withhold the information you have marked in case number 12-000385 under section 552.108(a)(2) of the Government Code.

We understand you to claim some of the remaining information related to case number 12-000385 is excepted under section 552.101 of the Government Code in conjunction with common-law privacy. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. In Open Records Decision No. 393 (1983), this office concluded that, generally, only that information which either identifies or tends to identify a victim of sexual assault or other sex-related offense may be withheld under common-law privacy; however, because the identifying information was inextricably intertwined with other releasable information, the governmental body was required to withhold the entire report. ORD 393 at 2; *see* Open Records Decision

No. 339 (1982); *see also Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied) (identity of witnesses to and victims of sexual harassment was highly intimate or embarrassing information and public did not have a legitimate interest in such information); Open Records Decision No. 440 (1986) (detailed descriptions of serious sexual offenses must be withheld).

In this instance, the requestor has provided an authorization for release of information form signed by the individual whose information is at issue. Thus, this requestor has a special right of access under section 552.023 of the Government Code to the named individual's information that would otherwise be withheld to protect the named individual's right to privacy. *See Gov't Code § 552.023(b)* (governmental body may not deny access to person or person's representative to whom information relates on grounds that information is considered confidential under privacy principles); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning himself). Therefore, the city may not withhold the information at issue under section 552.101 of the Government Code on the basis of common-law privacy. *See Gov't Code § 552.023; ORD 481.*

Section 552.130 excepts from disclosure information that relates to a motor vehicle operator's or driver's license issued by an agency of this state or another state or country. Gov't Code § 552.130(a)(1). We note section 552.130 protects personal privacy. As previously noted, the requestor is the authorized representative of the named individual and has a special right of access to the named individual's private information. *See id.* § 552.023; ORD 481. Thus, with the exception of the named individual's information, which we have marked for release, the city must withhold the information you have marked under section 552.130.

In summary, the city must release any CHRI relating to the individual under investigation to this requestor. The city may withhold the information you have marked related to case number 12-000385 from this requestor under section 552.108(a)(2) of the Government Code. With the exception of the information we have marked for release, the city must withhold the information you have marked under section 552.130 of the Government Code. The city must release the remaining information.<sup>1</sup>

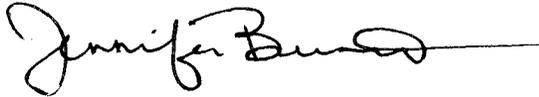
This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

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<sup>1</sup>Should the city receive another request for these same records from a person who would not have a right of access to the information, the city should resubmit this same information and request another ruling from this office. *See Gov't Code § 552.301(a).*

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,

A handwritten signature in black ink, appearing to read "Jennifer Burnett", with a horizontal line extending to the right.

Jennifer Burnett  
Assistant Attorney General  
Open Records Division

JB/tch

Ref: ID# 499202

Enc. Submitted documents

c: Requestor  
(w/o enclosures)