



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 23, 2013

Mr. James A. McKechnie
Assistant City Attorney
City of Wichita Falls
P.O. Box 1431
Wichita Falls, Texas 76307-1431

OR2013-18467

Dear Mr. Kechnie:

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# 501731 (City ID# 445).

The Wichita Falls Police Department (the "department") received a request for all reports pertaining to a named individual, including a specified report. 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.

We note the submitted information contains a court order of restricted access. The order was entered in accordance with section 58.203 of the Family Code, which states the Texas Department of Public Safety ("DPS") shall certify that juvenile law enforcement records are subject to automatic restriction of access under certain circumstances. Fam. Code § 58.203. Section 58.207 of the Family Code provides in relevant part:

(a) On certification of records in a case under Section 58.203, the juvenile court shall order:

(1) that the following records relating to the case may be accessed only as provided by Section 58.204(b):

...

(E) records maintained by a law enforcement agency[.]

...

(b) Except as provided by Subsection (c), on receipt of an order under Subsection (a)(1), the agency maintaining the records:

(1) may allow access only as provided by Section 58.204(b); and

(2) shall respond to a request for information about the records by stating that the records do not exist.

(c) Notwithstanding Subsection (b) of this section and Section 58.206(b), with the written permission of the subject of the records, an agency under Subsection (a)(1) may allow military personnel, including a recruiter, of this state or the United States to access juvenile records in the same manner authorized by law for records to which access has not been restricted under this section.

Fam. Code § 58.207(a)(1)(E), (b), (c). In this instance, the requestor identifies himself as a recruiter for the United States Army (the "Army"). He states the requested information involves an individual who is a potential enlistee in the Army. As noted above, section 58.207(c) provides access upon the written permission of the individual to "military personnel, including a recruiter, of this state or the United States[.]" *Id.* § 58.207(c).

Although the Army may have made the instant request for information for recruiting purposes, we have no indication the individual being investigated provided the Army with a signed authorization for the release of the information at issue. Accordingly, if the Army does not provide a signed written consent for release from the individual being investigated, then the requestor has no right of access to this information, and in accordance with the submitted order of restricted access and section 58.207(b), we find that the department must respond to the request by stating that the records at issue do not exist.¹ However, if the Army provides a signed written consent for release from the individual being investigated, then the department may allow the requestor access to the submitted information in the same manner authorized by law for records in which access has not been restricted under section 58.207. In that instance, we will address your arguments under sections 552.101 and 552.108 of the Government Code for the submitted information.

Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses information protected by other statutes. Juvenile law enforcement records relating to conduct that occurred on or after September 1, 1997 are confidential under section 58.007 of the Family Code. For purposes of section 58.007, "child" means a person who is ten years of age or older and under seventeen years of age. *See* Fam. Code § 51.02(2). The relevant language of section 58.007 reads as follows:

¹In that instance, as our ruling is dispositive, we need not address your arguments against disclosure of this information.

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

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

(2) if maintained electronically in the same computer system as records or files relating to adults, be accessible under controls that are separate and distinct from 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 Subchapters B, D, and E.

...

(e) Law enforcement records and files concerning a child may be inspected or copied by a juvenile justice agency as that term is defined by Section 58.101, a criminal justice agency as that term is defined by Section 411.082, Government Code, the child, and the child's parent or guardian.

...

(j) Before a child or a child's parent or guardian may inspect or copy a record or file concerning the child under Subsection (e), the custodian of the record or file shall redact:

...

(2) any information that is excepted from required disclosure under Chapter 552, Government Code, or other law.

Id. § 58.007(c), (e), (j)(2). We find the submitted information involves a juvenile engaged in delinquent conduct or conduct indicating a need for supervision that occurred after September 1, 1997. Under section 58.007(e), the juvenile may inspect law enforcement records concerning him or herself. *Id.* § 58.007(e). Thus, if the Army received signed, written consent for release from the individual, then under section 58.007(e), the requestor, as the juvenile's authorized representative, has a right to inspect juvenile law enforcement records concerning this individual. However, we note section 58.007(j) also provides that information subject to any other exception to disclosure under the Act or other law must be redacted. *See id.* § 58.007(j)(2). Thus, we will address your remaining argument under section 552.108 of the Government Code to the submitted information.

Section 552.108(a)(2) of the Government Code excepts from disclosure information concerning an investigation that concluded in a result other than conviction or deferred adjudication. *See* Gov't Code 552.108(a)(2). A governmental body claiming section 552.108(a)(2) must demonstrate that the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. *See id.* §§ 552.108(a)(2), .302(e)(1)(A). You inform us that the submitted information relates to a criminal investigation that did not result in conviction or deferred adjudication. Based on your representation and our review, we agree that section 552.108(a)(2) is applicable to the submitted information.

However, section 552.108 does not except from disclosure basic information about an arrested person, an arrest, or a crime. *See id.* § 552.108(c). Basic information refers to the information held to be public in *Houston Chronicle Publishing Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). Thus, with the exception of basic information, the department may generally withhold the submitted information under section 552.108(a)(2) of the Government Code.

As previously noted, the requestor is a recruiter for the Army, and we understand that the individual named in the requested information is a potential enlistee in the Army. 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. 5 U.S.C. § 9101(b)(1)(C); *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 the individual being investigated has provided the Army with consent for the release of CHRI. *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 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 Army's right of access to CHRI preempts state law. *Id.* § 9101(b)(4) (section 9101 "shall apply notwithstanding any other provision of law . . . of any State"). We conclude the Army's right of access under federal law preempts the state laws you claim. *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 that 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). If

the Army provides a signed written consent for release from the individual being investigated pursuant to section 58.207(c) of the Family Code, then the Army has also provided written consent from the individual at issue as required by federal law. Therefore, in that situation, the department must release basic information and CHRI to this requestor and may withhold the remaining information under section 552.108(a)(2) of the Government Code.

In summary, if the Army does not provide a signed written consent for release from the individual being investigated, then the requestor has no right of access to this information, and in accordance with the submitted order of restricted access and section 58.207(b), we find that the department must respond to the request by stating that the records at issue do not exist. However, if the Army provides a signed written consent for release from the individual being investigated, then the department must release basic information and CHRI to this requestor and may withhold the remaining information under section 552.108(a)(2) 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,



Britni Fabian
Assistant Attorney General
Open Records Division

BF/dls

Ref: ID# 501731

Enc. Submitted documents

c: Requestor
(w/o enclosures)