



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 20, 2014

Mr. Daniel Ortiz
Assistant City Attorney
City of El Paso
P.O. Box 1890
El Paso, Texas 79950-1890

OR2014-04685

Dear Mr. Ortiz:

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# 517343 (City of El Paso ID# 13-1026-3939).

The El Paso Police Department (the "department") received a request for a specified incident report. You state the department has released some responsive information to the requestor. You claim some of the submitted information is excepted from disclosure under section 552.101 of the Government Code. We have considered the claimed exception and reviewed 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. This exception encompasses information that other statutes make confidential, such as section 58.007 of the Family Code. 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. The relevant language of section 58.007 reads as follows:

(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.

Fam. Code § 58.007(c). For purposes of section 58.007(c), "child" means a person who is ten years of age or older and under seventeen years of age when the conduct occurred. *See id.* § 51.02(2). The submitted information involves juvenile delinquent conduct that occurred after September 1, 1997. *See id.* § 51.03 (defining "delinquent conduct" for purposes of Fam. Code § 58.007). It does not appear that any of the exceptions in section 58.007 apply. Therefore, we find the submitted information is confidential under section 58.007(c) of the Family Code.

We note, however, the requestor is an investigator with the United States Investigations Services ("USIS") and requests the information at issue as part of a background investigation for a national security or public trust employment position. We also note 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 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* 5 U.S.C. § 9101(b)(1), (c). Furthermore, where USIS conducts an investigation on behalf of OPM, USIS is authorized to receive CHRI. 20 Op. Off. Legal Counsel 299 (1996). 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

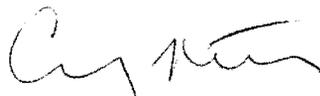
“identification information such as fingerprint records to the extent that such information does not indicate involvement of the individual in the criminal justice system” or “records of a State or locality sealed pursuant to law from access by State and local criminal justice agencies of that State or locality.” 5 U.S.C. § 9101(a)(2).

The requestor has submitted written consent from the individual under investigation for the release of that individual’s CHRI. 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”). Accordingly, we conclude OPM and USIS, which is conducting an investigation on behalf of OPM, have a right of access to CHRI held by the department regarding the named individual under investigation. In addition, we conclude such a right of access under federal law preempts the state confidentiality provision you claim under section 58.007 of the Family Code and the common-law right to privacy under Texas law. *See English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990) (noting 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 federal agency acting within scope of its congressionally delegated authority may preempt state regulation). As stated above, the submitted information is subject to section 58.007(c) of the Family Code. The department must release the CHRI relating to the named individual under investigation to the requestor and withhold the remaining information under section 552.101 of the Government Code in conjunction with section 58.007(c) of the Family 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,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/dls

Ref: ID# 517343

Enc. Submitted documents

c: Requestor
(w/o enclosures)