



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 31, 2014

Ms. Laura Garza Jimenez
County Attorney
Nueces County
901 Leopard Street, Room 207
Corpus Christi, Texas 78401

OR2014-13292

Dear Ms. Jimenez:

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# 529571.

The Nueces County Sheriff's Office (the "sheriff's office") received a request for all dates of incarceration of a named individual. You claim the requested information is excepted from disclosure under sections 552.101 and 552.142 of the Government Code.¹ We have considered the exceptions you claim.

Initially, we note the requestor is an investigator with the Texas Workforce Commission (the "commission") and asserts a right of access to the requested information under section 301.081 of the Labor Code. Section 301.081 provides, in part, as follows:

- (a) Each employing unit shall keep employment records containing information as prescribed by the commission and as necessary for the proper administration of [Title 4 of the Labor Code]. The records are open to inspection and may be copied by the commission or an authorized representative of the commission at any reasonable time and as often as necessary.

¹Although you also raise section 552.101 of the Government Code in conjunction with section 411.081 of the Government Code, we note section 552.142 of the Government Code is the proper exception to raise when asserting information is confidential pursuant to a nondisclosure order.

(b) The commission may require from an employing unit sworn or unsworn reports regarding persons employed by the employing unit as necessary for the effective administration of [Title 4 of the Labor Code].

Labor Code § 301.081(a)-(b). An “employing unit” is defined as a person who has employed an individual to perform services in Texas. *See id.* § 201.011(11) (defining “employing unit”). As noted above, the requestor is seeking the incarceration dates of the named individual. Thus, we find the requested information does not consist of information maintained by the sheriff’s office as an employing unit of the named individual. Therefore, the requestor does not have a right of access to the requested information pursuant to section 301.081 of the Labor Code. Accordingly, we address your arguments against disclosure of the requested information.

Section 552.142 of the Government Code is applicable to records of certain deferred adjudications. Section 552.142 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 Section 411.081(d) [of the Government Code].

(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.

Gov’t Code § 552.142. Section 411.081(d) of the Government Code provides, in relevant part,

Notwithstanding any other provision of [subchapter F], if a person is placed on deferred adjudication community supervision . . . subsequently receives a discharge and dismissal . . . and satisfies the requirements of Subsection (e), the person may petition the court that placed the defendant on deferred adjudication for an order of nondisclosure[.] . . . A criminal justice agency may disclose criminal history record information [(“CHRI”)] that is the subject of the order only to other criminal justice agencies, for criminal justice or regulatory licensing purposes, an agency or entity listed in Subsection (i), or the person who is the subject of the order.

Id. § 411.081(d). You explain an order of nondisclosure was issued pursuant to section 411.081(d) of the Government Code prohibiting the release of some of the requested information. As noted above, the requestor is a representative of the commission and is not the person who is the subject of the order or a criminal justice agency. Further, the

commission is not one of the specified entities enumerated in subsection 411.081(i). *Id.* § 411.081(i) (listing entities authorized to receive section 411.081 information). Thus, the information at issue is generally confidential under section 552.142 of the Government Code.

However, section 411.104(b) provides the commission “is entitled to obtain from the [Texas Department of Public Safety (the “department”) CHRI] maintained by the department that relates to a person who is an applicant for a security sensitive position.” *Id.* § 411.104(b); *see id.* § 411.087(a)(2) (authorizing entity entitled to obtain CHRI from department to also obtain CHRI maintained by criminal justice agency). We note in Attorney General Opinion GA-0680, this office determined because section 411.081(d) limits disclosure to only the listed entities, it denies access to any entity not listed. *See* Attorney General Opinion GA-0680 at 2 (2008). Additionally, section 411.081(d) is an independent provision that applies by its plain language, “[n]otwithstanding” any other provision in subchapter F. *See id.* We note section 411.104 is contained in subchapter F. Accordingly, section 411.081(d) prevails over section 411.104(b) with respect to any CHRI subject to an order of nondisclosure. *See id.* Therefore, the sheriff’s office must withhold the requested information at issue under section 552.142 of the Government Code.

Section 552.101 of the Government Code excepts from required disclosure “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 sheriff’s office to compile unspecified law enforcement records concerning the named individual. Therefore, to the extent the sheriff’s office maintains any other law enforcement records depicting the named individual as a suspect, arrestee, or criminal defendant, the sheriff’s office must generally withhold such information under section 552.101 in conjunction with common-law privacy.

However, as previously mentioned, the requestor is a representative of the commission and may have a right of access to portions of the requested information pursuant to section 411.104 of the Government Code. As stated above, section 411.104(b) provides the

commission is entitled to obtain from the department CHRI that relates to persons applying for security sensitive positions. *See* Gov't Code § 411.104(b); *see also id.* § 411.104(a) ("security sensitive position" has meaning assigned by section 301.042(c) of the Labor Code); Labor Code § 301.042(c) (defining "sensitive security position"). In addition, section 411.087(a) of the Government Code provides, in pertinent part:

(a) A person, agency, department, political subdivision, or other entity that is authorized by this subchapter to obtain from the [DPS CHRI] maintained by the [DPS] that relates to another person is authorized to:

...

(2) obtain from any other criminal justice agency in this state [CHRI] maintained by that criminal justice agency that relates to that person.

Gov't Code § 411.087(a)(2). We note "CHRI" is defined as "information collected about a person by a criminal justice agency that consists of identifiable descriptions and notations of arrests, detentions, indictments, informations, and other formal criminal charges and their dispositions." *See id.* § 411.082(2). However, the commission may only receive CHRI that relates to a person who is an applicant for a security sensitive position. *See id.* § 411.104(b). When read together, sections 411.087 and 411.104 of the Government Code may grant the commission a right of access to CHRI in the remaining requested information.

Accordingly, if the named individual is an applicant for a security sensitive position, then the requestor is authorized to obtain the named individual's CHRI pursuant to section 411.104(b) of the Government Code. *See id.* § 411.104(b). Although you raise section 552.101 of the Government Code in conjunction with common-law privacy for this information, we note the requestor's statutory right of access prevails over the doctrine of 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.*, 436 F.3d 541, 544 (5th Cir. 2006) (common law controls only where there is no conflicting or controlling statutory law). Thus, if the named individual is an applicant for a security sensitive position, to the extent it exists, the sheriff's office must make available to the requestor any remaining CHRI under section 411.104(b). If, however, the named individual is not an applicant for a security sensitive position, then the requestor does not have a right of access to any remaining CHRI in the requested information, and to the extent the sheriff's office maintains any other law enforcement records depicting the named individual as a suspect, arrestee, or criminal defendant, the sheriff's office must withhold such information under section 552.101 in conjunction with common-law privacy.

In summary, the sheriff's office must withhold the information subject to section 552.142 of the Government Code. If the named individual is not an applicant for a security sensitive

position, then, to the extent the sheriff's office maintains any other law enforcement records depicting the named individual as a suspect, arrestee, or criminal defendant, the sheriff's office must withhold such information under section 552.101 in conjunction with common-law privacy. If the named individual is an applicant for a security sensitive position, then, to the extent it exists, the sheriff's office must make available to the requestor CHRI under section 411.104(b) 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,



Paige Thompson
Assistant Attorney General
Open Records Division

PT/dls

Ref: ID# 529571

Enc. Submitted documents

c: Requestor
(w/o enclosures)