January 13, 2015

Ms. Linda Pemberton
Paralegal
City of Killeen
P.O. Box 1329
Killeen, Texas 76540-1329

OR2015-00618

Dear Ms. Pemberton:

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# 550371 (Killeen ID# W014742).

The Killeen Police Department (the "department") received a request for information pertaining to a specified incident. You claim the submitted information is excepted from disclosure under section 552.101 of the Government Code.[1] We have considered the exception you claim and reviewed the submitted information.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information made confidential by section 261.201 of the Family Code, which provides, in relevant part, as follows:

> (a) [T]he following information is confidential, is not subject to public release under [the Act], and may be disclosed only for purposes consistent

[1]Although you also raise section 552.101 of the Government Code in conjunction with common-law privacy for the submitted information, you provide no arguments explaining how this doctrine is applicable to the information at issue. Therefore, we assume you no longer assert this doctrine. *See* Gov't Code §§ 552.301, .302.

> with this code and applicable federal or state law or under rules adopted by an investigating agency:
>
> > (1) a report of alleged or suspected abuse or neglect made under [chapter 261 of the Family Code] and the identity of the person making the report; and
> >
> > (2) except as otherwise provided in this section, the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation under [chapter 261 of the Family Code] or in providing services as a result of an investigation.

Fam. Code § 261.201(a). The submitted information consists of information used or developed in an investigation of alleged or suspected abuse or neglect under chapter 261 of the Family Code. Accordingly, this information falls within the scope of section 261.201 of the Family Code. *See id.* §§ 101.003(a) (defining "child" for the purposes of this section as a person under 18 years of age who is not and has not been married or who has not had the disabilities of minority removed for general purposes), 261.001(1), (4) (defining "abuse" and "neglect" for purposes of chapter 261 of the Family Code). We have no indication the department has adopted a rule governing the release of this type of information. Accordingly, we assume that no such regulation exists. Given that assumption, and based on our review, we determine the submitted information is generally confidential pursuant to section 261.201 of the Family Code. *See* Open Records Decision No. 440 at 2 (1986) (predecessor statute).

We note, however, it appears the requestor is a representative of the United States Army (the "Army") and the individual who is the subject of the report at issue is enlisted in the Army. The United States Department of Defense (the "DoD") is authorized to perform background investigations of persons seeking acceptance or retention in the armed services. *See* 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 it receives the consent of the individual being investigated for release of such information. *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 confidentiality provisions. *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 section 261.201 of the Family Code. *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 a federal agency acting within scope of its congressionally delegated authority may preempt state regulation). Federal law, however, also provides the Army's right of access is contingent on the request being made for eligibility or retention purposes, and 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, it is unclear if the individual under investigation is seeking retention in the armed services and if the request is for retention purposes. Further, we have no indication the individual under investigation provided the Army with a signed authorization for the release of the information at issue. Nevertheless, if the instant request was for retention purposes and if the Army provides a signed written consent for release from the individual being investigated, then the department must release CHRI from the submitted information to this requestor, and must withhold the remaining information under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code. If the instant request was not made for retention purposes, or if the Army does not provide a written consent for release, then the department must withhold the submitted information in its entirety under section 552.101 in conjunction with section 261.201 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,

Cristian Rosas-Grillet
Assistant Attorney General
Open Records Division

CRG/cbz

Ref: ID# 550371

Enc. Submitted documents

c: Requestor
(w/o enclosures)