



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

November 2, 2005

Ms. Rebecca Brewer
Abernathy, Roeder, Boyd & Joplin, P.C.
P. O. Box 1210
McKinney, Texas 75070-1210

OR2005-09921

Dear Ms. Brewer:

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# 235330.

The Wylie Police Department (the "department"), which you represent, received a request for information pertaining to a named individual. You claim that the requested information is exempted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Section 552.101 of the Government Code encompasses confidentiality provisions 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. The relevant language of section 58.007(c) 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 Subchapter B.

Fam. Code § 58.007(c). 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). After reviewing the submitted information, we find that one of the reports at issue does not identify a juvenile suspect or offender. Thus, you have failed to demonstrate that this report is a law enforcement record of a child as defined by section 51.02(2) of the Family Code. *See* Gov’t Code § 552.301(e)(1) (requiring the governmental body to explain the applicability of the raised exception). Accordingly, this information is not confidential under section 58.007 and must be released in its entirety to the requestor. However, the remaining report involves juvenile conduct that occurred after September 1, 1997. Thus, this information, which we have marked, is subject to section 58.007.

We also note that the requestor is a Record Searcher for United States Investigations Services (“USIS”) and states that she is conducting a background investigation for a national security or public trust employment position. We 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 that 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. §§ 1104 (2000) (president may delegate personnel management functions to OPM), 1304 (investigations conducted by OPM), 3301 (president may prescribe regulations for admission of individuals into civil service); 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 that “[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 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 the information at issue. Furthermore, federal law provides that the 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”). Thus, we conclude that, where a requestor seeks information as part of an investigation conducted on behalf of the

OPM, she has a right of access to CHRI held by the department. In addition, we conclude that such a right of access under federal law preempts the state confidentiality provision 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 *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, to the extent the requestor seeks the information at issue as part of an investigation conducted on behalf of the OPM, the department must release the CHRI to the requestor. The department must withhold the remaining portion of the information at issue under section 552.101 of the Government Code in conjunction with section 58.007 of the Family Code. However, if the requestor is not seeking the information at issue on behalf of the OPM, the entire marked report is confidential under section 58.007 and must be withheld under section 552.101.¹

In summary, we have marked a portion of the submitted information that is confidential under section 58.007 of Family Code. If the requestor seeks this information on behalf of the OPM, the department must release the portion of the marked information that constitutes CHRI; and the remaining information at issue must be withheld under section 552.101 of the Government Code. However, if the requestor does not seek the information at issue on behalf of the OPM; then the marked information must be withheld in its entirety under section 552.101. The remaining submitted information must be released to the requestor.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll

¹As our ruling is dispositive, we do not address your remaining arguments.

free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Office of the Attorney General at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



L. Joseph James
Assistant Attorney General
Open Records Division

LJJ/krl

Ref: ID# 235530

Enc. Submitted documents

c: Ms. Alyssa Pearson
1406 Quail Meadow Drive
Wylie, Texas 75098
(w/o enclosures)