



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 25, 2008

Mr. Jason Day
City Attorney
City of Royse City
P.O. Box 638
Royse City, Texas 75189

OR2008-13194

Dear Mr. Day:

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# 323060.

The Royse City Police Department (the "department") received a request for all information pertaining to a named individual. You state you have provided some of the requested information to the requestor. You claim a portion of one of the submitted incident reports is excepted 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 excepts from 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 made confidential by other statutes, such as section 58.007 of the Family Code, which makes confidential juvenile law enforcement records relating to conduct that occurred on or after September 1, 1997. The relevant language of section 58.007 reads:

(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 at the time of the reported conduct. *See id.* § 51.02(2). Report number 0301N0522 pertains to two juveniles allegedly making threats against an acquaintance, and report number 0304C0100 pertains to a juvenile arrested for selling narcotics. Thus, we find these reports involve juvenile delinquent conduct. *See id.* § 51.03(a) (defining "juvenile delinquent conduct" for the purposes of section 58.007). It does not appear that any of the exceptions in section 58.007 of the Family Code apply. Therefore, we find report numbers 0301N0522 and 0304C0100 are subject to 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 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 that individual’s CHRI. Furthermore, federal law provides that 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 OPM, the requestor has a right of access to CHRI held by the department regarding the individual under investigation. In addition, we conclude 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 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). As stated above, report numbers 0301N0522 and 0304C0100 are subject to section 58.007(c) of the Family Code. However, report number 0301N0522 contains CHRI of the individual under investigation by USIS. Therefore, the department must release the CHRI relating to the individual under investigation from report number 0301N0522. Report number 0304C0100, however, does not contain CHRI of the individual under investigation. Therefore, the remainder of report number 0301N0522, as well as report number 0304C0100 in its entirety, must be withheld under section 552.101 of the Government Code in conjunction with section 58.007 of the Family Code. As you have claimed no exceptions for the remaining incident report, it must be released.

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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3). If the governmental body does not file suit over 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,