ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 21, 2012

Mr. Stephen A. Cumbie
Assistant City Attorney
City of Fort Worth
1000 Throckmorton Street, 3rd Floor
Fort Worth, Texas 76102

OR2012-18795

Dear Mr. Cumbie:

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# 472912 (PIR No. W020143).

The Fort Worth Police Department (the "department") received a request for any arrest or offense reports on a named individual, including information pertaining to three specified incidents. You state the department has released some of the requested information. You claim the remaining requested information 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 protected by other statutes, including section 261.201 of the Family Code. Section 261.201(a) provides as follows:

> [T]he following information is confidential, is not subject to public release under [the Act] and may be disclosed only for purposes consistent with [the Family 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 this chapter 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 this chapter or in providing services as a result of an investigation.

Fam. Code § 261.201(a). You assert the information you have marked consists of files, reports, records, communications, or working papers used or developed in an investigation under chapter 261. Upon review, we find the information at issue is within the scope of section 261.201 of the Family Code. *See id.* § 261.001(1)(E) (defining "abuse" for purposes of chapter 261 of the Family Code as including offense of aggravated sexual assault under section 22.021 of the Penal Code); *see also* Penal Code § 22.021(b)(1) (defining "child" for purposes of aggravated sexual assault of a child as person under 17 years of age). You do not indicate the department has adopted a rule governing the release of this type of information; therefore, we assume that no such regulation exists. Given that assumption, we find the information you have marked is generally confidential pursuant to section 261.201 of the Family Code.

However, we note the requestor is a representative of the Probation and Pretrial Services Office of the United States District Court for the Northern District of Texas (the "probation office"). Section 261.201(a) provides that information encompassed by subsection (a) may be disclosed "for purposes consistent with [the Family Code] and applicable federal or state law." Fam. Code § 261.201(a). Chapter 411 of the Government Code constitutes "applicable state law" in this instance. Section 411.089(a) of the Government Code provides that "[a] criminal justice agency is entitled to obtain from the [Texas Department of Public Safety] any criminal history record information maintained by the [Texas Department of Public Safety] about a person." *See* Gov't Code § 411.089(a). In addition, section 411.087(a) of the Government Code provides in pertinent part the following:

> (a) [a] person, agency, department, political subdivision, or other entity that is authorized by this subchapter to obtain from the [Texas Department of Public Safety] criminal history record information maintained by the [Texas Department of Public Safety] that relates to another person is authorized to:
>
> . . .
>
> (2) obtain from any other criminal justice agency in this state criminal history record information maintained by that criminal justice agency that relates to that person.

Id. § 411.087(a)(2). We note "criminal history record information" 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). Thus, the information at issue contains criminal history record information ("CHRI"). However, a criminal justice agency that receives CHRI from another criminal justice agency pursuant to section 411.087(a)(2) may only receive such information for a criminal justice purpose. *See id.* §§ 411.083(c), .087(b); *see also* Open Records Decision No. 655 (1997) (discussing limitations on release of criminal history record information). Thus, to the extent the requestor in this instance represents a "criminal justice agency," he is authorized to obtain criminal history record information from the department pursuant to section 411.087(a)(2) of the Government Code, but only for a criminal justice purpose and for purposes consistent with the Family Code. *See* Gov't Code §§ 411.083(c), .087(a)(2); *see also* Fam. Code § 261.201(a).

Section 411.082 defines a "criminal justice agency" as including "a federal or state agency that is engaged in the administration of criminal justice under a statute or executive order and that allocates a substantial portion of its annual budget to the administration of criminal justice." Gov't Code § 411.082(3)(A). "Administration of criminal justice" has the meaning assigned to it by article 60.01 of the Code of Criminal Procedure. *See id.* § 411.082(1). Article 60.01 defines "administration of criminal justice" as the "performance of any of the following activities: detection, apprehension, pretrial release, post-trial release, prosecution, adjudication, correctional supervision, or rehabilitation of an offender. The term includes criminal identification activities and the collection, storage, and dissemination of criminal history record information." Code Crim. Proc. art. 60.01(1).

Although it appears the requestor is engaged in the administration of criminal justice for purposes of chapter 411, we are unable to determine whether she intends to use the requested CHRI for a criminal justice purpose. We also are unable to determine whether the requestor intends to use the information for purposes consistent with the Family Code. Consequently, if the department determines the requestor intends to use the CHRI for a criminal justice purpose and for purposes consistent with the Family Code, then the department must release the information at issue that is otherwise subject to section 261.201 of the Family Code and that shows the type of allegation made and whether there was an arrest, information, indictment, detention, conviction, or other formal charges and their dispositions. Although you also raise section 552.101 of the Government Code in conjunction with common-law privacy for this information, we note a statutory right of access prevails over the common-law. *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); *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); Open Records Decision Nos. 613 at 4 (1993) (exceptions in Act cannot impinge on statutory right of access

to information), 451 (1986) (specific statutory right of access provisions overcome general exceptions to disclosure under the Act). In that instance, the department must withhold the remaining information you have marked under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code. If the department determines the requestor does not intend to use the CHRI for a criminal justice purpose or for purposes consistent with the Family Code, then the department must withhold the information you have marked in its entirety pursuant to section 552.101 in conjunction with section 261.201. *See* Fam. Code § 261.201(b)-(g) (listing entities authorized to receive 261.201 information); Open Records Decision Nos. 655, 440 at 2 (1986) (construing predecessor statute).

Section 552.101 of the Government Code also encompasses 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. Fam. Code § 58.007(c). The relevant portion of section 58.007 provides:

> (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:
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> > (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.

Id. § 58.007(c). For purposes of section 58.007, "child" means a person who is ten years of age or older and younger than seventeen years of age. *See id.* § 51.02(2). Upon review, we find the information you have marked involves delinquent conduct by children that occurred after September 1, 1997. *See id.* § 51.03 (defining "delinquent conduct" for purposes of section 58.007). Thus, this information is generally confidential under section 58.007 of the Family Code.

However, section 58.007(e) of the Family Code provides, "[l]aw enforcement records and files concerning a child may be inspected or copied by a juvenile justice agency as that term is defined by Section 58.101 [of the Family Code] [or] a criminal justice agency as that term is defined by Section 411.082, Government Code[.]" *Id.* § 58.007(e). Section 411.082 of the Government Code defines a "criminal justice agency" as including "a federal or state

agency that is engaged in the administration of criminal justice under a statute or executive order and that allocates a substantial portion of its annual budget to the administration of criminal justice." Gov't Code § 411.082(3)(A).

However, as previously noted, the requestor is a representative of the probation office. We understand the probation office is a criminal justice agency for purposes of section 58.007(e). Accordingly, the requestor has a right to inspect the information you have marked under section 58.007(e) of the Family Code, and it may not be withheld from this requestor under section 552.101 of the Government Code in conjunction with section 58.007(c) of the Family Code. Although you also raise section 552.101 of the Government Code in conjunction with common-law privacy for this information, we note a statutory right of access prevails over the common-law. *See Collins*, 297 S.W.3d at 415; ORDs 613 at 4, 451. Accordingly, the department must release the juvenile law enforcement records you have marked to this requestor pursuant to section 58.007(e) of the Family Code.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is 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 established. *Id.* at 681-82. 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) (when considering prong regarding individual's privacy interest, court recognized distinction between public records found in courthouse files and local police stations and compiled summary of information and noted that individual has significant privacy interest in compilation of one's criminal history). Moreover, we find a compilation of a private citizen's criminal history is generally not of legitimate concern to the public. Information that refers to an individual solely as a victim, witness, or involved person does not implicate the privacy interest of the individual and may not be withheld under section 552.101 on that basis.

The present request, in part, seeks any arrest or offense reports pertaining to the named individual. This portion of the request requires the department to compile unspecified law enforcement records concerning the individual named in the request, thus implicating the named individual's right to privacy. Thus, to the extent the department maintains law enforcement records, other than records pertaining to the specified incidents and the submitted records you have marked under sections 261.201 and 58.007 of the Family Code, listing the named individual as a suspect, arrestee, or criminal defendant, the department must generally withhold any such information under section 552.101 of the Government Code in conjunction with common-law privacy.

As previously noted, however, the requestor, as a representative of the probation office, may have a right of access to CHRI in this information pursuant to chapter 411 of the Government Code. Although it appears that the requestor is engaged in the administration of criminal justice for the purposes of chapter 411 of the Government Code, we are unable to determine whether the requestor intends to use the CHRI for a criminal justice purpose. Accordingly, we conclude that if the department determines that the requestor intends to use the CHRI for a criminal justice purpose, then the department may make available to the requestor any CHRI from the documents otherwise subject to section 552.101 in conjunction with common-law privacy, that shows the type of allegation made and whether there was an arrest, information, indictment, detention, conviction, or other formal charges and their dispositions. *See* ORDs 613 at 4, 451. In that event, the department must withhold the remaining information under section 552.101 of the Government Code in conjunction with common-law privacy. However, if the department determines that the requestor does not intend to use the CHRI for a criminal justice purpose, then the requestor does not have a right of access to any CHRI under section 411.089. In that event, to the extent the department maintains law enforcement records, other than records pertaining to the specified incidents and the submitted records you have marked under sections 261.201 and 58.007 of the Family Code, depicting the named individual as a suspect, arrestee, or criminal defendant, the department must withhold such information in its entirety under section 552.101 in conjunction with common-law privacy.

In summary, if the department determines the requestor intends to use the CHRI in the information subject to section 261.201 of the Family Code, which you have marked, for a criminal justice purpose and for purposes consistent with the Family Code, then the department must release the information at issue that is otherwise subject to section 261.201 and that shows the type of allegation made and whether there was an arrest, information, indictment, detention, conviction, or other formal charges and their dispositions. In that instance the department must withhold the remaining information you have marked under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code. If the department determines the requestor does not intend to use the CHRI for a criminal justice purpose or for purposes consistent with the Family Code, then the department must withhold the information you have marked in its entirety pursuant to section 552.101 in conjunction with section 261.201. The department must release the juvenile law enforcement records you have marked pursuant to section 58.007(e) of the Family Code. To the extent the department maintains law enforcement records, other than records pertaining to the specified incidents and the submitted records you have marked under sections 261.201 and 58.007 of the Family Code, depicting the named individual as a suspect, arrestee, or criminal defendant, and if the department determines that the requestor intends to use the CHRI in these documents for a criminal justice purpose, then the department may make available to the requestor any CHRI from these documents and withhold the remaining information under section 552.101 of the Government Code in conjunction with common-law privacy. If the department determines that the requestor does not intend to use the CHRI otherwise subject to common-law privacy for a criminal justice

purpose. then to the extent the department maintains law enforcement records depicting the named individual as a suspect, arrestee, or criminal defendant, other than records pertaining to the specified incidents and the submitted records you have marked under sections 261.201 and 58.007 of the Family Code, the department must withhold such information in its entirety under section 552.101 in conjunction with common-law privacy.[1]

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.oag.state.tx.us/open/index_orl.php, 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 must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free at (888) 672-6787.

Sincerely,

Sean Nottingham
Assistant Attorney General
Open Records Division

SN/bhf

Ref: ID# 472912

Enc. Submitted documents

c: Requestor
(w/o enclosures)

[1]We note that, because this requestor has a special right of access to some of the information being released, the department must again ask this office for a decision if it receives another request for this information from a different requestor.