



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 2, 2013

Ms. Linda M. Champion
Assistant City Attorney
City of Victoria
P.O. Box 1758
Victoria, Texas 77902-1758

OR2013-07270

Dear Ms. Champion:

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# 486085 (Victoria File No. 2013-0186).

The Victoria Police Department (the "department") received a request for any information pertaining to a named individual, including a specified case number. You claim the submitted information is excepted from disclosure under sections 552.108 and 552.111 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

We understand you to contend case number 2013-000075 is not responsive to the present request for information. However, we note case number 2013-000075 was specified in the request for information; thus, this information is responsive to the request. As such, we will determine whether any of this information must be withheld under the Act.

¹Although you raise section 552.101 of the Government Code in conjunction with the attorney work-product privilege, this office has concluded section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990). We note the proper exception to raise in this instance is section 552.111 of the Government Code.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.”² Gov’t Code § 552.101. Section 552.101 encompasses the doctrine of common-law privacy, which protects information that (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 satisfied. *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). Furthermore, we find that a compilation of a private citizen’s criminal history is generally not of legitimate concern to the public. However, 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, requires the department to compile unspecified law enforcement records concerning the named individual. We find the portion of the request seeking unspecified law enforcement records implicates the named individual’s right to privacy. You have submitted case number 2013-000075, which was specifically requested and also does not depict the named individual as a suspect, arrestee, or criminal defendant. Thus, case number 2013-000075 may not be withheld as a criminal history compilation under section 552.101 in conjunction with common-law privacy.

We note the requestor identifies herself as an investigator for the Texas Board of Nursing (the “board”). Section 411.125(a) of the Government Code provides that

[t]he [board] is entitled to obtain from the [Texas Department of Public Safety (“DPS”)] criminal history record information maintained by [DPS] that relates to a person who:

- (1) is an applicant for or the holder of a license issued by the board;
- (2) has requested a determination of eligibility for a license from the board; or

²The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

(3) is subject to investigation by the board in connection with a complaint or formal charge against the person.

Gov't Code § 411.125(a). Moreover, section 411.087(a) of the Government Code provides in part:

(a) A person, agency, department, political subdivision, or other entity that is authorized by this subchapter to obtain from [DPS] criminal history record information maintained by [DPS] 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). “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.” *Id.* § 411.082(2). Thus, under sections 411.125 and 411.087, the requestor may have a right of access to any criminal history record information about the named individual contained in the department’s records.

Accordingly, to the extent the named individual is an applicant for a license from the board, a holder of a license from the board, has requested a determination of eligibility for a license from the board, or is subject to investigation by the board in connection with a complaint or formal charge, then the requestor is authorized to obtain criminal history record information relating to the named individual from the department pursuant to section 411.087(a)(2) of the Government Code. *See id.* §§ 411.087(a)(2), .125(a). Thus, if any of these conditions are met, then the department must make available to the requestor any criminal history record information under section 411.087 because a statutory right of access prevails over a claim under common-law privacy or section 552.108 of the Government Code. *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). However, if the individual at issue does not meet any of the criteria of subsections 411.125(a)(1)-(3), then the requestor does not have a special right of access to any criminal history record information under section 411.087. In that event, to the extent

the department maintains law enforcement records depicting the named individual as a suspect, arrestee, or criminal defendant, the department must withhold such information under section 552.101 in conjunction with common-law privacy.³

We note portions of case number 2013-000075 are protected under common-law privacy, the two-part test for which is discussed above. The type of information considered intimate or embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Indus. Found.*, 540 S.W.2d at 683. This office has found some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy. See Open Records Decision Nos. 470, 455 (1987) (information pertaining to prescription drugs, illnesses, operations, and physical disabilities protected from disclosure). Upon review, we find the information we have marked is highly intimate or embarrassing and not of legitimate public concern. Therefore, the department must withhold the information we have marked in case number 2013-000075 under section 552.101 of the Government Code in conjunction with common-law privacy.

In summary, if the requestor has a special right of access under section 411.087(a)(2) of the Government Code, the department must make available to the requestor any criminal history record information of the named individual under section 411.087. If the board does not have a special right of access to any criminal history record information under section 411.087, to the extent the department maintains law enforcement records depicting the named individual as a suspect, arrestee, or criminal defendant, the department must withhold such information under section 552.101 of the Government Code in conjunction with common-law privacy. In either event, the department must withhold the information we have marked in case number 2013-000075 under section 552.101 of the Government Code in conjunction with common-law privacy. The department must release the remaining information.

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

³As our ruling is dispositive, we need not address your remaining argument against disclosure.

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,

A handwritten signature in black ink that reads "Jennifer Burnett". The signature is written in a cursive style with a long horizontal flourish extending to the right.

Jennifer Burnett
Assistant Attorney General
Open Records Division

JB/tch

Ref: ID# 486085

Enc. Submitted documents

c: Requestor
(w/o enclosures)