



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 2, 2013

M. Lysia H. Bowling
City Attorney
City of San Angelo
72 West College Avenue
San Angelo, Texas 76903

OR2013-07306

Dear Ms. Bowling:

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# 486462.

The City of San Angelo (the "city") received a request for all court documents, dismissal letters, and police records relating to a named individual. You claim that the submitted information is excepted from disclosure under sections 552.101 and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note the city only submitted a police report in response to this request. To the extent information responsive to the rest of the request existed on the date the city received this request, we assume the city has released it to the requestor. If not, then the city must do so immediately. *See* Gov't Code §§ 552.006, .301, .302; Open Records Decision No. 664 (2000).

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 exception encompasses information made confidential by other statutes, including section 261.201 of the Family Code. Section 261.201(a) provides 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 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 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). We understand you to argue the submitted information was used or developed in an investigation of alleged or suspected child abuse under chapter 261 of the Family Code. *See id.* § 261.001(1)(E) (definition of “abuse” for purposes of chapter 261 of the Family Code includes indecency with child and sexual assault under Penal Code sections 21.11 and 22.011). The submitted information consists of a report of indecent exposure and sexual assault involving a victim who was seventeen years of age at the time of the offense. Although section 101.003(a) of the Family Code defines a “child” for purposes of section 261.201 as a “person under 18 years of age who is not and has not been married or who has not had the disabilities of minorities removed for general purposes,” *id.* § 101.003(a), we note sections 21.11 and 22.011 of the Penal Code define a “child” as “a person younger than seventeen years of age.” Penal Code §§ 21.11(a), 22.011(c)(1). We find, when read together, section 261.001(1)(E) of the Family Code and sections 21.11(a) and 22.011(c)(1) of the Penal Code prescribe indecency with a child and sexual assault of a child under chapter 261 requires the child be under the age of seventeen. In this instance, the victim was seventeen years of age at the time of this incident. Therefore, the victim was not a child as defined by sections 21.11(a) and 22.011(c)(1), and the submitted information may not be withheld under section 261.201 of the Family Code.

Section 552.108(a)(2) of the Government Code excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication[.]” Gov’t Code § 552.108(a)(2). A governmental body claiming section 552.108(a)(2) must demonstrate that the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. *See id.* § 552.301(e)(1)(A) (governmental body must provide comments explaining why exceptions raised should apply to information requested). You state the submitted information pertains to a closed case that concluded in a result other than conviction or deferred adjudication. Thus, we agree that section 552.108(a)(2) is applicable to the submitted information.

We note, however, section 552.108 does not except from disclosure basic information about an arrested person, an arrest, or a crime. Gov't Code § 552.108(c). Basic information refers to the information held to be public in *Houston Chronicle Publishing Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). *See also* Open Records Decision No. 127 (1976) (summarizing the types of information considered to be basic information). Thus, with the exception of basic information, the city may withhold the submitted information under section 552.108(a)(2).

Basic information includes an identification and description of the complainant. In this instance, the information at issue is related to an alleged sexual offense, and the complainant is also the alleged sexual assault victim. Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which protects information that is highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and of no legitimate public interest. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). This office has concluded common-law privacy protects information that either identifies or tends to identify a victim of a sexual assault or other sex-related offense. *See* Open Records Decision Nos. 393 (1983), 339 (1982). Therefore, in releasing basic information, the city must withhold the information we have marked that identifies the complainant under section 552.101 of the Government Code in conjunction with common-law privacy.

We note, however, the requestor is a recruiter for the United States Navy (the “Navy”). We understand the individual who is the subject of this request for information is a potential enlistee in the Navy. The United States Department of Defense (the “DoD”) is authorized to perform background investigations of persons seeking to enlist to determine the eligibility of applicants for acceptance into 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 Navy 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 id.* § 9101(b)(1), (c); *see also* 10 U.S.C. § 111(b)(7) (DoD includes Department of the Navy). 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 Navy’s right of access to CHRI preempts state laws. *Id.* § 9101(b)(4) (section 9101 “shall apply notwithstanding any other provision of law . . . of any State”). We conclude the Navy’s right of access under federal law preempts the state law

the city claims here. *See English v. General Elec. Co.*, 496 U.S. 72, 79 (1990) (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) (federal agency acting within scope of its congressionally delegated authority may preempt state regulation). However, federal law also provides the Navy's right of access to CHRI is contingent 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, the requestor has provided a signed authorization from the individual under investigation for the release of the information concerning the individual's education, employment, and medical history. Although the Navy may have made the instant request for information for recruiting purposes, we have no indication the individual being investigated provided the Navy with a signed authorization for the release of his CHRI. Nevertheless, if the instant request was made for recruiting purposes, and if the Navy provides a signed written consent for release of CHRI from the individual being investigated, then the city must release CHRI to this requestor. In this case, with the exception of basic information, which must be released, the city may withhold the remaining information under section 552.108(a)(2) of the Government Code. If the Navy does not provide the necessary written consent of release, with the exception of basic information, which must be released, the city may withhold the information under section 552.108(a)(2) of the Government Code. Regardless, in releasing basic information, the city must withhold the victim's identifying information, which we have marked, under section 552.101 of the Government Code in conjunction with common-law privacy.

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,



Thana Hussaini
Assistant Attorney General
Open Records Division

TH/som

Ref: ID# 486462

Enc. Submitted documents

c: Requestor
(w/o enclosures)