



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

May 20, 2016

Mr. Ryan D. Pittman
Counsel for the City of Wylie
Abernathy Roeder Boyd & Hullett P.C.
P.O. Box 1210
McKinney, Texas 75070-1210

OR2016-11664

Dear Mr. Pittman:

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# 611191.

The Wylie Police Department (the "department"), which you represent, received a request for information pertaining to a named individual, including three specified reports. The department claims the submitted information is excepted from disclosure under sections 552.101 and 552.130 of the Government Code. We have considered the exceptions the department claims and reviewed the submitted information.

First, we note the department did not submit information regarding the request for the 2009 and 2010 incidents. To the extent this information existed when the department received the request, we assume the department has released it. *See* Gov't Code §§ 552.301, .302.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. Section 552.101 encompasses information other statutes make confidential, such as section 58.007 of the Family Code. 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:

- (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.

Fam. Code § 58.007(c). Juvenile law enforcement records relating to delinquent conduct or conduct indicating a need for supervision that occurred on or after September 1, 1997, are confidential under section 58.007(c). *See id.* § 51.03(a), (b) (defining “delinquent conduct” and “conduct indicating a need for supervision”). For purposes of section 58.007(c), a “child” is 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). Upon review, we find, except for report number 10000208, the remaining two reports involve a child allegedly engaged in delinquent conduct or conduct indicating a need for supervision that occurred after September 1, 1997. Therefore, except for report number 10000208, we find the remaining two reports are subject to section 58.007(c) of the Family Code. The offender in report number 10000208 is not a “child” as defined by section 51.02(2); thus, it is not confidential under section 58.007(c).

We note, however, the requestor is an investigator with KeyPoint Government Solutions (“KeyPoint”) and requests the information as part of a background investigation for a national security or public trust employment position. KeyPoint informs this office it 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. §§ 1104 (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 “[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 of access to the criminal history record information (“CHRI”) of state and local criminal justice agencies when it receives the consent of the individual being investigated for release of such information. *See* 5 U.S.C. § 9101(b)(1), (c). 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 it 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.” *Id.* § 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 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”). Accordingly, we conclude OPM has a right of access to CHRI the department holds regarding the named individual under investigation. In addition, we conclude such a right of access under federal law preempts section 58.007 of the Family Code. *See English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990) (noting 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) (noting federal agency acting within scope of its congressionally delegated authority may preempt state regulation). Thus, the department must release the CHRI relating to the named individual under investigation to the requestor and withhold the remaining information in the two reports under section 552.101 of the Government Code in conjunction with section 58.007(c) of the Family Code.

Next, we consider the department’s claims under sections 552.101 and 552.130 for report number 10000208. The department asserts the dates of birth are excepted from public disclosure under section 552.101 of the Government Code in conjunction with common-law privacy. Section 552.101 encompasses the doctrine of common-law privacy. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). Under the common-law right of privacy, an individual has a right to be free from the publicizing of private affairs in which the public has no legitimate concern. *Id.* at 682. In considering whether a public citizen’s date of birth is private, the Third Court of Appeals looked to the supreme court’s rationale in *Texas Comptroller of Public Accounts v. Attorney General of Texas*, 354 S.W.3d 336 (Tex. 2010). *Paxton v. City of Dallas*, No. 03-13-00546-CV, 2015 WL 3394061, at *3 (Tex. App.—Austin May 22, 2015, pet. denied) (mem. op.). The supreme court concluded public employees’ dates of birth are private under section 552.102 of the Government Code because the employees’ privacy interest substantially outweighed the negligible public interest in

disclosure.¹ *Tex. Comptroller*, 354 S.W.3d at 347-48. Based on *Texas Comptroller*, the court of appeals concluded the privacy rights of public employees apply equally to public citizens, and thus, public citizens' dates of birth are also protected by common-law privacy pursuant to section 552.101. *City of Dallas*, 2015 WL 3394061, at *3. Because OPM has consent from the person at issue, the requestor has a right of access to this person's date of birth under section 552.023 of the Government Code, and it may not be withheld from the requestor under common-law privacy. *See* Gov't Code § 552.023(a) (governmental body may not deny access to person to whom information relates or person's agent on ground that information is considered confidential by privacy principles); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individuals request information concerning themselves). Thus, with the exception of the investigated person's date of birth, the department must withhold the public citizen's date of birth we have marked under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.130 of the Government Code excepts from public disclosure information related to a motor vehicle title or registration. Gov't Code § 552.130. We have marked the motor vehicle record information the department must withhold under section 552.130.

In summary, the department must withhold the following information from report number 10000208: 1) the public citizen's date of birth we have marked pursuant to section 552.101 of the Government Code in conjunction with common-law privacy and 2) the motor vehicle record information we have marked pursuant to section 552.130 of the Government Code. The department must release the rest of report number 10000208. As for the remaining two reports, the department must release the CHRI relating to the named individual under investigation and withhold the remaining information under section 552.101 of the Government Code in conjunction with section 58.007(c) of the Family Code.²

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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for

¹Section 552.102(a) excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a).

²Should the department receive another request for these same records from a person who does not have a right of access to the information, the department should resubmit this same information and request another ruling from this office. *See* Gov't Code § 552.301(a).

providing public information under the Act may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in black ink, appearing to read 'Yen-Ha Le', with a stylized flourish at the end.

Yen-Ha Le
Assistant Attorney General
Open Records Division

YHL/sdk

Ref: ID# 611191

Enc. Submitted documents

c: Requestor
(w/o enclosures)