



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

March 18, 2003

Ms. Larissa T. Roeder
Assistant District Attorney
Dallas County
133 North Industrial Boulevard, LB 19
Dallas, Texas 75207

OR2003-0619A

Dear Ms. Roeder:

This ruling examines Open Records Letter No. 2003-0619 (2003) and whether certain information is subject to required public disclosure under chapter 552 of the Government Code.

The Dallas County District Attorney's Office (the "district attorney") received a request for "the State's file, including all offense reports and witness statements and excluding all public records, pertaining to the incident at the Park Cities Inn on January 19, 1982, that resulted in charges of attempted capital murder of a peace officer being filed against" the requestor's client. In the district attorney's original request for a decision in this matter, dated November 1, 2002, you claimed that the requested information was protected by sections 552.101, 552.103, 552.108, 552.111 and 552.134 of the Government Code. In Open Records Letter No. 2003-0619 (2003), we found that the submitted partial grand jury transcript is not subject to the Public Information Act's (the "Act") disclosure requirements, that the submitted medical records may only be released in accordance with the Medical Practices Act (the "MPA"), and that other portions of the submitted information are excepted from disclosure under sections 552.101, 552.108(a)(4), 552.130, and 552.134 of the Government Code. We further held that the remaining responsive information was required to be released. We have re-examined our ruling in Open Records Letter No. 2003-0619 (2003) and determined that we made an error. Where this office determines that an error was made in the decision process under sections 552.301 and 552.306, and that error resulted in an incorrect decision, we will correct the previously issued ruling. *See generally* Gov't Code § 552.011 (providing that Office of the Attorney General may issue a decision to maintain uniformity in application, operation, and interpretation of this chapter). Consequently, this decision serves as the correct ruling and is a substitute for the decision issued on January 29, 2003.

Initially, we note that the information at issue includes a partial transcript of grand jury testimony. The Act provides that the judiciary is not a governmental body subject to the Act. Gov't Code §552.003(1)(B). This office has concluded that a grand jury is an extension of the judiciary for purposes of the Act. *See* Open Records Decision No. 513 at 3 (1988). Thus, records within the actual or constructive possession of a grand jury are not subject to disclosure under chapter 552.¹ *See id.* The transcript of the testimony of grand jury witnesses is part of the record of the grand jury proceeding. *See Stern v. State*, 869 S.W. 2d 614 at 621 (Tex. App.—Houston [14th Dist.] 1994, writ denied); *see also* Open Records Decision No. 398 (1983). Thus, even though the transcript is physically held by the district attorney, it is in the grand jury's constructive possession. *See* Open Records Decision Nos. 513 (1988), 398 (1983). We therefore conclude that the transcript is not subject to the Act's disclosure requirements.

We also note that access to some of the information at issue is governed by the Medical Practice Act (the "MPA"), chapter 159 of the Occupations Code. Section 159.002 of the MPA provides:

- (a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.
- (b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

¹Grand jury testimony is recorded pursuant to article 20.012 of the Code of Criminal Procedure. Release of such information is governed by article 20.02(c) of this code, which provides:

[a] disclosure of a record made under Article 20.012, a disclosure of a typewritten transcription of that record, or a disclosure otherwise prohibited by Subsection (b) or Article 20.16 may be made by the attorney representing the state in performing the attorney's duties to a grand juror serving on the grand jury before whom the record was made, another grand jury, a law enforcement agency, or a prosecuting attorney, as permitted by the attorney representing the state and determined by the attorney as necessary to assist the attorney in the performance of the attorney's duties. The attorney representing the state shall warn any person the attorney authorizes to receive information under this subsection of the person's duty to maintain the secrecy of the information. Any person who receives information under this subsection and discloses the information for purposes other than those permitted by this subsection is subject to punishment for contempt in the same manner as persons who violate Subsection (b).

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

This office has determined that in governing access to a specific subset of information, the MPA prevails over the more general provisions of chapter 552 of the Government Code. *See* Open Records Decision No. 598 (1991). Information that is subject to the MPA includes both medical records and information obtained from those medical records. *See* Occ. Code §§ 159.002, .004; Open Records Decision No. 598 (1991). This office has concluded that the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982).

Medical records may be released only as provided under the MPA. Open Records Decision No. 598 (1991). We previously marked the documents that consist of medical records. The medical records must be released upon the patient's signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. Occ. Code §§ 159.004, .005. Section 159.002(c) also requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). Thus, the district attorney must release any medical records pertaining to the requestor's client upon receipt of signed consent from the requestor's client that meets the requirements of section 159.005 of the MPA.

The remaining information at issue is made expressly public under section 552.022 of the Government Code. Section 552.022 provides, in relevant part

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

The remaining information pertains to a completed investigation and is therefore expressly public under section 552.022(a)(1). You contend that the requested information is excepted under section 552.103 and as attorney work product under section 552.111. Sections 552.103 and 552.111 of the Government Code are discretionary exceptions to disclosure that protect the governmental body's interests and are therefore not other law that makes

information expressly confidential for purposes of section 552.022(a). *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 551 (1990) (statutory predecessor to section 552.103 serves only to protect a governmental body's position in litigation and does not itself make information confidential), 473 (1987) (governmental body may waive section 552.111); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). The attorney work product privilege is also found in rule 192.5 of the Texas Rules of Civil Procedure. Recently, the Texas Supreme Court held that “[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are ‘other law’ within the meaning of section 552.022.” *In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001). The Texas Rules of Civil Procedure, however, only apply to “actions of a civil nature.” Tex. R. Civ. P. 2. Accordingly, the attorney work product privilege found in rule 192.5 does not apply to the criminal matter at issue here. You also claim that the requested information is excepted under sections 552.101, 552.108(a)(4), 552.108(b)(3), and 552.134. Because information subject to section 552.022(a)(1) may be withheld as provided by sections 552.101, 552.108, and 552.134, we will address the applicability of those exceptions to the remaining information.

Section 552.108 states in pertinent part:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime [is excepted from required public disclosure] if:

...

(4) it is information that:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) reflects the mental impressions or legal reasoning of an attorney representing the state [and]

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution [is excepted from required public disclosure] if:

...

(3) the internal record or notation:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) reflects the mental impressions or legal reasoning of an attorney representing the state.

(c) This section does not except from [required public disclosure] information that is basic information about an arrested person, an arrest, or a crime.

You cite to subsections 552.108(a)(4), (b)(3) in connection with your assertion of attorney work product and argue that the present request is essentially a request for the district attorney's entire prosecution file. When a request essentially seeks the entire prosecution file, the information is excepted from disclosure in its entirety pursuant to the holding in *Curry v. Walker*, 873 S.W.2d 379 (Tex. 1994) (discovery request for district attorney's entire litigation file may be denied because decision of what to include in file necessarily reveals prosecutor's mental impressions or legal reasoning). In Open Records Letter No. 2003-0619 (2003), we held that the requestor's clarified request did not constitute a request for the district attorney's entire case file. We find, however, that this conclusion was based on our mis-reading of the requestor's clarified request. Further, you have better explained how the district attorney maintains its files and, more specifically, how the district attorney maintains the information at issue. As a result, we find that the requestor's clarified request was a request for the district attorney's entire prosecution file pertaining to the incident at the Park Cities Inn on January 19, 1982. Accordingly, the district attorney may withhold the remaining information pursuant to subsection 552.108(a)(4)(B) of the Government Code.²

However, section 552.108 does not except basic information about an arrested person, an arrest, or a crime. Gov't Code § 552.108(c). We believe such 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). Thus, the district attorney must release the basic offense and arrest information.

To summarize, we conclude that (1) the partial grand jury transcript is not subject to the Act's disclosure requirements; (2) the district attorney must release any medical records pertaining to the requestor's client upon receipt of signed consent from the requestor's client that meets the requirements of section 159.005 of the MPA; and (3) with the exception of the basic offense and arrest information, the remaining information at issue may be withheld under section 552.108(a)(4)(B). Open Records Letter No. 2003-0619 (2003) is overruled to the extent it conflicts with this ruling.

²As we are able to make this determination, we need not address your remaining claimed exceptions.

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 appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal 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, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code

§ 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in cursive script that reads "Karen Rabon".

Karen Rabon
Assistant Attorney General
Open Records Division

KR/sdk

Enc: Submitted documents

c: Mr. Randy Schaffer
1301 McKinney, Suite 3100
Houston, Texas 77010
(w/o enclosures)