



OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

February 24, 2003

Ms. Larissa T. Roeder
Assistant District Attorney
Dallas County
133 North Industrial Boulevard, LB 19
Dallas, Texas 75207-4399

OR2003-1202

Dear Ms. Roeder:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 176921.

The Dallas County District Attorney's Office (the "district attorney") received a written request for fourteen categories of information pertaining to a criminal prosecution for the aggravated sexual assault of a minor. You state that some of the requested information does not exist.¹ You inquire as to whether the district attorney may refuse to comply with the request pursuant to section 552.028 of the Government Code. Alternatively, you contend that a portion of the request is not a request for public information under the Public Information Act (the "Act"), that some of the information at issue is not "public information" that is subject to the Act, and that the other submitted information is excepted from required disclosure pursuant to sections 552.101 and 552.108 of the Government Code.

Section 552.028 of the Government Code provides:

- (a) A governmental body is not required to accept or comply with a request for information from:

¹The Public Information Act does not require a governmental body to obtain information not in its possession or to prepare new information in response to a records request. *See Economic Opportunities Dev. Corp. of San Antonio v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision No. 445 (1986); *see also* Attorney General Opinion JM-48 (1983) (governmental body not required to comply with standing request for information to be collected or prepared in future).

- (1) an individual who is imprisoned or confined in a correctional facility; or
- (2) an agent of that individual, other than that individual's attorney when the attorney is requesting information that is subject to disclosure under this chapter.

(b) This section does not prohibit a governmental body from disclosing to an individual described by Subsection (a)(1), or that individual's agent, information held by the governmental body pertaining to that individual.

Gov't Code § 552.028. Although you state that "the nature and scope of this request would indicate that" the requestor is acting as an inmate's agent, you have not affirmatively represented to this office that such is the case. Whether an individual is acting as an agent of an imprisoned individual is a factual determination that this office cannot make in the open records process. Consequently, we must rely on the representations of the governmental body requesting our opinion. Open Records Decision Nos. 554 (1990), 552 (1990). Because you have not represented to this office that the requestor in fact is acting as an agent of an imprisoned individual, we cannot conclude that section 552.028 is applicable in this instance. We therefore must address your other arguments for non-disclosure regarding the information at issue.

You contend that the portion of the request that seeks "all exculpatory evidence which would tend to show that [the criminal defendant] did not commit the offense" with which he was charged is not a proper request made under the Act because the requestor "failed to identify any specific piece of information" and "is in essence trying to use the Act as a post conviction discovery tool." We note, however, that a request for records made pursuant to the Act may not be disregarded simply because a citizen does not specify the exact documents he or she desires. It is incumbent on a governmental body to make a good faith effort to relate a request for information to information that it holds. *See* Open Records Decision Nos. 561 at 8 (1990), 87 (1975). Furthermore, a written communication that reasonably can be judged to be a request for information is a request for information for purposes of the Act. *See id.* In this instance, we find that this portion of the written request can reasonably be judged as a request for public information for purposes of the Act. Accordingly, we conclude that the district attorney may not withhold information that is responsive to this portion of the request on the basis that this communication was not provided to the district attorney in accordance with the Act.

We next address a procedural matter. Section 552.301(a) of the Government Code requires that a governmental body request a decision from the attorney general within ten business days after receiving a request for information that the governmental body wishes to withhold, unless there has been a previous determination that the requested information is excepted from required public disclosure. You state that the district attorney received the records

request on December 16, 2002, which was three days following the date on which you faxed your request for a decision to this office on December 13, 2002. Because you have submitted to this office no other evidence sufficient to establish the date on which the district attorney received the records request, we conclude that you have failed to comply with the procedural requirements of section 552.301 in requesting this decision from us. *See* Gov't Code § 552.301(e)(1)(C) (requiring governmental body to submit "a signed statement as to the date on which the written request for information was received by the governmental body or evidence sufficient to establish that date"). When a governmental body fails to comply with the requirements of section 552.301, the information at issue is presumed public. Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex. App.--Austin 1990, no writ); *City of Houston v. Houston Chronicle Publ'g Co.*, 673 S.W.2d 316, 323 (Tex. App.--Houston [1st Dist.] 1984, no writ); Open Records Decision No. 319 (1982). To overcome this presumption, the governmental body must show a compelling reason to withhold the information. Gov't Code § 552.302; *see also Hancock*, 797 S.W.2d at 381.

A compelling reason for withholding information is demonstrated where information is made confidential by other law or where third party interests are at issue. Open Records Decision No. 150 (1977). Although you contend that some of the submitted information is excepted from required public disclosure pursuant to section 552.108, you have not demonstrated a compelling reason to withhold this information under that exception. *See* Open Records Decision No. 177 (1977) (custodian may waive "law-enforcement exception"). *But see* Open Records Decision No. 586 (1991) (need of another governmental body to withhold requested information may provide compelling reason for non-disclosure under section 552.108 in certain circumstances). Consequently, section 552.108 does not constitute a "compelling reason" in this instance for withholding information from the public. Accordingly, the district attorney may not withhold any of the requested information pursuant to section 552.108 of the Government Code.

On the other hand, a demonstration that information is deemed confidential by law constitutes a "compelling" reason for withholding information from the public. *See* Open Records Decision No. 150 (1977) (demonstration that information is made confidential by statute or comes under protection of exception to disclosure intended to protect privacy interests constitutes compelling reason for non-disclosure). Because section 552.101 of the Government Code protects "information considered to be confidential by law," including information made confidential by statutory law, we will consider the applicability of this exception. Additionally, we will consider your argument that some of the submitted information is not subject to the Act and thus is not subject to required public disclosure.

Among the documents you submitted to this office as being responsive to the records request is a grand jury transcript, which you contend is a record of the judiciary not subject to the Act. Section 552.003(B) of the Government Code specifically excludes the judiciary, of which the grand jury is a part, from the provisions of the Act. This office has concluded that where a district attorney gathers information pursuant to a subpoena or otherwise holds

information on behalf of the grand jury, the information is deemed to be in the constructive possession of the grand jury despite the fact that the information is in the actual possession of the district attorney. Open Records Decision No. 411 (1984); *see also* Open Records Decision No. 513 (1988). When an individual or entity acts at the direction of the grand jury as its agent, information prepared or collected by the agent is within the grand jury's constructive possession and is not subject to the Act. *See id.* Information that is not so held or maintained is subject to the Act and may be withheld only if a specific exception to disclosure is applicable. *See id.*

It is not clear to this office that in this particular instance the submitted grand jury transcript is in fact in the constructive possession of the grand jury. However, if the district attorney determines that he is holding the transcript in his capacity as an agent of the grand jury, we conclude that the transcript is not subject to disclosure under the Act. In the event that the district attorney determines that in this instance the submitted transcript is not being held on behalf of the grand jury, we will address your claim regarding section 552.101 of the Government Code for that information, as well as the remaining submitted information.

The submitted documents also contain medical records that are subject to the access provisions of the Medical Practice Act (the "MPA"), chapter 159 of the Occupations Code. The MPA provides that "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." Occupations Code § 159.002(b). 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 must be released upon the governmental body's receipt of 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. *See* 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. *See* Open Records Decision No. 565 at 7 (1990). Thus, the information that we have marked as subject to the MPA may only be disclosed in accordance with the access provisions of that statute. *See* Occ. Code § 159.005(a)(5), (b); *see also* Open Records Decision Nos. 598 (1991), 546 (1990) (finding that because hospital treatment is routinely conducted under supervision of physicians, documents relating to diagnosis and treatment during hospital stay would constitute protected MPA records). Absent the applicability of an MPA access provision, we conclude that the district attorney must withhold this information pursuant to the MPA.

We now address whether the remaining submitted records are excepted from required public disclosure pursuant to section 552.101 of the Government Code, which excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 encompasses information made confidential by

statute. As noted above, the records you submitted to this office pertain to the district attorney's prosecution of the sexual assault of a child. Section 261.201(a) of the Family Code provides:

The following information is confidential, is not subject to public release under Chapter 552, Government Code, 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 [of a child] 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. Because the remaining submitted information pertains to an investigation of alleged child abuse, this office concludes that those records are made confidential pursuant to section 261.201 of the Family Code. You have not informed this office of any rules the district attorney has adopted that would permit access to these records. Consequently, the district attorney must withhold the remaining submitted records in their entirety pursuant to section 552.101 of the Government Code.²

In summary, absent the applicability of an MPA access provision, the district attorney must withhold the medical records that we have marked pursuant to the MPA. The district attorney must withhold the remaining records in their entirety.

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

²Because we resolve this aspect of your request under section 261.201 of the Family Code, we need not address your other arguments for withholding these records.

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).

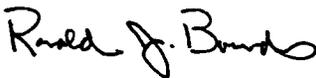
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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,



Ronald J. Bounds
Assistant Attorney General
Open Records Division

RJB/RWP/lmt

Ref: ID# 176921

Enc: Marked documents

c: Ms. Tameaka Lee
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(w/o enclosures)