



OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

July 8, 2003

Mr. Lance A. Kutnick
Assistant District Attorney
105th Judicial District
901 Leopard, Room 206
Corpus Christi, Texas 78401-3681

OR2003-4694

Dear Mr. Kutnick:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 183937.

The Nueces County District Attorney's Office (the "district attorney") received a request for "files, records, and any other documents in the possession of the [district attorney] pertaining to [a specified person]" and concerning two specified cases and "all other prosecutions by your office" of the specified person. You state that some responsive information will be released to the requestor. You also state that some responsive information is not maintained by the district attorney.¹ You claim, however, that the remaining requested information is excepted from disclosure pursuant to sections 552.103, 552.107, and 552.108 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted information, which includes representative sample documents.²

¹ We note that it is implicit in several provisions of the Public Information Act (the "Act") that the Act applies only to information already in existence. See Gov't Code §§ 552.002, .021, .227, .351. The Act does not require a governmental body to prepare new information in response to a request. See Attorney General Opinion H-90 (1973); see also Open Records Decision Nos. 572 at 1 (1990), 555 at 1-2 (1990), 452 at 2-3 (1986), 416 at 5 (1984), 342 at 3 (1982), 87 (1975); *Economic Opportunities Dev. Corp. of San Antonio v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App. -San Antonio 1978, writ dismissed). A governmental body must only make a good faith effort to relate a request to information which it holds. See Open Records Decision No. 561 at 8 (1990).

² We assume that the representative sample of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach and, therefore, does not authorize the withholding of any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Initially, we note that portions of the submitted information may constitute grand jury records that are not subject to the Act. Article 20.02(a) of the Code of Criminal Procedure provides that "[t]he proceedings of the grand jury shall be secret." This office has concluded that grand juries are not subject to the Act and that records that are within the constructive possession of grand juries are not public information subject to disclosure under the Act. *See* 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.* Thus, to the extent that any portion of the submitted information is in the custody of the district attorney as agent of the grand jury, such information is in the constructive possession of the grand jury and is therefore not subject to disclosure under the Act. However, to the extent that any portion of the submitted information is not in the custody of the district attorney as agent of the grand jury, we will address your claims.

Portions of the submitted information are subject to the Medical Practice Act ("MPA"), chapter 159 of the Occupations Code. Section 159.002 provides in pertinent part:

(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.

(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.

Occ. Code § 159.002(b), (c). 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). Further, information that is subject to the MPA also includes information that was obtained from medical records. *See id.* § 159.002(a), (b), (c); *see also* Open Records Decision No. 598 (1991). 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). We have marked the portions of the submitted information which constitute medical records. Absent the applicability of an MPA access provision, the district attorney must withhold these medical records pursuant to the MPA.

Next, we note that portions of the submitted information are subject to section 552.022 of the Government Code. Section 552.022 makes certain information public, unless it is expressly confidential under other law. *See* Gov't Code § 552.022(a). One category of public information under section 552.022 is "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]" *Id.* § 552.022(a)(1). Another category subject to section 552.022 is "information that is also contained in a public court record[.]" *Id.* § 552.022(a)(17). The submitted information includes information that is made public under section 552.022(a)(1) of the Government Code. Consequently, unless that particular information is expressly confidential under other law or is excepted from disclosure pursuant to section 552.108 of the Government Code, it must be released to the requestor. Further, the submitted information includes information, which we have marked, that is made public under section 552.022(a)(17). Consequently, unless that particular information is made expressly confidential under other law, it must be released to the requestor.

Although the district attorney claims that the information that is subject to subsections 552.022(a)(1) and (a)(17) is excepted from disclosure pursuant to sections 552.103, 552.107, and 552.108 of the Government Code, we note that these exceptions to disclosure constitute discretionary exceptions to disclosure under the Act and, as such, do not constitute "other law" that makes information confidential.³ Accordingly, we conclude that the district attorney may not withhold any portion of this particular information pursuant to sections 552.103 and 552.107 of the Government Code. The district attorney also may not withhold any portion of the submitted information that is subject to section 552.022(a)(17) under section 552.108 of the Government Code. Consequently, the district attorney must release the information that is subject to section 552.022(a)(17) to the requestor in its entirety. However, since section 552.022(a)(1) provides that information that is public under that section may be excepted from disclosure under section 552.108 of the Government Code, we will address the district attorney's section 552.108 claim with regard to that particular information, as well as the remaining submitted information.

Section 552.108 (a)(1) provides that information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from disclosure if "release of the information would interfere with the detection, investigation, or prosecution of crime[.]" Gov't Code § 552.108(a)(1). Generally, a

³ Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.*, Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 551 (1990) (statutory predecessor to section 552.103 serves only to protect governmental body's position in litigation and does not itself make information confidential), 473 (1987) (governmental body may waive section 552.111), 522 at 4 (1989) (discretionary exceptions in general); *see also Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103). Discretionary exceptions, therefore, do not constitute "other law" that makes information confidential.

governmental body claiming section 552.108(a)(1) as an exception to disclosure of requested information must demonstrate, if the information does not supply the explanation on its face, how and why the release of the requested information would interfere with law enforcement or prosecution. *See* Gov't Code §§ 552.108(a), (b), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You state that the information that you submitted to us as State's Exhibit 2 concerns charges of aggravated assault and capital murder that arose from the same incident involving the requestor's client. You also state that the release of this particular information would interfere with the detection, investigation, and prosecution of crimes that were allegedly committed by the requestor's client in that the capital murder case associated with this information is still under appeal. You further state that the defendant associated with this information has not exhausted all appellate and postconviction remedies in state and/or federal court. Based on our review of your representations and the information that you submitted to us as State's Exhibit 2, we find that the release of the remaining portions of this information "would interfere with the detection, investigation, or prosecution of crime." Gov't Code § 552.108(a). Thus, we find that section 552.108(a)(1) is applicable to State's Exhibit 2.

Section 552.108(a)(2) protects records pertaining to criminal investigations or prosecutions that have concluded in a final result other than conviction or a deferred adjudication. *See* Gov't Code § 552.108(a)(2). You state that the information that you have submitted to us as State's Exhibits 5 - 8 pertain to criminal cases that have been dismissed. Thus, we understand from your representations that the district attorney contends that State's Exhibits 5 - 8 pertain to cases that have concluded in final results other than conviction or deferred adjudication. Accordingly, we find that section 552.108(a)(2) is applicable to State's Exhibits 5 - 8.

We note, however, that section 552.108 does not except from disclosure basic information about an arrested person, an arrest, or a crime. *See* Gov't Code § 552.108(c). We believe such basic information refers to the information held to be public in *Houston Chronicle Publishing Company 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* Open Records Decision No. 127 (1976) (summarizing types of basic information that must be made available to public). Accordingly, with the exception of basic information that must be released to the requestor from throughout the remaining portions of State's Exhibit 2 and State's Exhibits 5 - 8, we conclude that the district attorney may withhold State's Exhibit 2 and State's Exhibits 5 - 8 pursuant to section 552.108 of the Government Code. We note, however, that the district attorney maintains the discretion to release all or part of that particular information that is not otherwise confidential by law. *See* Gov't Code § 552.007.⁴

⁴ Because we base our ruling on section 552.108 of the Government Code, we need not address your remaining claimed exceptions to disclosure. We note in this regard that "basic information" may not generally be withheld from disclosure under section 552.103 of the Government Code. *See* Open Records Decision Nos. 597 (1991), 362 (1983).

In summary, to the extent that any portion of the submitted information is in the custody of the district attorney as agent of the grand jury, such information is in the constructive possession of the grand jury and is therefore not subject to disclosure under the Act. To the extent that any portion of the submitted information is not in the custody of the district attorney as agent of the grand jury, the district attorney must withhold the medical records that we have marked pursuant to the MPA, absent the applicability of an MPA access provision, and release the information that we have marked pursuant to section 552.022(a)(17) of the Government Code. Further, in that event, the district attorney may withhold State's Exhibit 2 and State's Exhibits 5 - 8 pursuant to section 552.108 of the Government Code, with the exception of basic information that must be released to the requestor from throughout all of that particular information.

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,



Ronald J. Bounds
Assistant Attorney General
Open Records Division

RJB/lmt

Ref: ID# 183937

Enc. Marked documents

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(w/o enclosures)