



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

July 31, 2003

Mr. Scott A. Durfee
General Counsel
Harris County District Attorney's Office
1201 Franklin Street, Suite 600
Houston, Texas 77002

OR2003-5285

Dear Mr. Durfee:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 185186.

The Harris County District Attorney's Office (the "district attorney") received a request for information relating to a specified case. You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, and 552.108 of the Government Code. We have considered the exceptions you claim and have reviewed the information you submitted.¹

We first note that some of the submitted information was obtained pursuant to a grand jury subpoena. This office has concluded that a grand jury is not a governmental body that is subject to chapter 552 of Government Code, so that records that are within the actual or constructive possession of a grand jury are not subject to disclosure under chapter 552. *See* Gov't Code § 552.003(1)(B) (definition of governmental body does not include judiciary); Open Records Decision No. 513 at 3 (1988) (information held by grand jury, which is extension of judiciary for purposes of chapter 552, is not itself subject to chapter 552). When an individual or an 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 chapter 552. *See* Open Records Decision No. 513 at 3. Information that is not

¹This letter ruling assumes that the submitted representative sample of information is truly representative of the requested information as a whole. This ruling neither reaches nor authorizes the district attorney to withhold any information that is substantially different from the submitted information. *See* Gov't Code § 552.301(e)(1)(D); Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

so held or maintained is subject to chapter 552 and may be withheld from disclosure only if a specific exception to disclosure is shown to be applicable. *Id.* Thus, to the extent that the district attorney has custody of the submitted information as agent of the grand jury, such information is in the grand jury's constructive possession and is not subject to disclosure under chapter 552 of the Government Code. *Id.* at 4. To the extent that the submitted information is subject to chapter 552, we address your arguments against disclosure.

Some of the submitted information is subject to section 552.022 of the Government Code. This section provides in part that

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[.]

Gov't Code § 552.022(a)(1). In this instance, the submitted information includes completed reports made of, for, or by a governmental body. The district attorney must release the completed reports under section 552.022(a)(1) unless they are excepted from disclosure under section 552.108 or expressly confidential under other law. The district attorney does not seek to withhold the completed reports under section 552.108. The district attorney does claim that the reports are excepted from disclosure under section 552.103 of the Government Code. Section 552.103 is a discretionary exception, however, that protects the governmental body's interests and may be waived. *See 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 Gov't Code § 552.103); Open Records Decision No. 542 at 4 (1990) (governmental body may waive litigation exception). As such, section 552.103 is not other law that makes information confidential for the purposes of section 552.022. Therefore, the district attorney may not withhold the completed reports under section 552.103. We have marked the documents that are subject to section 552.022.

We note that one of these documents contains confidential motor vehicle record information. Section 552.130 of the Government Code excepts from required public disclosure information that relates to

- (1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or]
- (2) a motor vehicle title or registration issued by an agency of this state[.]

Gov't Code § 552.130(a)(1)-(2). We have marked Texas driver's license, license plate, and vehicle identification numbers in one of the completed reports. The district attorney must withhold the marked information under section 552.130.

This same document also contains social security numbers that may be confidential under section 552.101 of the Government Code.² A social security number is excepted from disclosure under section 552.101 in conjunction with 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), if a governmental body obtained or maintains the social security number pursuant to any provision of law enacted on or after October 1, 1990. *See* Open Records Decision No. 622 at 2-4 (1994). It is not apparent to this office that the social security numbers in question here are confidential under section 405(c)(2)(C)(viii)(I) of the federal law. You have cited no law, and we are aware of no law, enacted on or after October 1, 1990 that authorizes the district attorney to obtain or maintain a social security number. Thus, we have no basis for concluding that the social security numbers in question were obtained or are maintained pursuant to such a law and are therefore confidential under the federal law. We caution you, however, that chapter 552 of the Government Code imposes criminal penalties for the release of confidential information. *See* Gov't Code §§ 552.007, .352. Therefore, before releasing a social security number to the public, the district attorney should ensure that it was not obtained and is not maintained pursuant to any provision of law enacted on or after October 1, 1990.

Next, we address your arguments with regard to the information that is not subject to section 552.022. You contend that responsive medical records are confidential under the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. *See* Occ. Code § 151.001. Section 159.002 of the MPA provides in part:

- (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.
- (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.

Id. § 159.002(a)-(c). 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). We also have determined

²Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This exception encompasses information that another statute makes confidential.

that the MPA ordinarily encompasses only records created either by a physician or by someone acting under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). However, when a file is created as the result of a hospital stay, we have concluded that all of the documents in the file that relate to diagnosis and treatment constitute either physician-patient communications or records of the identity, diagnosis, evaluation, or treatment of a patient by a physician, created or maintained by a physician, for purposes of the MPA. *See* Open Records Decision No. 546 (1990). Medical records must be released upon 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. Medical records that pertain to a deceased patient may be released only on the signed consent of the decedent's personal representative. *See id.* §§ 159.005(a)(5). Any subsequent release of medical records must be consistent with the authorized purposes for which the records were first obtained. *See id.* § 159.002(c); Open Records Decision No. 565 at 7 (1990). Medical records may be released only as provided under the MPA. *See* Open Records Decision No. 598 (1991). We have marked the submitted information that is subject to the MPA. The district attorney must not release that information unless the MPA permits the district attorney to do so.

You contend that the rest of the submitted information is excepted from disclosure under section 552.103 of the Government Code. Section 552.103 provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

(b) For purposes of this section, the state or a political subdivision is considered to be a party to litigation of a criminal nature until the applicable statute of limitations has expired or until the defendant has exhausted all appellate and postconviction remedies in state and federal court.

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The governmental body has the burden of providing relevant facts and documents sufficient to establish the applicability of section 552.103 to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate: (1) that litigation was pending or reasonably anticipated on the date of its receipt of the request for information *and* (2) that the information at issue is related to that

litigation. See *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); see also Open Records Decision No. 551 at 4 (1990). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *Id.*

You state that the rest of the submitted information relates to a criminal prosecution in which the defendant was found guilty. You also inform us, however, that the defendant's appeal of the conviction was pending when the district attorney received this request for information. Based on your representations, we find that criminal litigation was pending when the district attorney received this request for information and that the rest of the submitted information relates to the pending litigation. See Gov't Code § 552.103(b); Open Records Decision No. 478 at 5 (1987). We therefore conclude that the district attorney may withhold the remaining information at this time under section 552.103.

In reaching this conclusion with respect to the remaining information, we assume that the opposing party in the criminal litigation has not seen or had access to any of that information. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to that litigation to obtain it through discovery procedures. See Open Records Decision No. 551 at 4-5 (1990). If the opposing party has seen or had access to information relating to litigation, through discovery or otherwise, then there is no interest in withholding that information from public disclosure under section 552.103. See Open Records Decision Nos. 349 (1982), 320 (1982). Furthermore, section 552.103 is no longer applicable once the related litigation concludes. See Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

Lastly, we note that some of the information that the district attorney may not withhold is protected by copyright. An officer for public information must comply with the copyright law and is not required to furnish copies of records that are copyrighted. See Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception to disclosure applies to the information. *Id.* However, a member of the public who wishes to make copies of copyrighted materials must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. See Open Records Decision No. 550 at 8-9 (1990).

In summary, any information of which the district attorney has custody as agent of the grand jury is in the grand jury's constructive possession and is not subject to disclosure under chapter 552 of the Government Code. The district attorney must withhold the Texas driver's license, license plate and vehicle identification numbers in one of the completed reports under section 552.130 of the Government Code. That report also contains social security numbers that may be excepted from disclosure under section 552.101 in conjunction with section 405(c)(2)(C)(viii)(I) of title 42 of the United States Code. The district attorney must not release the information that is subject to the MPA unless the MPA permits the district

attorney to do so. The remaining information that is not subject to section 552.022 is excepted from disclosure at this time under section 552.103. The district attorney must release the remaining information, complying with copyright law in doing so. As we are able to make these determinations, we need not address the district attorney's claim under section 552.108.

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).

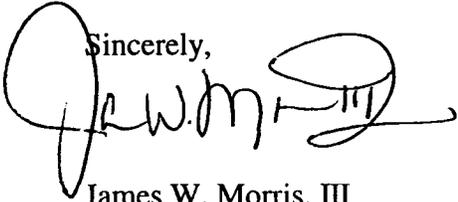
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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 black ink, appearing to read "J.W. Morris, III". The signature is fluid and cursive, with a large initial "J" and "M".

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/sdk

Ref: ID# 185186

Enc: Submitted documents

c: Ms. Denise Mallas
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Prole, Iowa 50229
(w/o enclosures)