



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 13, 2004

Ms. Patricia E. Carls
City Attorney
Brown & Carls, LLP
106 East Sixth Street, Suite 550
Austin, Texas 78701

OR2004-0264

Dear Ms. Carls:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 194275.

The Georgetown Police Department (the "department"), which you represent, received a request for information pertaining to a specified person and incident and for a certain period of time. You characterize the request as one seeking information relating to the specified incident. You claim that portions of the requested information constitute grand jury records that are not subject to the Public Information Act (the "Act"). You claim that the remaining requested information, or portions thereof, is excepted from disclosure pursuant to sections 552.101 and 552.103 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted information. We have also considered comments submitted by the requestor. *See Gov't Code § 552.304* (providing that person may submit comments stating why information should or should not be released).

You claim that portions of the submitted information 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." Crim. Proc. Code art. 2002(a). 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 that is 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.* You state,

and the submitted information reflects, that portions of this information were obtained by the department pursuant to a grand jury subpoena and that the department is holding this information as an agent of the grand jury. Accordingly, we conclude that the information that we have marked is in the constructive possession of the grand jury and is therefore not subject to disclosure under the Act.

Next, we address the requestor's claim that the department did not comply with section 552.301 of the Government Code in requesting this decision from us. Section 552.301(b) provides that a governmental body must ask the attorney general for a decision as to whether requested information must be disclosed and state the exceptions to disclosure that apply to the requested information not later than the tenth business day after the date of receiving the written request for information. *See Gov't Code § 552.301(b)*. In addition, section 552.301(e) provides that a governmental body that requests an attorney general decision under section 552.301(a) must, within a reasonable time, but not later than the fifteenth business day after the date of receiving the written request, submit to the attorney general (1) written comments stating the reasons why the stated exceptions to disclosure apply that would allow the requested information to be withheld; (2) a copy of the written request for information; (3) a signed statement of or evidence sufficient to establish the date that the governmental body received the written request; and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions to disclosure apply to which parts of the documents. *See id.* § 552.301(e).

You indicate that the department received the request for information on October 17, 2003. Therefore, the department had until October 31, 2003 to request a decision from us as to whether the requested information must be disclosed and state the exceptions to disclosure that apply to the requested information and until November 7, 2003 to submit to us the items required to be submitted under section 552.301(e) of the Government Code. The department requested a decision from us and submitted to us all of the items required to be submitted under section 552.301(e) on October 31, 2003. Accordingly, we conclude that the department complied with section 552.301 of the Government Code in requesting this decision from us.

We note that the remaining submitted information includes arrest warrants. The 78th Legislature recently amended article 15.26 of the Code of Criminal Procedure to add language providing:

The arrest warrant, and any affidavit presented to the magistrate in support of the issuance of the warrant, is public information, and beginning immediately when the warrant is executed the magistrate's clerk shall make a copy of the warrant and the affidavit available for public inspection in the clerk's office during normal business hours. A person may request the clerk to provide copies of the warrant and affidavit on payment of the cost of providing the copies.

Act of May 31, 2003, 78th Leg., R.S., ch. 390, § 1, 2003 Tex. Sess. Laws Serv. 1631 (to be codified as amendment to Crim. Proc. Code art. 15.26). Thus, the arrest warrants that we have marked are made public under article 15.26 of the Code of Criminal Procedure. As a general rule, the exceptions to disclosure found in the Act do not apply to information that is made public by other statutes. *See* Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1989). Accordingly, we conclude that the marked arrest warrants must be released to the requestor pursuant to article 15.26 of the Code of Criminal Procedure.

We also note that the remaining submitted information includes complaints. Article 15.04 of the Code of Criminal Procedure provides that “[t]he affidavit made before the magistrate or district or county attorney is called a ‘complaint’ if it charges the commission of an offense.” Crim. Proc. Code art. 15.04. Case law indicates that a complaint can support the issuance of an arrest warrant. *See Janecka v. State*, 739 S.W.2d 813, 822-23 (Tex. Crim. App. 1987); *see also Villegas v. State*, 791 S.W.2d 226, 235 (Tex. App.—Corpus Christi 1990, pet. ref’d); *Borsari v. State*, 919 S.W.2d 913, 918 (Tex. App.—Houston [14 Dist.] 1996, pet. ref’d) (discussing well-established principle that complaint in support of arrest warrant need not contain same particularity required of indictment). The complaints that we have marked appear to have been presented to a magistrate in support of the issuance of an arrest warrant. Accordingly, we conclude that the department must release these marked complaints to the requestor pursuant to article 15.26 of the Code of Criminal Procedure.

Further, we note that portions of the remaining submitted information are subject to chapter 611 of the Health and Safety Code. Chapter 611 provides for the confidentiality of records created or maintained by a mental health professional. Section 611.002(a) provides:

Communications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.

Health & Safety Code § 611.002. Section 611.001 defines a “professional” as (1) a person authorized to practice medicine, (2) a person licensed or certified by the state to diagnose, evaluate or treat mental or emotional conditions or disorders, or (3) a person the patient reasonably believes is authorized, licensed, or certified. *See* Health and Safety Code § 611.001. Sections 611.004 and 611.0045 provide for access to mental health records only for certain individuals. *See* Open Records Decision No. 565 (1990). Based on our review of the remaining submitted information, we find that portions of this information, which we have marked, constitute mental health records that are subject to chapter 611. Accordingly, we conclude that the department may only disclose this marked information as provided by the access provisions of sections 611.004 and 611.0045 of the Health and Safety Code. Absent the applicability of a mental health record access provision, the department must withhold these marked records pursuant to chapter 611 of the Health and Safety Code.

You also claim that portions of the remaining submitted information constitute medical records that are subject to the Medical Practice Act (the "MPA"), subtitle B of title 3 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). When a patient is deceased, as here, medical records may be released only on the signed consent of the deceased's personal representative. *See* Occ. Code §§ 159.005(a)(5). The consent must specify (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. In addition, 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). 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 medical records that are subject to the MPA. *See* Occ. Code § 159.005(a)(5), (b); *see also* Open Records Decision No. 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). The department may only disclose this information in accordance with the access provisions of the MPA. Absent the applicability of an MPA access provision, the department must withhold these marked records pursuant to the MPA.

Finally, you indicate that portions of the remaining submitted information are excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code.¹ Section 261.201 provides in part:

(a) 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 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.

¹ Section 552.101 of the Government Code excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. *See* Gov't Code § 552.101. Section 552.101 encompasses information that is protected from disclosure by other statutes.

Fam. Code § 261.201(a). The remainder of the submitted information concerns reports of alleged or suspected abuse made under chapter 261 and working papers used or developed in an investigation under chapter 261 of the Family Code. You have not indicated that the department has adopted a rule that governs the release of this type of information. We, therefore, assume that no such regulation exists. Given that assumption, we conclude that the department must withhold the remainder of the submitted information pursuant to section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code.² See Open Records Decision No. 440 at 2 (1986) (applying predecessor statute).

In summary, portions of the submitted information constitute grand jury records that are not subject to the Act. The department must release the marked arrest warrants and complaints pursuant to article 15.26 of the Code of Criminal Procedure. Absent the applicability of an access provision, the department must withhold the information that we have marked pursuant to chapter 611 of the Health and Safety Code and the MPA. The department must withhold the remainder of the submitted information pursuant to section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code.

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

² As our ruling is dispositive, we need not address your remaining arguments.

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# 194275

Enc. Marked documents

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(w/o enclosures)