



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 24, 2005

Ms. Shelly O'Brien Yeatts
Assistant District Attorney
Dallas County Criminal District Attorney's Office
133 North Industrial Boulevard, LB-19
Dallas, Texas 75207-4399

OR2005-02541

Dear Ms. Yeatts:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 220882.

The Dallas County Criminal District Attorney's Office (the "district attorney") received a request from the City of Garland (the "city") for a complete copy of the district attorney's files relating to a specified case number. You inform us that the district attorney has released some of the responsive information. You assert that other responsive information is not subject to the Act. You claim that the rest of the requested information is excepted from disclosure under sections 552.101, 552.108, and 552.111 of the Government Code. We have considered your arguments and have reviewed the information you submitted.¹ We also have considered the comments we received from the city. *See* Gov't Code § 552.304 (any person may submit written comments stating why information at issue in request for attorney general decision should or should not be released).

Initially, we address your assertion that some of the submitted information is not subject to the Act. This office has concluded that a grand jury is not a governmental body that is subject to the Act, so that records that are within the actual or constructive possession of a grand jury are not subject to disclosure under the Act. *See* Gov't Code §§ 552.003(1)(B)

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), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

(Act's definition of governmental body does not include judiciary), .0035 (access to information collected, assembled, or maintained by or for judiciary is governed by rules adopted by Supreme Court of Texas or other applicable laws and rules); Open Records Decision No. 513 at 3 (1988) (information held by grand jury, which is extension of judiciary for purposes of Act, is not itself subject to Act). 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 the Act. *See* Open Records Decision No. 513 at 3. Information that is not so held or maintained is subject to the Act and may be withheld from the public only if a specific exception to disclosure is shown to be applicable. *Id.*

You inform us that the information submitted as Exhibits E-1, E-2, and E-3 was obtained pursuant to grand jury subpoenas. You assert that this information is within the constructive possession of the grand jury and is not subject to the Act. Based on your representations and our review of the information in question, we agree that Exhibits E-1, E-2, and E-3 are not subject to disclosure under the Act. Thus, the district attorney need not release Exhibits E-1, E-2, or E-3.

Next, we address the city's contention that the district attorney has waived sections 552.108 and 552.111. The city contends that the district attorney waived these exceptions by not timely raising them in connection with a prior request by the city for the same information. The district attorney argues that these exceptions were not waived because his office understood that the city had withdrawn the prior request for the information in question. The district attorney bases his understanding of the outcome of the prior request on the fact that the city never responded to the district attorney's request for clarification of that request. The district attorney's request to the city for clarification stated:

If you wish to specifically request any of the information set forth above that this office believes is excepted from required public disclosure under the [Act], please notify me and I will immediately request a ruling from the attorney general as to the applicability of the cited exceptions.

We note that the Act permits a governmental body to seek clarification and narrowing of the scope of a request for information. *See* Gov't Code § 552.222; Open Records Decision No. 663 at 2-5 (1999).² During the interval in which a governmental body and a requestor are communicating in good faith to clarify or narrow a request, the governmental body's ten-business-day deadline to request a ruling is tolled. *See* Open Records Decision No. 663 at 5. The ten-business-day period resumes upon receipt of the response to the request for clarification or narrowing. In this instance, the city did not respond to the district attorney's

²Section 552.222(b) provides that if what information is requested is unclear to the governmental body, or if a large amount of information has been requested, the governmental body may communicate with the requestor for the purpose of narrowing or clarifying the request.

request for clarification and narrowing. Consequently, the district attorney's ten-business-day deadline never began to run again. We therefore conclude that, by his actions in responding to the city's prior request, the district attorney has not waived sections 552.108 and 552.111.

We note, however, that section 552.022 is applicable to the information that the district attorney seeks to withhold under these exceptions. Under section 552.022(a)(1), a "completed report, audit, evaluation, or investigation made of, or, or by a governmental body" must be released, unless the information is excepted from disclosure under section 552.108 or expressly confidential under other law. Gov't Code § 552.022(a)(1). In this instance, the rest of the submitted information is part of a completed investigation made of, for, or by the district attorney. Section 552.111 is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See* Gov't Code § 552.007; Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 470 at 7 (1987) (statutory predecessor to Gov't Code § 552.111 was subject to waiver). As such, section 552.111 is not other law that makes information confidential for the purposes of section 552.022. Therefore, the district attorney may not withhold any of the remaining information under section 552.111.³ Information that is subject to section 552.022(a)(1) may be withheld, however, under sections 552.101 and 552.108. Accordingly, we will consider the district attorney's claims under these exceptions.

Section 552.101 excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses information that is made confidential by statute. The disclosure of medical records is governed by 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.

³We note that the Texas Rules of Civil Procedure and Texas Rules of Evidence have been held to be "other law" within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001). Although the attorney work product privilege also is found in rule 192.5 of the Texas Rules of Civil Procedure, the rules apply only to "actions of a civil nature." *See* TEX. R. CIV. P. 2. Because the information at issue here relates to a criminal case, rule 192.5 is not applicable in this instance.

(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 the Act. *See* Open Records Decision No. 598 (1991). We also have concluded that when a file is created as the result of a hospital stay, 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 that are created or maintained by a physician. *See* Open Records Decision No. 546 (1990). 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. *See* Occ. Code §§ 159.004, .005. Any subsequent release of medical records must be consistent with the purposes for which the governmental body obtained the records. *See id.* § 159.002(c); Open Records Decision No. 565 at 7 (1990). Medical records may only be released in accordance with the MPA. *See* Open Records Decision No. 598 (1991).

You assert that the documents submitted as Exhibit E-4 are confidential under the MPA. You have not demonstrated, however, that the documents in question are medical records for purposes of the MPA. *See* Occ. Code § 159.002(a)-(b). Likewise, you have not shown, and it is not otherwise clear, whether or to what extent the documents in Exhibit E-4 contain any information that was obtained from medical records. *See id.* § 159.002(c). We therefore conclude that you have not demonstrated that any of the information in Exhibit E-4 is confidential under the MPA. Thus, the district attorney may not withhold any of the information in Exhibit E-4 on that basis.

You also raise section 552.101 of the Government Code in conjunction with section 773.091 of the Health and Safety Code. Section 773.091 is applicable to information that relates to the provision of emergency medical services and provides in part:

(a) A communication between certified emergency medical services personnel or a physician providing medical supervision and a patient that is made in the course of providing emergency medical services to the patient is confidential and privileged and may not be disclosed except as provided by this chapter.

(b) Records of the identity, evaluation or treatment of a patient by emergency medical services personnel or by a physician providing medical supervision that are created by the emergency medical services personnel or physician or

maintained by an emergency medical services provider are confidential and privileged and may not be disclosed except as provided by this chapter.

(c) Any person who receives information from confidential communications or records as described by this chapter, other than a person listed in Section 773.092 who is acting on the survivor's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was obtained.

Health & Safety Code § 773.091(a)-(c). You also assert that information contained in Exhibit E-4 is confidential under section 773.091. We find, however, that this section is not applicable to any of the information in question. Therefore, the district attorney may not withhold any of the information in Exhibit E-4 under section 552.101 in conjunction with section 773.091 of the Health and Safety Code.

Lastly, we address your claim under section 552.108. This exception provides in 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) represents the mental impressions or legal reasoning of an attorney representing the state.

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

Gov't Code § 552.108(a)(4), (b)(3). A governmental body must reasonably explain how and why section 552.108 is applicable to the information that the governmental body seeks to withhold under this exception. *See id.* § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Open Records Decision No. 434 at 2-3 (1986). You assert that the information submitted as Exhibit E-5 either was prepared by a prosecutor in anticipation of or in the course of preparing for criminal litigation or reflects a prosecutor's mental impressions or legal reasoning. Based on your representations and our review of the information in question, we conclude that the district attorney may withhold Exhibit E-5 under section 552.108(a)(4) and (b)(3).

In summary: (1) Exhibits E-1, E-2, and E-3 are not subject to disclosure under the Act; and (2) the district attorney may withhold Exhibit E-5 under section 552.108(a)(4) and (b)(3) of the Government Code. The rest of the submitted information must be released.

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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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).

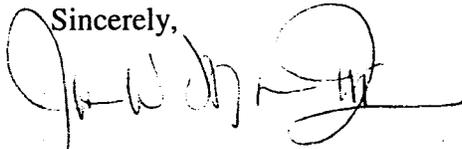
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental

body. *Id.* § 552.321(a); *Tex. 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 "James W. Morris, III". The signature is stylized with a large initial "J" and a long horizontal stroke at the end.

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

JWM/krl

Ref: ID# 220882

Enc: Submitted documents

c: Mr. Mark E. Dempsey
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(w/o enclosures)