



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 23, 2005

Ms. Paula J. Alexander
General Counsel
Metropolitan Transit Authority of Harris County
P. O. Box 61429
Houston, Texas 77208-1429

OR2005-07606

Dear Ms. Alexander:

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# 230783.

The Metropolitan Transit Authority of Harris County ("Metro") received a request for information pertaining to an investigation that led to the termination of a former Metro employee as well as the former employee's personnel file. You claim that the submitted information is excepted from disclosure under section 552.108 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

As a preliminary matter, you indicate that the submitted information relates to the investigation conducted in connection with the former employee's termination. To the extent information responsive to the request for the former employee's personnel file existed on the date Metro received this request for information, we assume it has been released to the requestor. If not, any such information must be released at this time. *See* Gov't Code §§ 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible).

Next, we note that the submitted records include a grand jury summons. The judiciary is expressly excluded from the requirements of the Act. Gov't Code § 552.003(1)(B). This office has determined that a grand jury, for purposes of the Act, is a part of the judiciary, and

therefore not subject to the Act. Open Records Decision No. 411 (1984). Further, records kept by a district attorney who is acting as an agent for a grand jury are considered records in the constructive possession of the grand jury and therefore are not subject to the Act. Open Records Decisions Nos. 513 (1988), 411 (1984), 398 (1983); *but see* Open Records Decision No. 513 at 4 (1988) (defining limits of judiciary exclusion). Thus, this summons, which we have marked, is apparently held by Metro on behalf of the grand jury, and therefore, is not subject to the Act and need not be disclosed.

We also note that the submitted information contains medical records. Section 552.101 of the Government Code exempts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."¹ Gov't Code § 552.101. This exception encompasses information made confidential by other statutes. Access to medical records is governed by the Medical Practice Act ("MPA"), chapter 159 of the Occupations Code. Section 159.002 of the MPA provides in relevant 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). 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. 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. Open Records Decision No. 565 at 7 (1990). Medical records may be released only as provided under the MPA. Open Records Decision No. 598 (1991). We have marked the medical records that are subject to the MPA.

The submitted information also contains chiropractor records. Section 201.402(b) of the Occupations Code states:

Records of the identity, diagnosis, evaluation, or treatment of a patient by a chiropractor that are created or maintained by a chiropractor are confidential

¹The Office of the Attorney General will raise a mandatory exception like section 552.101 on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

and privileged and may not be disclosed except as provided by this subchapter.

Occ. Code § 201.402(b). Thus, section 201.402(b) makes confidential the submitted chiropractor records. Chapter 201 of the Occupations Code includes exceptions to confidentiality and consent provisions. *See id.* §§ 201.403, .404, .405. As such, unless otherwise authorized to release the information under section 201.403 or 201.404 of the Occupations Code, Metro must withhold the submitted chiropractor records, which we have marked, pursuant to section 552.101 of the Government Code in conjunction with section 201.402(b) of the Occupations Code.

We now turn to your arguments regarding the remaining submitted information. Section 552.108(a)(2) of the Government Code excepts from required public disclosure “[i]nformation held by a law enforcement agency . . . that deals with the detection, investigation, or prosecution of crime . . . if . . . it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication.” Gov’t Code § 552.108(a)(2). A governmental body claiming section 552.108(a)(2) must demonstrate that the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. We note that section 552.108 is generally not applicable to information relating to an administrative investigation that did not result in a criminal investigation or prosecution. *See Morales v. Ellen*, 840 S.W.2d 519, 525-26 (Tex. Civ. App.—El Paso 1992, writ denied) (statutory predecessor to section 552.108 not applicable to internal investigation that did not result in criminal investigation or prosecution); Open Records Decision No. 350 at 3-4 (1982).

In this instance, you inform us that the submitted information relates to an investigation that was initially conducted by Metro’s Police Internal Affairs Division. You state that “[b]ecause of the criminal nature of the alleged solicitation of business for a privately owned company while on official METRO duty, it was determined that the investigation should be handled by” Metro’s Police Department Criminal Investigation Division (the “department”). We note that the department is a “law enforcement agency” for purposes of section 552.108 of the Government Code. *See* Transp. Code § 451.108. You also inform us that the department “found the allegations to have merit” and referred the matter to the Harris County District Attorney’s Office, which, upon review of the investigation, declined to prosecute the alleged criminal violation. You explain that the investigation is now “closed and no criminal changes were filed.” Based on your representations and our review of the submitted information, we agree that section 552.108(a)(2) is applicable.

However, section 552.108 does not except from disclosure basic information about an arrested person, an arrest, or a crime. Gov’t Code § 552.108(c). 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). Thus, with the exception of the basic front page offense and arrest information, Metro may withhold the remaining submitted information from disclosure based on section 552.108(a)(2). We note that Metro has the discretion to release all or part of this information that is not otherwise confidential by law. Gov't Code § 552.007.

In summary, the marked summons is not subject to the Act and need not be disclosed. The medical records that we have marked may only be released in accordance with the MPA. The chiropractor records that we have marked must be withheld pursuant to section 552.101 of the Government Code in conjunction with section 201.402(b) of the Occupations Code, unless Metro is otherwise authorized to release the information under section 201.403 or 201.404 of the Occupations Code. With the exception of basic information, which must be released, Metro may withhold the remaining submitted information under section 552.108(a)(2) of the Government 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, 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,



Robert B. Rapfogel
Assistant Attorney General
Open Records Division

RBR/krl

Ref: ID# 230783

Enc. Submitted documents

c: Mr. Eric C. Carcerano
Staff Attorney
Combined Law Enforcement Associations of Texas
5675 Eastex Freeway, Suite M8
Beaumont, Texas 77706
(w/o enclosures)