



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 18, 2006

Ms. Deborah F. Harrison
Assistant District Attorney
Collin County Courthouse
210 South McDonald, Suite 324
McKinney, Texas 75069

OR2006-12265

Dear Ms. Harrison:

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# 262680.

The Collin County District Attorney's Office (the "district attorney") received a request for all information pertaining to the prosecution of the requestor's client for murder. You claim that some of the requested information is not subject to the Act pursuant to section 552.003 of the Government Code, and that the remaining information is excepted from disclosure under sections 552.101, 552.103, 552.108, 552.111, 552.115, 552.130, 552.132, 552.1325, and 552.136 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, you inform us that some of the submitted documents are records of a grand jury. 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 governmental body that is acting as an agent for a grand jury are considered records in the constructive possession of the grand jury, and therefore are also 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, to the extent that the information at issue is held by the district attorney as agent of the grand jury, it consists of records of the judiciary not subject to disclosure under the Act. To the extent the submitted information does not consist of records of the judiciary, we will address your exceptions to disclosure.

We next note that the submitted information includes arrest warrants, capiases, and supporting affidavits. Article 15.26 of the Code of Criminal Procedure provides that "[t]he

arrest warrant, and any affidavit presented to the magistrate in support of the issuance of the warrant, is public information[.]” 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.” 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); *Borsari v. State*, 919 S.W.2d 913, 918 (Tex. App.—Houston [14 Dist.] 1996, pet. ref’d) (complaint in support of arrest warrant need not contain same particularity required of indictment); *Villegas v. State*, 791 S.W.2d 226, 235 (Tex. App.—Corpus Christi 1990, pet. ref’d). 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)*. Therefore, the arrest warrants, capiases, and supporting affidavits, which we have marked, must be released pursuant to article 15.26 of the Code of Criminal Procedure.

We also note that the submitted information contains affidavits supporting the issuance of search warrants. The release of a search warrant affidavit is governed by article 18.01 of the Code of Criminal Procedure, which provides in part the following:

No search warrant shall issue for any purpose in this state unless sufficient facts are first presented to satisfy the issuing magistrate that probable cause does in fact exist for its issuance. A sworn affidavit setting forth substantial facts establishing probable cause shall be filed in every instance in which a search warrant is requested. The affidavit is public information if executed, and the magistrate’s clerk shall make a copy of the affidavit available for public inspection in the clerk’s office during normal business hours.

Crim. Proc. Code art. 18.01(b). Article 18.01(b) makes the search warrant affidavits at issue expressly public. As we noted above, the exceptions found in the Act do not apply to information that is made public by other statutes. *See Open Records Decision No. 525 (1989) (statutory predecessor)*. Therefore, the district attorney must release the search warrant affidavits, which we have marked, pursuant to article 18.01(b).

The submitted information also contains documents filed with the court. A document that has been filed with a court is expressly public under section 552.022 of the Government Code and may not be withheld unless confidential under other law. *See Gov’t Code § 552.022(a)(17)*. Although you assert that these documents are excepted under sections 552.103 and 552.108 of the Government Code, these sections are discretionary exceptions to disclosure that protect a governmental body’s interests and may thus be waived by the governmental body. *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 section 552.103); *Open Records Decision Nos. 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived), 177 (1977) (governmental body may waive statutory predecessor to section 552.108)*. Therefore, sections 552.103 and 552.108 do not constitute other law for purposes of section 552.022, and the district attorney may not withhold the

court-filed documents on those grounds. We note, however, that these documents contain fingerprints, Texas motor vehicle record information, and a credit card number. Sections 552.101, 552.130, and 552.136 of the Government Code constitute other law for purposes of section 552.022; therefore, we will address whether this information is excepted under these sections.

Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” This section encompasses information protected by other statutes. Chapter 560 of the Government Code provides that a governmental body may not release fingerprint information except in certain limited circumstances. *See* Gov’t Code §§ 560.001 (defining “biometric identifier” to include fingerprints), 560.002 (prescribing manner in which biometric identifiers must be maintained and circumstances in which they can be released), 560.003 (biometric identifiers in possession of governmental body exempt from disclosure under the Act). You do not inform us, and the submitted information does not indicate, that section 560.002 permits the disclosure of the submitted fingerprint information. Therefore, the district attorney must withhold this information in the court-filed documents, which we have marked, under section 552.101 in conjunction with section 560.003 of the Government Code.

Section 552.130 of the Government Code provides that information relating to a motor vehicle operator’s license, driver’s license, motor vehicle title, or registration issued by a Texas agency is excepted from public release. Gov’t Code § 552.130(a)(1), (2). The district attorney must withhold the Texas motor vehicle record information we have marked in the court-filed documents under section 552.130.

Section 552.136(b) of the Government Code states that “[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” The district attorney must withhold the account number we have marked in the court-filed documents under section 552.136. The district attorney must release the remaining information subject to section 552.022 of the Government Code.

Some of the documents at issue are medical records, access to which is governed by the Medical Practice Act (the “MPA”), subtitle B of title 3 of the Occupations Code. Section 159.002 of the MPA provides in part the following:

(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. *Id.* §§ 159.004, 159.005. 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 portion of the submitted information that constitutes medical records of the requestor's client and that may only be released in accordance with the MPA.

The submitted information also contains records that are subject to Chapter 611 of the Health and Safety Code, which provides for the confidentiality of records created or maintained by a mental health professional. Section 611.002(a) states that "[c]ommunications 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." 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. *Id.* § 611.001(b). Sections 611.004 and 611.0045 provide for access to mental health records only by certain individuals. *See* Open Records Decision No. 565 (1990). We have marked the information that constitutes mental health records of the requestor's client, and that may only be released in accordance with sections 611.004 and 611.0045 of the Health and Safety Code.

The submitted information also contains dental records. Section 258.102 of the Occupations Code provides in pertinent part as follows:

(a) The following information is privileged and may not be disclosed except as provided by this subchapter:

- (1) a communication between a dentist and a patient that relates to a professional service provided by the dentist; and
- (2) a dental record.

Occupation Code § 258.102(a). A "dental record" means dental information about a patient that is created or maintained by a dentist and relates to the history or treatment of the patient. *Id.* § 258.101(1). Section 258.104 provides for the disclosure of privileged dental records by the patient. *See id.* § 258.104(a). We have marked the dental records of the requestor's

client that may only be released in accordance with chapter 258 of the Occupations Code. *See id.* §§ 258.104-258.107.

The submitted information also includes emergency medical service (“EMS”) records that are subject to chapter 773 of the Health and Safety Code. Access to EMS records is governed by the provisions of section 773.091 of the Health and Safety Code. *See* Open Records Decision No. 598 (1991). Section 773.091 provides in part the following:

(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.

...

(g) The privilege of confidentiality under this section does not extend to information regarding the presence, nature of injury or illness, age, sex, occupation, and city of residence of a patient who is receiving emergency medical services. . . .

Health & Safety Code § 773.091(b), (g). Thus, except for the information specified in section 773.091(g), EMS records are deemed confidential under section 773.091 and, therefore, may only be released in accordance with chapter 773 of the Health and Safety Code. *See id.* §§ 773.091-773.094. We note, however, that records that are confidential under section 773.091 may be disclosed to “any person who bears a written consent of the patient or other persons authorized to act on the patient's behalf for the release of confidential information.” Health & Safety Code §§ 773.092(e)(4), 773.093. We have marked the EMS records of the requestor’s client that are subject to section 773.091, that may only be released in accordance with sections 773.092 and 773.093 of the Health and Safety Code.

You assert that the remaining information is excepted under section 552.108, which states in pertinent part the following:

(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) reflects the mental impressions or legal reasoning of an attorney representing the state [and]

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

Gov't Code § 552.108(a)(4), (b)(3). When a request essentially seeks the entire prosecution file, the information is excepted from disclosure in its entirety pursuant to the holding in *Curry v. Walker*, 873 S.W.2d 379 (Tex. 1994) (discovery request for district attorney's entire litigation file may be denied because decision of what to include in file necessarily reveals prosecutor's mental impressions or legal reasoning). The request for information encompasses the district attorney's entire case file; therefore, *Curry* provides that the release of the information at issue would reveal the district attorney's mental impressions or legal reasoning. Accordingly, we find that subsections 552.108(a)(4)(B) and (b)(3)(B) of the Government Code apply to the remaining information.

However, section 552.108 does not except basic information about an arrested person, an arrest, or a crime. Gov't Code § 552.108(c). We believe such basic information refers to the information held to be public in *Houston Chronicle Publishing Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App. —Houston [14th Dist.] 1975), *writ ref'd n.r.e.*, 536 S.W.2d 559 (Tex. 1976). Thus, with the exception of the basic front page offense and arrest information, you may withhold the remaining information from disclosure based on section 552.108.¹

¹As we are able to resolve this under section 552.108, we do not address your other arguments for exception of this information.

To conclude, any documents held by the district attorney as agent of a grand jury are not subject to release pursuant to the Act. The district attorney must release the marked arrest warrants and supporting affidavits pursuant to article 15.26 of the Code of Criminal Procedure, and the marked search warrant affidavits pursuant to article 18.01 of the Code of Criminal Procedure. The district attorney must also release the documents marked under section 552.022 of the Government Code; however, the district attorney must withhold the information in these documents that we have marked under section 552.101 of the Government Code in conjunction with section 560.003 of the Government Code, section 552.130 of the Government Code, and section 552.136 of the Government Code. The marked medical documents may only be released in accordance with the MPA, the marked mental health records may only be released in accordance with sections 611.004 and 611.0045 of the Health and Safety Code, the marked dental records may only be released in accordance with chapter 258 of the Occupations Code, and the marked EMS records may only be released in accordance with chapter 773 of the Health and Safety Code.² With the exception of basic information, which must also be released, the district attorney may withhold the remaining information under section 552.108 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

²We note that the requestor, as the representative of the individual at issue, has a right of access to information in the submitted documents that otherwise would be excepted from release under the Act. *See* Gov't Code § 552.023. Thus, the district attorney must again seek a decision from this office if it receives a request for this information from a different requestor.

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 Office of the Attorney General 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,



James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/eb

Ref: ID# 262680

Enc. Submitted documents

c: Mr. F. Clinton Broden
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