



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 10, 2007

Ms. Sara Lynn Hayes
Public Information Coordinator-Designee
Twenty-First Judicial District
100 West Buck, Suite 407
Caldwell, Texas 77836

OR2007-10291

Dear Ms. Hayes:

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# 286288.

The 21st Judicial District Attorney's Office (the "district attorney") received a request for all documents related to the criminal prosecution of a named individual. You state that you have released some of the information. You contend that a portion of the information is not subject to the Act. You claim that the remaining information is excepted from disclosure under sections 552.101, 552.108, and 552.130 of the Government Code, and is privileged under rule 192.5 of the Texas Rules of Civil Procedure.¹ We have considered your arguments and reviewed the submitted information.

Initially, you inform us that some of the information at issue is held by the district attorney on behalf of a grand jury. The judiciary is expressly excluded from the requirements of the Act. *See 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 is therefore not subject to the Act. *See Open Records Decision No. 411 (1984)*. Further, records kept by another person or entity acting as an agent for a grand jury are considered to be records in the constructive possession

¹Although you also raise section 552.021 of the Government Code as an exception to disclosure, we note that this provision is not an exception to disclosure under the Act. *See Gov't Code § 552.021* (providing that public information is available during normal business hours).

of the grand jury and therefore are not subject to the Act. *See* Open Records Decisions Nos. 513 (1988), 398 (1983). *But see* ORD 513 at 4 (defining limits of judiciary exclusion). The fact that information collected or prepared by another person or entity is submitted to the grand jury does not necessarily mean that such information is in the grand jury's constructive possession when the same information is also held in the other person's or entity's own capacity. Information held by another person or entity but not produced at the direction of the grand jury may well be protected under one of the Act's specific exceptions to disclosure, but such information is not excluded from the reach of the Act by the judiciary exclusion. *See* ORD 513. Thus, to the extent that the district attorney has possession of the information at issue as an agent of the grand jury, such information is in the grand jury's constructive possession and is not subject to the Act. This decision does not address the public availability of any such information. To the extent that the district attorney does not have possession of the information at issue as an agent of the grand jury, the information is subject to the Act and must be released unless it falls within an exception to public disclosure.

You claim that portions of the remaining information at issue are privileged based on Texas Rule of Civil Procedure 192.5. However, the Texas Rules of Civil Procedure apply only to "actions of a civil nature." *See* TEX. R. CIV. P. 2. The information at issue pertains to a criminal case. Thus, the district attorney may not withhold any of the information at issue under Texas Rule of Civil Procedure 192.5.

Section 552.101 of the Government Code exempts from 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 other statutes make confidential. 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 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). 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). We have marked the medical record that is subject to the MPA. The district attorney may only disclose this record in accordance with the access provisions of the MPA. Absent the applicability of an MPA access provision, the district attorney must withhold this record pursuant to the MPA. *See* Open Records Decision No. 598 (1991).

Section 552.108(a)(2) of the Government Code excepts from disclosure information concerning an investigation that concluded in a result other than conviction or deferred adjudication. 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. You inform us that the information at issue relates to a criminal investigation that concluded in a grand jury's decision to "no bill" the suspect. Therefore, this investigation has concluded in a result other than a conviction or deferred adjudication. Accordingly, we agree that section 552.108(a)(2) is applicable to the information in items 1 through 13.

However, as you acknowledge, section 552.108 does not except from required public disclosure "basic information about an arrested person, an arrest, or a crime." Gov't Code § 552.108(c). Such 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). *See* Open Records Decision No. 127 (1976) (summarizing types of information considered to be basic information). Thus, with the exception of basic information, which you state you have released, you may withhold the information in items 1 through 13 from disclosure pursuant to section 552.108(a)(2).² We note that you have the discretion to release all or part of this information that is not otherwise confidential by law. Gov't Code § 552.007.

Section 552.130 of the Government Code provides that information is excepted from required public disclosure "if the information 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. Item 23 contains

²As our ruling is dispositive on this issue, we need not address your remaining arguments against disclosure of this information.

information subject to section 552.130. Upon review, it appears that the requestor is the mother of the individual whose Texas motor vehicle record information is at issue. We note that if the requestor is the authorized representative of the individual whose Texas motor vehicle information is at issue, she has a special right of access to this information. *See* Gov't Code 552.023 (person or person's authorized representative has special right of access to information relating to person and protected by public disclosure by laws intended to protect that person's privacy interests). If the requestor is not the authorized representative of the individual whose Texas motor vehicle information is at issue, the department must withhold the information we have marked pursuant to section 552.130 of the Government Code.

In summary, to the extent the information at issue consists of records in the custody of the district attorney on behalf of the grand jury, such information is not subject to disclosure under the Act. The marked medical record in item 30 may only be released in accordance with the MPA. With the exception of basic information, the district attorney may withhold the information in items 1 through 13 under section 552.108(a)(2) of the Government Code. The district attorney must withhold the marked Texas-issued motor vehicle record information in item 23 pursuant to section 552.130 of the Government Code unless the requestor has a right of access pursuant to section 552.023 of the Government Code. The remaining information must be released.³

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

³We note that the submitted information contains a social security number. Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act. We note that an individual or his authorized representative has a right to his own social security number. *See* Gov't Code § 552.023.

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); *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. 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,



Nikki Hopkins
Assistant Attorney General
Open Records Division

NH/mcf

Ref: ID# 286288

Enc. Submitted documents

c: Ms. Sara Colvin
8911 Iron Bridge Road
Burton, Texas 77835
(w/o enclosures)