



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 27, 2010

Ms. Donna C. Goode
First Assistant Criminal District Attorney
Galveston County
600 59th Street, Suite 1001
Galveston, Texas 77551-4137

OR2010-16296

Dear Ms. Goode:

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# 399047.

The Galveston County Criminal District Attorney's Office (the "district attorney") received a request for all documents and records containing information regarding the death of a named individual and his interaction with four named officers, including any records and recordings pertaining to any person or thing present at or near the location where the officers arrested the named individual. You state you will withhold social security numbers of living individuals pursuant to section 552.147(b) of the Government Code.¹ You claim the submitted information is excepted from disclosure under sections 552.101, 552.107, 552.108, 552.117, 552.1175, and 552.130 of the Government Code.² We have considered the exceptions you claim and reviewed the submitted information. We have also received and considered comments submitted by the requestor. *See* Gov't Code § 552.304 (interested party may submit written comments regarding availability of requested information).

¹Section 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. *See* Gov't Code § 552.147.

²Although you also raise section 552.101 of the Government Code in conjunction with the attorney-client privilege, this office has concluded section 552.101 does not encompass discovery privileges or other exceptions found in the Act. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990).

Initially, we note the requestor does not object to the redaction of personal addresses, social security numbers, private cellular telephone numbers, family member information, and personal e-mail addresses of police officers. Thus, we understand the requestor to agree to the redaction of information protected by sections 552.117 and 552.1175 of the Government Code, as well as personal e-mail addresses of police officers.³ Further, the requestor does not object to the redaction of information protected by section 552.130 of the Government Code and section 772.318 of the Health and Safety Code.⁴ Accordingly, any such information within the submitted documents is not responsive to the present request for information. This ruling does not address the public availability of any information that is not responsive to the request, and the district attorney need not release non-responsive information in response to this request.

Next, you argue some of the submitted information consists of grand jury records and is, therefore, in the actual or constructive possession of the grand jury. The judiciary is expressly excluded from the requirements of the Act. *Id.* § 552.003(1)(B). This office has determined 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, 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 the information you marked is in the custody of the district attorney as an agent for the grand jury, these records are in the grand jury's constructive possession and are not subject to the Act. This decision

³Section 552.117(a)(2) of the Government Code applies to a peace officer as defined by Article 2.12 of the Code of Criminal and requires the governmental body to hold information pertaining to that officer in an employment context. Gov't Code § 552.117(a)(2). Section 552.1175 of the Government Code also applies to a peace officer as defined by Article 2.12 of the Code of Criminal Procedure but does not require a governmental body to hold information pertaining to that officer in an employment context. *See id.* § 552.1175. Sections 552.117 and 552.1175 except the home address, home telephone number, social security number, or information that reveals whether the person has family members; however, only section 552.1175 requires a peace officer to elect to restrict access to these pieces of information for the information to be excepted.

⁴Section 552.130 of the Government Code protects information relating to a motor vehicle operator's license, driver's license, motor vehicle title, or registration issued by a Texas agency. *See* Gov't Code § 552.130. Section 772.318 of the Health and Safety Code applies to an emergency communication district for a county with a population of more than 20,000 and excepts the originating telephone numbers and address supplied by a 9-1-1 service supplier. *See* Health & Safety Code § 772.318.

does not address the public availability of such information. However, to the extent this information is not in the custody of the district attorney as an agent for the grand jury, we will address your claimed exceptions to the disclosure of this information.

Next, we note the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a)(1) provides for the required public disclosure of "a completed report, audit, evaluation, or investigation made of, or, or by a governmental body, except as provided by Section 552.108." Gov't Code § 552.022(a)(1). The submitted information constitutes a completed investigation; thus, it is subject to section 552.022(a)(1). Therefore, the district attorney may only withhold this information if it is subject to section 552.108 or confidential under "other law." Section 552.107 of the Government Code is a discretionary exception under the Act and does not constitute "other law" for purposes of section 552.022. *See* Open Records Decision No. 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Consequently, no portion of the submitted information may be withheld under section 552.107. However, information subject to section 552.022(a)(1) may be withheld pursuant to section 552.108. Accordingly, we will consider your arguments under section 552.108, as well as under section 552.101 of the Government Code, which is "other law" for the purpose of section 552.022 of the Government Code. Further, the attorney-client privilege is also found in rule 503 of the Texas Rules of Evidence. The Texas Supreme Court held "[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are 'other law' within the meaning of section 552.022." *See In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001); *see also* ORD 676. Accordingly, we will consider your assertion of this privilege under rule 503.

We note the submitted information includes 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." Gov't Code § 552.101. This section encompasses information protected by other statutes, including the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. *See* Occ. Code §§ 151.001-165.160. 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 found when a file is created as the result of a hospital stay, all documents in the file relating to diagnosis and treatment constitute physician-patient communications or "[r]ecords of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician." Open Records Decision No. 546 (1990).

When a patient is deceased, as is the case here, medical records pertaining to the deceased patient may only be released upon the signed consent of the deceased's personal representative. Occ. Code § 159.005(a)(5). Medical records must be released on receipt of 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 id.* §§ 159.004, .005. Any subsequent release of medical records must be consistent with the purposes for which the governmental body obtained the records. *Id.* § 159.002(c); Open Records Decision No. 565 at 7 (1990). Although you claim these medical records are excepted under section 552.108 of the Government Code, the MPA's specific right of access provision prevails over the Act's general exceptions to disclosure. *See* Open Records Decision No. 451 at 4 (1986) (specific statutory right of access provisions overcome general exceptions to disclosure under statutory predecessor to Act). We have marked medical records that may only be released in accordance with the MPA.

We also note the submitted information 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, which is also encompassed by section 552.101. *See* Open Records Decision No. 598 (1991). Section 773.091 provides in part:

(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-.094. We note this information may be released to “any person who bears a written consent of the patient or other persons authorized to act on the patient’s behalf.” *Id.* § 773.092(e)(4). When the patient is deceased, the patient’s personal representative may consent to the release of the patient’s records. *Id.* § 773.093(a); *see also* Open Records Decision No. 632 (1995) (defining “personal representative” for purposes of section 773.093 of the Health and Safety Code). The consent must be in writing, signed by the patient, authorized representative, or personal representative, and specify (1) the information to be covered by the release; (2) the reasons or purposes for the release; and (3) the person to whom the information is to be released. Health & Safety Code § 773.093(a). We also note a specific statutory right of access provision prevails over general exceptions to disclosure under the Act. *See* ORD 451 at 4. Thus, if the district attorney receives proper consent, the marked EMS records must be released in their entirety in accordance with chapter 773 of the Health and Safety Code. If the district attorney does not receive proper consent, then with the exception of the information subject to section 773.091(g), which is not confidential, the marked EMS records must be withheld under section 552.101 in conjunction with section 773.091(b) of the Health and Safety Code. We will address your claim under section 552.108 of the Government Code for the remaining information, including the information subject to section 773.091(g).

Section 552.108 of the Government Code 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.

Gov't Code § 552.108(a)(4). A governmental body that claims an exception to disclosure under section 552.108 must reasonably explain how and why this exception is applicable to the information the governmental body seeks to withhold. *See id.* §§ 552.108(a)(4), .301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Open Records Decision No. 434 at 2-3 (1986). In *Curry v. Walker*, 873 S.W.2d 379 (Tex. 1994), the Texas Supreme Court held a request for a district attorney's "entire litigation file" was "too broad" and, quoting *National Union Fire Insurance Co. v. Valdez*, 863 S.W.2d 458 (Tex. 1993, orig. proceeding), held "the decision as to what to include in [the file] necessarily reveals the attorney's thought processes concerning the prosecution or defense of the case." *Curry*, 873 S.W.2d at 380.

You state the instant request for information encompasses the district attorney's entire case file concerning the death of the named individual. You further state the entire file necessarily reveals the district attorney's thought processes concerning the prosecution of the case. The requestor argues her request was not for the district attorney's entire file. However, the requestor seeks all documents and records containing information regarding the death of the named individual and his interaction with four named officers, including any records and recordings pertaining to any person or thing present at or near the location where the officers arrested the named individual. Thus, we agree the requestor essentially seeks the district attorney's entire prosecution file. We also understand the requestor to argue the district attorney seeks to withhold its entire prosecution file pursuant to the Texas Supreme Court's decision in *Curry*, which is inapplicable to a request under the Act. The Texas Supreme Court's decision in *Curry* simply states a prosecutor's decision as to what to include in the prosecutor's file necessarily reveals the prosecutor's thought processes in regards to a case. We note the district attorney seeks to withhold its entire prosecution file under section 552.108(a)(4), which is an exception under the Act. Section 552.108(a)(4) protects information that would reveal the mental impressions or legal reasoning of an attorney, and according to the holding in *Curry*, disclosure of a prosecutor's entire prosecution file would necessarily reveal the mental impressions or legal reasoning of the prosecutor. Thus, we conclude section 552.108(a)(4) is generally applicable to the remaining information, including the information subject to section 773.091(g).

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 Co. 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 made public by *Houston Chronicle*). Thus, with the exception of basic information, the district attorney may withhold the remaining information under section 552.108(a)(4).⁵

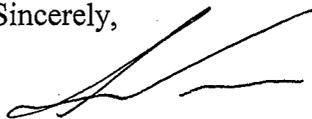
⁵As our ruling is dispositive, we need not address your remaining arguments against disclosure.

In summary, to the extent the marked information is in the custody of the district attorney as an agent for the grand jury, these records are in the grand jury's constructive possession and are not subject to the Act. The medical records we marked may only be released in accordance with the MPA. If the district attorney receives proper consent, the marked EMS records must be released in their entirety in accordance with chapter 773 of the Health and Safety Code. If the district attorney does not receive proper consent, then with the exception of the information subject to section 773.091(g) of the Health and Safety Code, the marked EMS records must be withheld under section 552.101 of the Government Code in conjunction with section 773.091(b) of the Health and Safety Code. With the exception of basic information, the district attorney may withhold the remaining information under section 552.108(a)(4) of the Government Code.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Ana Carolina Vieira
Assistant Attorney General
Open Records Division

ACV/eeg

Ref: ID# 399047

Enc. Submitted documents

c: Requestor
(w/o enclosures)