



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 22, 2011

Ms. Donna L. Clarke
Assistant Criminal District Attorney
Civil Division
County of Lubbock
916 Main Street, Suite 1101
Lubbock, Texas 79401

OR2011-10501

Dear Ms. Clark:

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# 424654.

The Lubbock County District Attorney's Office (the "district attorney") received a request for a copy of the district attorney's file pertaining to the prosecution of a named individual. You state the district attorney will release most of the requested information. You claim some of the submitted information is excepted from disclosure under sections 552.101, 552.108, 552.111, 552.117, 552.130, and 552.136 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note the submitted information is from a completed investigation and is subject to section 552.022(a)(1) of the Government Code. Section 552.022(a)(1) provides a completed investigation is public information unless it is confidential by other law or excepted from disclosure under section 552.108. Gov't Code § 552.022(a)(1). You claim Exhibit A is excepted from disclosure under section 552.111 of the Government Code. Section 552.111 is a discretionary exception and does not make information confidential; therefore, the district attorney may not withhold any of the information in Exhibit A under this exception. *See id.* § 552.007; Open Records Decision Nos. 677 at 10 (2002) (attorney work product privilege under section 552.111 may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally). The attorney work product privilege is also found in

rule 192.5 of the Texas Rules of Civil Procedure. The Texas Supreme Court held that “[t]he Texas Rules of Civil Procedure . . . are ‘other law’ within the meaning of section 552.022.” *In re City of Georgetown*, 53 S.W.3d 328, 337 (Tex. 2001). We note, however, the Texas Rules of Civil Procedure apply only to “actions of a civil nature.” See TEX. R. CIV. P. 2. Although you state the information in Exhibit A will be used in a civil case in which Lubbock County is named as a defendant, you inform us this information was prepared for criminal litigation. Thus, because Exhibit A was prepared in connection with criminal litigation, the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure does not apply to this information and Exhibit A may not be withheld on that basis. However, pursuant to section 552.022(a)(1), we will consider your claim under section 552.108 of the Government Code for Exhibit A. Furthermore, as sections 552.101, 552.117, 552.130, and 552.136 of the Government Code constitute “other law” that makes information confidential for the purposes of section 552.022, we will also consider the applicability of those sections to the information in Exhibits B through J.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. Section 552.101 encompasses information other statutes make confidential, including section 411.153 of the Government Code, which provides as follows:

- (a) A DNA record stored in the DNA database is confidential and is not subject to disclosure under the public information law, Chapter 552.
- (b) A person commits an offense if the person knowingly discloses to an unauthorized recipient information in a DNA record or information related to a DNA analysis of a sample collected under this subchapter.
- (c) An offense under this section is a state jail felony.
- (d) A violation under this section constitutes official misconduct.

Gov’t Code § 411.153. A “DNA record” means the results of a forensic DNA analysis performed by a DNA laboratory. See *id.* § 411.141(6)-(7). “Forensic analysis” is defined as “a medical, chemical, toxicologic, ballistic, or other expert examination or test performed on physical evidence, including DNA evidence, for the purpose of determining the connection of the evidence to a criminal action.” See Crim. Proc. Code art. 38.35(4); see also Gov’t Code § 411.141(10) (providing that “forensic analysis” has meaning assigned by Crim. Proc. Code art. 38.35). A “DNA database” means “one or more databases that contain forensic DNA records maintained by the director [of the Texas Department of Public Safety (the “DPS”)].” Gov’t Code § 411.141(5); see *id.* § 411.001(3).

The director of the DPS is required to establish certain procedures for DNA laboratories. See *id.* §§ 411.144(a), .142(h) (requiring director to establish standards for DNA analysis).

Section 411.144 of the Government Code provides that a DNA laboratory conducting a forensic DNA analysis under subchapter G of chapter 411 shall comply with subchapter G and the rules adopted under subchapter G. *See id.* § 411.144(d); 37 T.A.C. § 28.82(a). The DPS has adopted rules that govern the regulation of forensic DNA laboratories in this state. *See* 37 T.A.C. §§ 28.81, .82 (describing minimum standards by which a forensic DNA laboratory must abide); *see also* Gov't Code § 411.147(b).

In this instance, some of the submitted documents are DNA records relating to DNA analyses of samples collected under subchapter G of chapter 411 of the Government Code. The documents in question are contained in records of a criminal investigation. The documents appear to be the result of forensic DNA analyses performed by a DNA laboratory in accordance with DPS regulations. We therefore conclude that you must withhold the DNA records that we have marked in Exhibit B under section 552.101 of the Government Code in conjunction with section 411.153 of the Government Code. We find, however, none of the remaining information in Exhibit B may be withheld under section 552.101 on that basis.

Section 552.101 also encompasses section 1703.306 of the Occupations Code, which states, “[a] polygraph examiner, trainee, or employee of a polygraph examiner, or a person for whom a polygraph examination is conducted or an employee of the person, may not disclose information acquired from a polygraph examination[.]” Occ. Code § 1703.306. The district attorney must withhold Exhibit C under section 552.101 in conjunction with section 1703.306 of the Occupations Code.

Section 552.101 also encompasses the Medical Practice Act (the “MPA”), subtitle B of title 3 of the Occupations Code. *See id.* §§ 151.001–165.160. Section 159.002 of the MPA provides in relevant 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). Information subject to the MPA includes both medical records and information obtained from those medical records. *See id.* §§ 159.002, .004; Open Records Decision No. 598 (1991). ~~This office has concluded 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). This office also has concluded that, when a file is created as the result of a hospital stay, all 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). The information we have marked in Exhibit D constitutes medical records that are subject to the MPA. The district attorney may release these records only in accordance with the MPA. However, none of the remaining information in Exhibit D constitutes a medical record subject to the MPA and the remaining information may not be withheld on that basis.~~

Section 552.101 also encompasses section 773.091 of the Health and Safety Code, which provides in relevant 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), emergency medical services (“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-.093. Accordingly, with the exception of the information subject to section 773.091(g), the district attorney must withhold the documents we have marked in Exhibit D under section 552.101 in conjunction with section 773.091(b) of the Health and Safety Code.

Section 552.101 also encompasses laws that make criminal history record information (“CHRI”) confidential. CHRI generated by the National Crime Information Center or by the Texas Crime Information Center is confidential under federal and state law. Title 28, part 20

of the Code of Federal Regulations governs the release of CHRI that states obtain from the federal government or other states. Open Records Decision No. 565 at 7 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* at 10–12. Section 411.083 of the Government Code deems confidential CHRI the Department of Public Safety (“DPS”) maintains, except DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. *See* Gov’t Code § 411.083. Section 411.083(b)(1) and 411.089(a) of the Government Code authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for criminal justice purposes. *See* Gov’t Code § 411.089(b)(1). Upon review, we find the information in Exhibit E constitutes confidential CHRI that may not be released. The district attorney must withhold this information under section 552.101 in conjunction with section 411.083 of the Government Code.

Section 552.101 also encompasses section 560.003 of the Government Code, which provides that “[a] biometric identifier in the possession of a governmental body is exempt from disclosure under [the Act].” *Id.* § 560.003; *see id.* § 560.001(1) (“biometric identifier” means retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry). Section 560.002 of the Government Code provides, however, that “[a] governmental body that possesses a biometric identifier of an individual . . . may not sell, lease, or otherwise disclose the biometric identifier to another person unless . . . the individual consents to the disclosure[.]” *Id.* § 560.002(1)(A). The district attorney must withhold the thumbprints you have marked in Exhibit I under section 552.101 in conjunction with section 560.003 of the Government Code.

Section 552.101 also encompasses section 11 of article 49.25 of the Code of Criminal Procedure, which provides as follows:

The medical examiner shall keep full and complete records properly indexed, giving the name if known of every person whose death is investigated, the place where the body was found, the date, the cause and manner of death, and shall issue a death certificate The records are subject to required public disclosure in accordance with Chapter 552, Government Code, except that a photograph or x-ray of a body taken during an autopsy is excepted from required public disclosure in accordance with Chapter 552, Government Code, but is subject to disclosure:

- (1) under a subpoena or authority of other law; or
- (2) if the photograph or x-ray is of the body of a person who died while in the custody of law enforcement.

Crim. Proc. Code art. 49.25, § 11. You state the submitted information includes photographs and x-rays of the deceased taken during an autopsy. You state neither of the ~~statutory exceptions to confidentiality is applicable in this instance.~~ Based on your representation and our review, we find the district attorney must withhold Exhibit J under section 552.101 in conjunction with section 11 of article 49.25 of the Code of Criminal Procedure.

You claim Exhibit A is excepted from disclosure under section 552.108 of the Government Code, which 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 at issue. *See id.* § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You state the information at issue constitutes

information, internal records, and notations prepared by attorneys representing the state in anticipation of or in the course of preparing for criminal litigation. Based on your representations and our review of the information at issue, we conclude the district attorney may withhold Exhibit A under section 552.108(a)(4) and (b)(3) of the Government Code.

Next, we understand you to raise sections 552.117(a)(1) and 552.117(a)(2) of the Government Code for portions of the submitted information. Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security number, and family member information of a current or former employee of a governmental body who requests this information be kept confidential under section 552.024 of the Government Code. Act of May 24, 2011, 82nd Leg., R.S., S.B. 1638, § 2 (to be codified as an amendment to Gov't Code § 552.117(a)). Section 552.117(a)(2) excepts from disclosure the home address, home telephone number, emergency contact information, social security number, and family member information of a peace officer, regardless of whether the peace officer complies with sections 552.024 or 552.1175 of the Government Code.¹ *Id.* Sections 552.117(a)(1) and 552.117(a)(2) are only applicable to information the district attorney holds in its capacity as an employer. Upon review, we note the information at issue is not held by the district attorney in its capacity as an employer. As such, the district attorney may not withhold the information you have marked in Exhibit G under section 552.117(a)(1) or section 552.117(a)(2).

We note section 552.1175 of the Government Code may apply to a portion of the remaining information. Section 552.1175 provides, in part, that the home addresses and telephone numbers, emergency contact information, social security number, and family member information of a peace officer is confidential if an election is made under section 552.1175(b). Act of May 24, 2011, 82nd Leg., R.S., S.B. 1638, § 3 (to be codified as an amendment to Gov't Code § 552.1175(b)). To the extent the information we have marked in Exhibit G relates to a peace officer of another governmental entity, the district attorney must withhold this information under section 552.1175 if an election is made in accordance with section 552.1175(b).

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 an agency of this state or another state or country is excepted from public release. Act of May 24, 2011, 82nd Leg., R.S., S.B. 1638, § 4 (to be codified as an amendment to Gov't Code § 552.130(a)). We note that the purpose of section 552.130 is to protect the privacy interests of individuals. Because the right of privacy lapses at death, the Texas driver's license that pertains to the deceased individual may not be withheld under section 552.130. *See Moore v. Charles B. Pierce Film Enters., Inc.*, 589 S.W.2d 489, 491 (Tex. Civ. App.—Texarkana 1979, writ ref'd n.r.e.), *see also* Attorney General Opinions JM-229

¹Section 552.117(a)(2) adopts the definition of peace officer found at article 2.12 of the Code of Criminal Procedure.

(1984), H-917 (1976), ORD 272 at 1. The district attorney must withhold the information we have marked in Exhibits F, G, and H under section 552.130.

Section 552.136 of the Government Code provides “[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.” Gov’t Code § 552.136(b). An access device number is one that may be used to (1) obtain money, goods, services, or another thing of value, or (2) initiate a transfer of funds other than a transfer originated solely by paper instrument, and includes an account number. *See id.* § 552.136(a) (defining “access device”). Accordingly, the district attorney must withhold the debit card numbers we have marked in Exhibits F, G, and H under section 552.136.

In summary, in conjunction with section 552.101 of the Government Code, the district attorney must withhold: (1) the DNA records that we have marked in Exhibit B under section 411.153 of the Government Code; (2) Exhibit C under section 1703.306 of the Occupations Code; (3) the information we have marked in Exhibit D under the MPA; (4) with the exception of the information subject to section 773.091(g), the information we have marked in Exhibit D under section 773.091(b) of the Health and Safety Code; (5) Exhibit E under section 411.083 of the Government Code; (6) the thumbprints you have marked in Exhibit I under section 560.003 of the Government Code; and (7) Exhibit J under section 11 of article 49.25 of the Code of Criminal Procedure. The district attorney may withhold Exhibit A under section 552.108 of the Government Code. The district attorney must withhold the information we have marked in Exhibit G under section 552.1175 of the Government Code, if an election is made in accordance with that section. The district attorney must withhold the information we have marked in Exhibits F, G, and H under sections 552.130 and 552.136 of the Government Code.² The district attorney must release the remaining submitted information.³

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.

²We note this office issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including fingerprint information under section 552.101 of the Government Code in conjunction with section 560.003 of the Government Code; a Texas driver’s license number and a Texas license plate number under section 552.130 of the Government Code; and a debit card number under section 552.136 of the Government Code; without the necessity of requesting an attorney general decision.

³We note the information being released 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. Gov’t Code § 552.147(b).

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,

A handwritten signature in blue ink that reads "Tamara H. Holland".

Tamara H. Holland
Assistant Attorney General
Open Records Division

THH/bs

Ref: ID# 424654

Enc. Submitted documents

c: Requestor
(w/o enclosures)