



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 23, 2012

Mr. J. Frank Davis
Assistant District Attorney, Civil Division
Hays County Criminal District Attorney
111 East San Antonio Street, Suite 204
San Marcos, Texas 78666

OR2012-01085

Dear Mr. Davis:

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# 443007.

The Hays County Criminal District Attorney's Office (the "district attorney") received a request for the subpoena sent to military officials regarding a named individual's military records, all correspondence regarding those records and the subpoena, and all records received in response to the subpoena. You state you have released some of the requested information. You claim the submitted information is excepted from disclosure under sections 552.101 and 552.140 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we note the district attorney may have obtained the submitted information pursuant to a grand jury subpoena. The judiciary is expressly excluded from the requirements of the Act. *See id.* § 552.003(1)(B). This office has determined that for purposes of the Act, a grand jury is part of the judiciary and is therefore not subject to the Act. *See* Open Records Decision No. 411 (1984). Moreover, records kept by another person or entity acting as an agent for a grand jury are considered to be records in the constructive possession of the grand jury and are therefore 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 such information is in the grand jury's constructive possession when the same information also is 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. Therefore, to the extent the district attorney has possession of the submitted information as an agent of the grand jury, any 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, which need not be released to the requestor. To the extent the district attorney does not have possession of the submitted information as an agent of the grand jury, any such information is subject to the Act and must be released unless the information falls within the scope of an exception to disclosure.

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 federal law. The district attorney claims the submitted records are confidential under the Privacy Act. Section 552a(b) of the Privacy Act provides, "[n]o agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains[.]" 5 U.S.C. § 552a(b). However, our office and the courts have stated the Privacy Act applies only to federal agencies, and not to state or local agencies. *See St. Michael's Convalescent Hosp. v. State of California*, 643 F.2d 1369, 1373 (9th Cir. 1981) (definition of agency under Privacy Act does not encompass state agencies or bodies); *Shields v. Shetler*, 682 F. Supp. 1172, 1176 (D. Colo. 1988) (Privacy Act does not apply to state agencies or bodies); Attorney General Opinion MW-95 at 2 (1979) (neither FOIA nor federal Privacy Act applies to records held by state or local governmental bodies in Texas). Thus, the district attorney may not withhold the submitted personnel records on the basis of the Privacy Act.

Section 552.101 encompasses the Medical Practice Act ("MPA"), subtitle B of title 3 of the Occupations Code, which governs the public availability of medical records. *See* Occ. Code §§ 151.001-165.160. Section 159.002 of the MPA provides in pertinent 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). Section 151.002 of the Occupations Code defines “physician” as a person licensed to practice medicine in the state of Texas. Occ. Code § 151.002(a)(12). Upon review, you have not demonstrated the information at issue was created by a physician or someone under the supervision of a physician for the purposes of the MPA. Accordingly, none of the submitted information consists of medical records for the purposes of the MPA. Accordingly, the district attorney may not withhold any of the submitted information under section 552.101 in conjunction with the MPA.

Section 552.101 also encompasses the common-law right of privacy, which protects information that is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *See id.* at 681-82. This office has found some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). Upon review, we find the information we have marked is highly intimate or embarrassing and not of legitimate public concern. Accordingly, the district attorney must withhold the information we have marked under section 552.101 in conjunction with common-law privacy.

Section 552.140 of the Government Code provides in part:

- (a) This section applies only to a military veteran’s Department of Defense Form DD-214 or other military discharge record that is first recorded with or that otherwise first comes into the possession of a governmental body on or after September 1, 2003.

Id. § 552.140(a). Section 552.140 provides a military veteran’s DD-214 form or other military discharge record that is first recorded with or that otherwise first comes into the possession of a governmental body on or after September 1, 2003 is confidential for a period of seventy-five years and may only be disclosed in accordance with section 552.140 or in accordance with a court order. *See id.* § 552.140(a)-(b). The district attorney informs us it was first in possession of the submitted military discharge forms after September 1, 2003. Accordingly, the district attorney must withhold these forms, which we have marked, pursuant to section 552.140 of the Government Code.¹

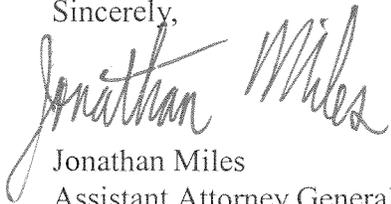
¹We note this office issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including a DD-214 under section 552.140 of the Government Code, without the necessity of requesting an attorney general decision.

In summary, to the extent the district attorney has possession of the information at issue as an agent of the grand jury, any such information is in the grand jury's constructive possession, is not subject to the Act, and need not be released to the requestor. To the extent the submitted information is subject to the Act, the district attorney must (1) withhold the information we have marked under section 552.101 in conjunction with common-law privacy; (2) withhold the military discharge forms we have marked under section 552.140 of the Government Code; and (3) release the remaining information.²

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,



Jonathan Miles
Assistant Attorney General
Open Records Division

JM/em

Ref: ID# 443007

Enc. Submitted documents

c: Requestor
(w/o enclosures)

²We note the information being released includes social security numbers. 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. See Gov't Code § 552.147(b).