



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

April 2, 2012

Mr. Jesse Blakley, Jr.  
Assistant District Attorney  
Brazoria County  
111 East Locust, Suite 408A  
Angleton, Texas 77515

OR2012-04725

Dear Mr. Blakley:

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# 409577.

The Brazoria County District Attorney's Office (the "district attorney's office") received five requests from the same requestor seeking 47 categories of information concerning a specified case, including (1) all evidence material to the case, (2) specified statements, interviews, reports, and notes created or collected by the district attorney's office, (3) specified exhibits presented during trial, (4) specified laboratory test results, (5) specified agreements between the state and other parties, (6) the victim's death certificate, (7) jail records concerning a named individual, (8) documents releasing the victim to the medical examiner, and (9) reports or records concerning the case from the Justice of the Peace. You claim the submitted information is excepted from disclosure under section 552.101 of the Government Code. We have considered the claimed exception and reviewed the submitted information. We have also considered comments received 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 address your assertion that the information at issue was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2011-13902 (2011). In that ruling, we determined the information at issue was used or developed in an investigation of alleged child abuse under chapter 261 of the Family Code,

and therefore was confidential under section 261.201(a) of the Family Code and must be withheld under section 552.101 of the Government Code on that basis. You seek to rely on the prior ruling, stating the information responsive to the instant request is identical to the information ruled on in Open Records Letter 2011-13902. However, we note that the previous request for information was submitted to the Brazoria County Sheriff's Office (the "sheriff's office"), while the instant request was submitted to the district attorney's office. These are two different governmental bodies. Therefore, the district attorney's office may not rely on our previous ruling to the sheriff's office as a previous determination for the information at issue. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). Accordingly, we will consider your arguments against disclosure of the information at issue.

First, we understand you to argue the instant request is improper because the information at issue is also being sought through formal discovery in the matter at issue. Section 552.0055 of the Government Code provides that "[a] subpoena duces tecum or a request for discovery that is issued in compliance with a statute or a rule of civil or criminal procedure is not considered to be a request for information under this chapter." Gov't Code § 552.0055. However, you do not assert the request is in fact a subpoena duces tecum or request for discovery, nor does anything in the request reflect that it meets the elements of a subpoena duces tecum. *See* Code Crim. Proc. arts. 24.02 (defining subpoena duces tecum), .03 (describing procedures for obtaining subpoenas, including subpoena duces tecum). Furthermore, the request does not indicate that the information is being otherwise requested pursuant to the authority of a statute or a rule of civil or criminal procedure. In fact, the requests state they are being made under the Act. We note the particular motives of an individual requesting records are not considered in determining whether information must be released under the Act. Gov't Code § 552.222(a)-(b) (governmental body may not make general inquiries of requestor or inquire into purpose for which information will be used). Nothing prohibits an individual from seeking information through both formal discovery and requests for information under the Act. Accordingly, we will consider whether the submitted information must be released under the Act.

We next note you have submitted only (1) two invoices to the defendant's attorney for laboratory testing and consultation services, (2) pharmacy, medical, and dental records of the defendant and victim, including State's Exhibit Numbers 49-52 and 60, (3) the State's prospective witness lists, (4) one laboratory test result document, and (5) two letters from the district attorney's office to the defendant's attorney concerning statements made by the defendant. You have not submitted the remaining information sought by the requestor. However, we note that part four of the first request seeks "actual clothing taken as evidence." This office has ruled tangible physical items are not "information" as that term is contemplated under the Act. *See, e.g.,* Open Records Decision No. 581 (1990).

Accordingly, any “actual clothing taken as evidence” that is maintained by the district attorney’s office is not public information as that term is defined in section 552.002 of the Government Code, and the district attorney’s office is not required to release such tangible items at issue to the requestor under the Act. *See* Gov’t Code §§ 552.002, .021. Therefore, with the exception of part four of the first request, to the extent the remaining requested information existed on the date the district attorney’s office received the request, we assume you have released it. *See* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible). If you have not released any such records, you must do so at this time. *See* Gov’t Code §§ 552.301(a), .302.

Next, we must address the district attorney’s office’s procedural obligations under section 552.301 of the Government Code when requesting a decision from this office under the Act. Pursuant to section 552.301(b), within ten business days after receiving the request the governmental body must request a ruling from this office and state the exceptions to disclosure that apply. *See id.* § 552.301(b). Pursuant to section 552.301(e), within fifteen business days of receipt of the request the governmental body must submit to this office (1) written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *See id.* § 552.301(e). In this instance, you state the district attorney’s office received the request for information on October 13, 2011. Accordingly, the ten-business-day deadline was October 27, 2011 and the fifteen-business-day deadline was November 3, 2011. The district attorney’s office, however, submitted all of the required information in an envelope postmarked January 27, 2012. *See id.* § 552.308(a) (deadline under the Act is met if document bears post office mark indicating time within the deadline period). Consequently, we find the district attorney’s office failed to comply with section 552.301 of the Government Code.

Pursuant to section 552.302 of the Government Code, a governmental body’s failure to comply with section 552.301 results in the legal presumption that the requested information is public and must be released unless a compelling reason exists to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); *see also* Open Records Decision No. 630 (1994). Generally, a compelling reason to withhold information exists where some other source of law makes the information confidential or where third party interests are at stake. Open Records Decision No. 150 at 2 (1977). You raise section 552.101 of the Government Code, which can provide a

compelling reason to withhold information. Therefore, we will address the applicability of section 552.101.

We first address the requestor's argument that the district attorney's office may not withhold information that was previously used in a public trial. This office has previously noted that "what information can or cannot be introduced during a trial and what information can or cannot be released to the public under the [predecessor to the Public Information] Act are two entirely different issues." Open Records Decision No. 416 at 7 (1984) (predecessor statute); *cf.* Crim. Proc. Code art. 38.02 (release of information by prosecutor to defense counsel for purpose relating to criminal prosecution is not "voluntary" release of information under the Act and does not waive prosecutor's future right to assert exceptions under the Act); *Cornyn v. City of Garland*, 994 S.W.2d 258, 265 (Tex. App.—Austin 1999, no pet.) (alleged prior disclosure of information in course of discovery did not foreclose possibility of raising litigation exception in response to subsequent request); Open Records Decision No. 579 (1990) (exchange of information among litigants in "informal" discovery is not "voluntary" release of information for purposes of statutory predecessor). However, section 552.007 of the Government Code provides if a governmental body receives a request for information it has previously *voluntarily* released to a member of the public, it may not withhold such information on the basis of any discretionary exception to disclosure; however it may claim the information is confidential under law. See Gov't Code § 552.007 (governmental body has discretion to release any information unless "expressly prohibited by law or the information is confidential under law"); see *also* Open Records Decision No. 522 at 4 (1989) (discretionary exceptions in general). The district attorney's office raises section 552.101 of the Government Code in conjunction with the Medical Practice Act (the "MPA"), and we note a portion of the submitted information is subject to section 552.101 in conjunction with chapter 258 of the Occupations Code and common-law privacy, as well as section 552.136 of the Government Code. Each of these provisions makes information confidential under the Act. Thus, even if we assume the requestor is correct in her assertion that portions of the information at issue were previously voluntarily released, such a situation would not prevent such information from now being withheld under provisions that render it confidential by law. Accordingly, we will address the applicability of sections 552.101 and 552.136.

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. This exception encompasses information made confidential by other statutes, such as section 261.201 of the Family Code. Section 261.201 provides, in relevant part:

- (a) [T]he following information is confidential, is not subject to public release under Chapter 552, Government Code, and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

- (1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and
- (2) except as otherwise provided in this section, the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

Fam. Code § 261.201(a). You assert the submitted information was used or developed in an investigation under chapter 261. *See id.* §§ 261.001(1) (defining “abuse” for purposes of chapter 261 of the Family Code), 101.003(a) (defining “child” for purposes of section 261.201 as person under 18 years of age who is not and has not been married or who has not had the disabilities of minority removed for general purposes). You further assert the information responsive to the instant request is identical to the information responsive to the prior request, which we determined was confidential under section 261.201(a) in Open Records Letter No. 2011-13902. However, we note the prior request sought only reports and notes created by the sheriff’s office, which is an agency authorized to conduct child abuse and neglect investigations under chapter 261 of the Family Code. The information submitted for our review in that instance included information used or developed by Child Protective Services during its investigation of alleged child abuse. The instant request seeks trial exhibits, notes, reports, and other information created by the district attorney’s office during a prosecution for capital murder. This is not the same information requested in the prior request, nor does the information submitted for our review in this instance appear to be the same information submitted for our review in response to the prior request. You have not explained how the submitted information was used or developed in a child abuse investigation under chapter 261. Accordingly, none of the submitted information may be withheld under section 552.101 of the Government Code in conjunction with section 261.201(a) of the Family Code.

Section 552.101 of the Government Code also encompasses the MPA, subtitle B of title 3 of the Occupations Code. *See Occ. Code* §§ 151.001-165.160. The MPA governs access to medical records and 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). We note the requestor argues that information may not be withheld under the MPA because of the exception to confidentiality provided by section 159.003, which provides in part:

(a) An exception to the privilege of confidentiality in a court or administrative proceeding exists:

...

(1) in a criminal prosecution in which the patient is a victim, witness, or defendant[.]

...

(c) Records or communications are not discoverable under Subsection (a)(10) until the court in which the prosecution is pending makes an in camera determination as to the relevancy of the records or communications or any portion of the records or communications. That determination does not constitute a determination as to the admissibility of the information.

*Id.* § 159.003(a)(10). However, this provision applies only to a determination of the discoverability of medical records in a criminal prosecution. It does not apply to determinations of whether medical records in the possession of governmental body must be released to the public under the Act. Further, as noted above, even if the submitted information contains medical records filed in court that are otherwise subject to required release under section 552.022(a)(17) of the Government Code, the MPA constitutes "other law" that makes information confidential for purposes of the Act. Accordingly, we will address the applicability of the MPA to the information at issue.

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). Section 159.001 of the MPA defines "patient" as a person who consults with or is seen by a physician to receive medical care. *See* Occ. Code § 159.001(3). Under this definition, a deceased person cannot be a "patient" under section 159.002 of the MPA. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). Thus, the MPA is applicable only to records relating to a person who was alive at the time of diagnosis, evaluation or treatment to which the records pertain.

Medical records must be released on the patient's signed, written consent, provided that the consent specifies (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. *See* Occ. Code §§ 159.004-.005. The medical records of a patient who is now deceased may only be released on the signed written consent of the decedent's personal representative. *See id.* § 159.005(a)(5). 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 documents that constitute confidential medical records of the defendant and the deceased victim. The district attorney's office must withhold these records under section 552.101 of the Government Code in conjunction with the MPA, unless the district attorney's office receives consent for release of the records that complies with sections 159.004 and 159.005 of the MPA.

Section 552.101 of the Government Code also encompasses section 258.102 of the Occupations Code. Section 258.102 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.

Occ. 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. *See id.* § 258.101(1). A person who receives information that is privileged under section 258.102 may disclose that information to another person only to the extent disclosure is consistent with the purpose for which the information was obtained. *See id.* § 258.108. Dental records must be released upon the patient's signed, written consent, provided the consent specifies (1) the information to be covered by the release, (2) the person to whom the information is to be released, and (3) the purpose for the release. *Id.* § 258.104. We find the information we have marked constitutes confidential dental records. Thus, the marked dental records must be withheld under section 258.102, unless the district attorney's office receives consent for release that complies with section 258.104.

Section 552.101 of the Government Code also encompasses the common-law right to privacy, which protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be met. *Id.* at 681-82. Common-law privacy protects the types of information held to be intimate or embarrassing in *Industrial Foundation*. *See id.* at 683 (information relating to sexual assault, pregnancy, mental or physical abuse in workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs). Additionally, this office has found some kinds of medical information or information indicating disabilities or specific illnesses are generally highly intimate or embarrassing. *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 of no legitimate public interest. Therefore, the district attorney's office must withhold the marked information under section 552.101 in conjunction with common-law privacy.

We note a portion of the remaining information is protected by section 552.136 of the Government Code. Section 552.136 of the Government Code provides 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." 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. *Id.* § 552.136(a). The district attorney's office must withhold the information we have marked under section 552.136.

Finally, we note the requestor argues that the requested information may not be withheld under sections 552.103 or 552.108 of the Government Code. However, the district attorney's office does not seek to withhold any information under those sections; thus, we need not address the requestor's arguments on those points.

In summary, the district attorney's office may release the marked medical and dental records only in accordance with the MPA and chapter 258 of the Occupations Code, respectively. The district attorney's office must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy and under section 552.136 of the Government Code. The remaining information must be released to the requestor.

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](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,



Misty Haberer Barham  
Assistant Attorney General  
Open Records Division

MHB/som

Ref: ID# 449577

Enc. Submitted documents

c: Requestor  
(w/o enclosures)