



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

April 12, 2012

Ms. Donna L. Clarke  
Assistant Criminal District Attorney  
Lubbock County District Attorney's Office  
P.O. Box 10536  
Lubbock, Texas 79408-3536

OR2012-05296

Dear Ms. Clarke:

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# 450454.

The Lubbock County District Attorney's Office (the "district attorney's office") received a request for information pertaining to two named individuals and a specified incident. You state the district attorney's office has released some information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.108 and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>1</sup>

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."<sup>2</sup> Gov't Code § 552.101. This section encompasses information protected by other statutes, such as

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<sup>1</sup>We assume the "representative sample" of information submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than those submitted to this office.

<sup>2</sup>The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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:

(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(b), (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. We have also found that when a file is created as the result of a hospital stay, all the 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). 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.

This office has determined that in governing access to a specific subset of information, the MPA prevails over the more general provisions of the Act. *See* ORD 598. 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 deceased patient 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 in the information at issue that constitute medical records. The district attorney’s office must withhold these records under the MPA, unless the district attorney’s office receives consent for release of those records that complies with sections 159.004 and 159.005(a)(5) of the MPA.<sup>3</sup>

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<sup>3</sup>As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

Next, we address your claim under section 552.111 of the Government Code for the remaining information at issue. Section 552.111 excepts from disclosure “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” Gov’t Code § 552.111. This exception encompasses the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure. *See City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); Open Records Decision No. 677 at 4-8 (2002). Rule 192.5 defines work product as

(1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party’s representatives, including the party’s attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or

(2) a communication made in anticipation of litigation or for trial between a party and the party’s representatives or among a party’s representatives, including the party’s attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

TEX. R. CIV. P. 192.5. A governmental body seeking to withhold information as attorney work product under section 552.111 bears the burden of demonstrating the information was created or developed for trial or in anticipation of litigation by or for a party or a party’s representative. *Id.*; ORD 677 at 6-8. In order for this office to conclude the information was developed or the communication was made in anticipation of litigation or for trial, we must be satisfied that

(a) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue and (b) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and [created or obtained the information] for the purpose of preparing for such litigation.

*Nat’l Tank Co. v. Brotherton*, 851 S.W.2d 193, 207 (Tex. 1993). A “substantial chance” of litigation does not mean a statistical probability, but rather “that litigation is more than merely an abstract possibility or unwarranted fear.” *Id.* at 204; ORD 677 at 7.

The work product doctrine is applicable to litigation files in both criminal and civil litigation. *See Curry v. Walker*, 873 S.W.2d 379, 381 (Tex. 1994); *see also U.S. v. Nobles*, 422 U.S. 225, 236 (1975). In *Curry*, the Texas Supreme Court determined a request for a district attorney’s “entire file” was “too broad” and, citing *Nat’l Union Fire Insurance Co. v. Valdez*, 863 S.W.2d 458, 460 (Tex. 1993), 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.”<sup>4</sup> *Curry*, 873 S.W.2d at 380. Accordingly, if a requestor seeks an attorney’s entire litigation file, and a governmental body demonstrates the file was created in anticipation of litigation or for trial, we will presume the entire file is excepted from disclosure under the attorney work product aspect of section 552.111. *See* Open Records Decision No. 647 at 5 (1996); *see also Nat’l Union*, 863 S.W.2d at 461 (organization of attorney’s litigation file necessarily reflects attorney’s thought processes). In this instance, we understand the district attorney’s office to contend the requestor seeks access to its entire file for a pending criminal prosecution. Based on your representations and our review, we conclude the district attorney’s office may withhold the remaining information at issue as attorney work product under section 552.111 of the Government Code.<sup>5</sup>

In summary, the district attorney’s office must withhold the medical records we have marked under the MPA, unless the district attorney’s office receives consent for release of those records that complies with sections 159.004 and 159.005(a)(5) of the MPA. The district attorney’s office may withhold the remaining information at issue as attorney work product under section 552.111 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](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,



Michelle R. Garza  
Assistant Attorney General  
Open Records Division

MRG/akg

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<sup>4</sup>We note the court also concluded in *National Union* that a specific document is not automatically considered to be privileged simply because it is part of an attorney’s file. *See* 863 S.W.2d at 461. The court held an opposing party may request specific documents or categories of documents that are relevant to the case without implicating the attorney work product privilege. *Id.*; *see* ORD 647 at 5.

<sup>5</sup>As we are able to make this determination, we need not address the other exception you claim.

Ref: ID# 450454

Enc. Submitted documents

c: Requestor  
(w/o enclosures)