



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 24, 2012

Ms. Meredith L. Kennedy
Assistant District Attorney
Wichita County
900 Seventh Street
Wichita Falls, Texas 76301

OR2012-17051

Dear Ms. Kennedy:

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# 468837.

The Wichita County District Attorney's Office (the "district attorney's office") received a request for all evidence, discovery, and video pertaining to the arrest of a named individual. You claim some of the submitted information is not subject to the Act. You also claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.108, 552.130, and 552.147 of the Government Code.¹ We have considered your arguments and reviewed the submitted information.

Initially, you inform us some of the submitted information consists of grand jury subpoenas and records obtained pursuant to those grand jury subpoenas. The judiciary is expressly excluded from the requirements of the Act. Gov't Code § 552.003(1)(B). This office has determined that a grand jury, for purposes of the Act, is a part of the judiciary and therefore not subject to the Act. *See* 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. *See* Open Records Decisions Nos. 513 (1988), 411, 398 (1983). *But see* ORD 513 at 4

¹Although you also raised sections 552.107, 552.111, 552.115, 552.117, 552.1175, 552.119, 552.132, 552.1325, 552.136, 552.137, 552.142, 552.1425, and 552.152 of the Government Code, you have not submitted arguments explaining how these exceptions apply to the submitted information. Therefore, we assume you have withdrawn these exceptions. *See* Gov't Code §§ 552.301, .302.

(defining limits of judiciary exclusion). Thus, the submitted information that is held by the district attorney's office as an agent of the grand jury consists of records of the judiciary not subject to disclosure under the Act, and we do not address its public availability. To the extent the submitted information is not held by the district attorney's office as an agent of the grand jury, we will address your arguments against disclosure of the submitted information.

Next, we note the submitted information contains documents subject to section 552.022(a)(17) of the Government Code. Section 552.022(a)(17) requires disclosure of "information that is also contained in a public court record," unless the information is expressly confidential under the Act or other law. Gov't Code § 552.022(a)(17). In this instance, the submitted information includes documents which have been signed by a magistrate. This information is expressly public under section 552.022(a)(17), and the district attorney's office must release it unless it is confidential under the Act. You raise sections 552.103 and 552.108 of the Government Code for this information. However, these are discretionary exceptions to disclosure that protect the governmental body's interests and do not make information confidential under the Act. *See id.* § 552.007; *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Record Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 177 at 3 (1977) (statutory predecessor to section 552.108 subject to waiver). Accordingly, the district attorney's office may not withhold the magistrate-signed documents under section 552.103 or section 552.108 of the Government Code. However, we note you also raise section 552.130 of the Government Code, which does make information confidential under the Act. Accordingly, we will consider the applicability of this exception to the information subject to section 552.022. We will also consider the applicability of the remaining exceptions you raise to the information not subject to section 552.022.

First, we address the applicability of section 552.130 of the Government Code to the information subject to section 552.022(a)(17). Section 552.130(a)(2) provides that information relating to a motor vehicle title or registration issued by an agency of this state, or another state or country, is excepted from public release. Gov't Code § 552.130(a)(2). Therefore, the district attorney's office must withhold the motor vehicle record information we have marked in the magistrate-signed documents under section 552.130(a)(2) of the Government Code.

Next, we address your arguments for the information not subject to section 552.022(a)(17). Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. Section 552.101 encompasses information made confidential by statute, such as the Medical Practice Act ("MPA"), subtitle B of title 3 of the Occupations Code, which governs release of medical records. *See Occ. Code* §§ 151.001-168.202. 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). This office has determined in governing access to a specific subset of information, the MPA prevails over the more general provisions of the Act, such as section 552.108 of the Government Code. *See* 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). Information subject to the MPA includes both medical records and information obtained from those medical records. *See* Occ. Code §§ 159.002, .004; ORD 598. We have further found when a file is created as a result of a hospital stay, all the documents in the file referring 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* ORDs 487, 370, 343. 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.

Upon review, we find portions of the submitted information, which we have marked, constitute records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that were created or are maintained by a physician and information obtained from a patient's medical records. Medical records must be released on receipt of signed, written consent, provided 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* 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). In this instance, the requestor

may be the personal representative of the deceased individual whose medical records are at issue. Thus, the medical records we have marked must be withheld under section 552.101 of the Government Code in conjunction with the MPA, unless the district attorney's office receives written consent from the deceased individual's personal representative for release of those records that complies with sections 159.004 and 159.005 of the MPA.

The submitted documents also include emergency medical services ("EMS") records to which the requestor may have a right of access. Section 552.101 of the Government Code also encompasses information protected by section 773.091 of the Health and Safety Code, which provides in part:

(b) Records of the identity, evaluation, or treatment of a patient by [EMS] personnel or by a physician providing medical supervision that are created by the [EMS] personnel or physician or maintained by an [EMS] 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). Except for the information specified in section 773.091(g), EMS records are deemed confidential and may be released only in accordance with chapter 773 of the Health & Safety Code. *See id.* §§ 773.091-.094. Upon review, we find section 773.091 is applicable to the information at issue, which we have marked. We note records that are confidential under section 773.091 may be disclosed to "any person who bears a written consent of the patient or other persons authorized to act on the patient's behalf for the release of confidential information[.]" *Id.* §§ 773.092(e)(4), .093. Section 773.093 provides a consent for release of EMS records must be written and signed by the patient, authorized representative, or personal representative and must specify: (1) the information or records to be covered by the release; (2) the reasons or purpose for the release; and (3) the person to whom the information is to be released. *Id.* § 773.093(a). When the patient is deceased, the patient's personal representative may consent to the release of the patient's records. *Id.*; *see also* Open Records Decision No. 632 (1995) (defining "personal representative" for purposes of section 773.093 of the Health and Safety Code). We note although you raise section 552.108 for the EMS records, the general exceptions found in the Act cannot impinge on a statutory right of access to information. *See* Open Records Decision No. 613 at 4 (1993) (exceptions in Act cannot impinge on a statutory right of access to information); *see also* Open Records Decision No. 451 (1986) (specific statutory right of access provisions overcome general exceptions to disclosure under the Act). Thus, if the district attorney's office does not receive consent that complies with section 773.093

of the Health and Safety Code, then with the exception of the information subject to section 773.091(g), the district attorney's office must withhold the marked EMS records under section 552.101 of the Government Code in conjunction with section 773.091(b) of the Health and Safety Code. However, if the district attorney's office receives proper consent, then the marked EMS records must be released in their entirety in accordance with chapter 773 of the Health and Safety Code. We will address your argument under section 552.108 of the Government Code for the remaining information not subject to section 552.022(a)(17), including the information subject to section 773.091(g) of the Health and Safety Code if the district attorney's office does not receive proper consent.

Section 552.108(a)(1) of the Government Code excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if: (1) release of the information would interfere with the detection, investigation, or prosecution of crime[.]" Gov't Code § 552.108(a)(1). Generally, a governmental body claiming section 552.108 must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You state the requested information relates to a pending criminal investigation and prosecution. Based upon this representation, we conclude section 552.108(a)(1) is applicable and the release of the remaining information would interfere with the detection, investigation, or prosecution of crime. *See Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975) (court delineates law enforcement interests that are present in active cases), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976).

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*. *See* 531 S.W.2d at 186-88. We note basic information includes a detailed description of the offense, but does not include motor vehicle information encompassed by section 552.130 of the Government Code. *See Open Records Decision No. 127 at 3-4 (1976)* (summarizing types of information deemed public *Houston Chronicle*). Thus, with the exception of basic information, you may withhold the remaining information, including the information subject to section 773.091(g) of the Health and Safety Code if the district attorney's office does not receive proper consent, under section 552.108(a)(1) of the Government Code.²

In summary, the information that is held by the district attorney's office as an agent of the grand jury consists of records of the judiciary and is not subject to disclosure under the Act. Except for the information we have marked to withhold under section 552.130 of the Government Code, the marked magistrate-signed documents are subject to

²As this ruling is dispositive of this information, we do not address your remaining arguments against disclosure except to note basic information is generally not excepted from public disclosure under section 552.103 of the Government Code. *Open Records Decision No. 597 (1991)*.

section 552.022(a)(17) of the Government Code and must be released. The district attorney's office must withhold the marked medical records under section 552.101 of the Government Code in conjunction with the MPA, unless the district attorney's office receives written consent from the deceased individual's personal representative for release of those records that complies with sections 159.004 and 159.005 of the MPA. With the exception of the information of the information subject to section 773.091(g) of the Health and Safety Code, the district attorney's office must withhold the marked EMS records under section 552.101 of the Government Code in conjunction with section 773.091(b) of the Health and Safety Code, unless the district attorney's office receives consent that complies with section 773.093 of the Health and Safety Code. With the exception of basic information, which must be released, the district attorney's office may withhold the remaining information, including the information subject to section 773.091(g) if the district attorney's office does not receive consent that complies with section 773.093, under section 552.108(a)(1) 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,



Kathryn R. Mattingly
Assistant Attorney General
Open Records Division

KRM/dls

Ref: ID# 468837

Enc. Submitted documents

c: Requestor
(w/o enclosures)