



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

July 24, 2003

Mr. John Feldt
Assistant District Attorney
Civil Division
Denton County
P.O. Box 2850
Denton, Texas 76202

OR2003-5114

Dear Mr. Feldt:

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# 184815.

The Denton County District Attorney's Office (the "District Attorney") received two requests for information from the same requestors. The first request seeks "all materials sent to [District Attorney Bruce Isaacks] via mail or fax by [either of the requestors], and all copies of cases sent to [him] or [his] office for prosecution re: [one of the requestors]." This request also asks the District Attorney to answer two questions, including why the District Attorney declined to prosecute numerous specified cases. The second request seeks "all materials sent to [Assistant District Attorney Lisa Decker] via mail or fax by [either of the requestors], and cases given to [her] by Lewisville Police [sic], reason why each declined [sic]." You inform us that Ms. Decker does not currently possess any correspondence sent to her by the requestors. We note that the Act does not require a governmental body to disclose information that does not exist at the time a request is received or to create new information in response to a request. *See Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986). You assert the submitted information is excepted from disclosure under sections 552.101, 552.107, 552.108, 552.111, and 552.130 of the Government Code. We reviewed the information you submitted and considered the exceptions you claim.

Initially, regarding the questions raised by the requestors in the first request for information, we note that the Act does not require a governmental body to answer questions. *See* Open Records Decision No. 555 at 1-2 (1990).

Next, as you acknowledge, the Medical Practice Act (the "MPA"), chapter 159 of the Occupations Code, governs some of the submitted information in Exhibit E. Section 159.002 of the MPA reads, in part, as follows:

(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.

Occ. Code § 159.002(a), (b), (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). Further, we have 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 at 1 (1990). The MPA permits disclosure of MPA records to the patient, a person authorized to act on the patient's behalf, or a person who has the written consent of the patient. Occ. Code §§ 159.003, .004, .005. The medical records must be released upon the patient's signed, written consent, provided that 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. Occ. Code §§ 159.004, .005. Section 159.002(c) also requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). In this instance, the requestor is the patient at issue; however, neither do you inform us nor does the submitted information indicate that the requestor has provided the District Attorney with a proper consent authorizing disclosure of the medical records to the requestor. Therefore, the District Attorney must withhold these records, which we have marked, in accordance with the MPA. *See* Open Records Decision No. 598 (1991).

Also, we note section 552.022 of the Government Code governs the submitted information. Section 552.022 provides, in relevant part, as follows:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). In this instance, section 552.022(a)(1) makes Exhibits D, E, and F expressly public as they consist of completed investigations. Therefore, the District Attorney may withhold this information only to the extent it is made confidential under other law or is otherwise protected by section 552.108 of the Government Code. Sections 552.107 and 552.111, discretionary exceptions under the Act, do not constitute "other law" that makes information confidential. *See* Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive Gov't Code § 552.107(1), 473 (1987) (governmental body may waive Gov't Code § 552.111); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the District Attorney may not withhold the submitted information under section 552.107 or 552.111 of the Government Code. However, we will address your arguments under section 552.108 of the Government Code.

You assert section 552.108 excepts Exhibits D, E, and F from required public disclosure. This provision provides, in pertinent part, as follows:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from the requirements of Section 552.021 if:

(1) release of the information would interfere with the detection, investigation or prosecution of crime; [or]

(2) it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication;

....

(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 the requirements of Section 552.021 if:

(1) release of the internal record would interfere with law enforcement or prosecution of crime; [or]

(2) the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication[.]

Gov't Code § 552.108(a)(1), (2), (b)(1), (2). Generally speaking, subsections 552.108(a)(1) and 552.108(b)(1) are mutually exclusive of subsections 552.108(a)(2) and 552.108(b)(2). Subsection 552.108(a)(1) protects information the release of which would interfere with a particular pending criminal investigation or prosecution, while subsection 552.108(b)(1) covers information the release of which would interfere with on-going law enforcement and prosecution efforts in general. In contrast, subsections 552.108(a)(2) and 552.108(b)(2) protect information that relates to concluded criminal investigations or prosecutions that did not result in conviction or deferred adjudication.

In this instance, you inform us that Exhibits D, E, and F concern investigations that did not result in conviction or deferred adjudication. You explain that the District Attorney declined to prosecute the incident at issue in Exhibits D and E and the two-year statute of limitations has expired. Further, you advise us that “[t]he information contained in Exhibit F does not relate to any matters that were ever prosecuted by the [District Attorney]” and that “[a]ll misdemeanor offenses described in Exhibit F would be barred for [sic] prosecution by the applicable two year statute of limitations.” Based on these representations, we conclude that Exhibits D, E, and F relate to cases that concluded in a result other than conviction or deferred adjudication. Therefore, the District Attorney may withhold Exhibits D, E, and F pursuant to section 552.108(a)(2).

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). We believe such basic information refers to the information held to be public in *Houston Chronicle Publishing Company v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). See Open Records Decision No. 127 (1976) (summarizing types of information considered basic information). Thus, the District Attorney must release the basic information in Exhibit E under section 552.108(c) of the Government Code.

In summary, the District Attorney must withhold the MPA records we have marked in accordance with the MPA. The District Attorney may withhold Exhibits D, E, and F under section 552.108 of the Government Code; however, the District Attorney must release basic information in Exhibit E as required by section 552.108(c). As section 552.108 is dispositive, we need not address your remaining claimed exceptions.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code

§ 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in cursive script that reads "Christen Sorrell".

Christen Sorrell
Assistant Attorney General
Open Records Division

CHS/seg

Ref: ID# 184815

Enc: Submitted documents

c: Mr. and Mrs. Larry and Barbara Wood
P.O. Box 1473
Addison, Texas 75001
(w/o enclosures)