



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 21, 2003

Ms. Johanna H. Grau
Assistant District Attorney
Dallas County
133 North Industrial Boulevard, LB-19
Dallas, Texas 75207-4399

OR2003-5886

Dear Ms. Grau:

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# 186344.

The Dallas County District Attorney's Office (the "district attorney") received a request to review all information relating to the capital murder trial of Jesse Joe Hernandez. You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, 552.108, 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the representative sample of information submitted to this office.¹

Initially, we note that some of the information at issue is not subject to the Act. This office has concluded that grand juries are not governmental bodies that are subject to the Act, so that records within their actual or constructive possession are not subject to disclosure under the Act. *See* Gov't Code §§ 552.003(1)(B), .0035(a); *see also* Open Records Decision No. 513 (1988); Open Records Decision No. 398 at 2 (1983) (grand jury is part of judiciary for purposes of the Act). When an individual or entity acts at the direction of the grand jury as its agent, information prepared or collected by the agent is within the grand jury's

¹We assume that the "representative sample" of records 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 that those records contain substantially different types of information than that submitted to this office.

constructive possession and is not subject to chapter 552. Open Records Decision No. 513 at 3. Information that is not so held or maintained is subject to chapter 552 and may be withheld from disclosure only if a specific exception to disclosure is applicable. *Id.* However, “the fact that information collected or prepared by the district attorney is submitted to the grand jury, when taken alone, does not mean that the information is in the grand jury’s constructive possession when the same information is also held by the district attorney.” *Id.* Therefore, to the extent the requested documents are maintained by the district attorney for or on behalf of the grand jury, they are in the custody of the district attorney as agent of the grand jury and not subject to disclosure under the Act. To the extent that they are not so maintained, they are subject to the Act and may be withheld only if an exception under the Act is shown to apply. As we are unable to determine the extent to which these documents are maintained for or on behalf of the grand jury, we will also address the exceptions that you claim under the Act for these documents.

Before addressing the exceptions you claim, we note that some of the submitted information is public by statute and cannot be withheld under an exception to disclosure. A search warrant affidavit is among the documents submitted to this office for review. An executed search warrant affidavit is made public by statute. *See* Code Crim. Proc. art. 18.01(b). In this instance, the submitted information indicates that a criminal investigator for the district attorney executed the search warrant associated with the submitted affidavit. Therefore, the district attorney must release the search warrant affidavit in its entirety under article 18.01(b) of the Code of Criminal Procedure. *See also* Open Records Decision No. 623 at 3 (1994) (exceptions to public disclosure under chapter 552 of Government Code generally do not apply to information that another statute expressly makes public).

The submitted documents contain information that relates to a sex offender who was subject to registration under Chapter 62 of the Code of Criminal Procedure. Article 62.02(b) of the Code of Criminal Procedure requires a sex offender registrant to provide the following information for the Department of Public Safety (“DPS”) sex offender registration database: the person’s full name; each alias; date of birth; sex; race; height; weight; eye color; hair color; social security number; driver’s license number; shoe size; home address; a photograph of the person; a complete set of the person’s fingerprints; the type of offense the person was convicted of; the age of the victim; the date of the conviction; the punishment received; an indication as to whether the person is discharged, paroled, or released on juvenile probation, community supervision, or mandatory supervision; and any other information required by DPS. *See* Crim. Proc. Code art. 62.02(b). This information is generally public information with the exception of the person’s social security number, driver’s license number, telephone number, all information required by DPS outside of the enumerated categories of information, and any information that would identify the victim of the offense for which the person is subject to registration. *See* Crim. Proc. Code art. 62.08(b). Accordingly, with the exception of the information not deemed public by article 62.08(b), the district attorney must release to the requestor the sex offender registration information in exhibits E-3 and E-6.

The submitted information includes the defendant's medical records to which the requestor may have a right of access under the Medical Practice Act (the "MPA"), chapter 159 of the Occupations Code. Section 159.002 of the MPA provides:

(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.

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). Medical records may be released only as provided under the MPA. Open Records Decision No. 598 (1991).

We also note that the submitted information includes court documents. Information filed with a court is generally a matter of public record and may not be withheld from disclosure. Gov't Code §552.022(a)(17); *Star-Telegram, Inc. v. Walker*, 834 S.W.2d 54 (Tex. 1992). Pursuant to section 552.022(a)(17), documents filed with a court must be released, except to the extent that they are confidential under other law. You claim that the court documents are confidential by statute. Thus, we will consider the applicability of section 552.101 to all of the remaining submitted information, including the court documents.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 261.201 of the Family Code reads in part as follows:

(a) The 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.

We find that the remaining information consists of records used or developed in an investigation made under chapter 261 of the Family Code. Because you have not cited any specific rule that the district attorney has adopted with regard to the release of this type of information, we assume that no such regulation exists. Given that assumption, the remaining information is confidential under section 261.201 and must be withheld from disclosure pursuant to section 552.101.² See Open Records Decision No. 440 at 2 (1986) (construing predecessor statute).

In summary, information maintained by the district attorney for or on behalf of the grand jury is not subject to disclosure under the Act. The search warrant affidavit must be released pursuant to article 18.01(b) of the Code of Criminal Procedure. Certain sex offender registration information is public under article 62.08(b) of the Code of Criminal Procedure and must be released. Absent the applicability of an MPA access provision, the district attorney must withhold the defendant's medical records pursuant to the MPA. The remaining information is confidential under section 261.201 of the Family Code and must not be released.

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

²Because we are able to resolve this matter under section 552.101, we need not address your other arguments against disclosure.

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,



Karen Hattaway
Assistant Attorney General
Open Records Division

KEH/sdk

Ref: ID# 186344

Enc: Submitted documents

c: Mr. Douglas H. Parks
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(w/o enclosures)