



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

September 7, 2004

Mr. C. Stephen Hughes
Assistant District Attorney
27th Judicial District of Texas
Bell County
P. O. Box 540
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OR2004-7598

Dear Mr. Hughes:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 208681.

The Office of the District Attorney, 27th Judicial District of Texas (the "district attorney") received a request for videotape or other tape recordings and other information pertaining to a certain automobile accident. You claim that the requested information, or portions thereof, is excepted from disclosure pursuant to sections 552.101, 552.103, 552.108, 552.111, and 552.130 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted representative sample documents.¹

Initially, we note that a portion of the submitted information may constitute a grand jury record that is not subject to the Public Information Act (the "Act"). This office has concluded that grand juries are not subject to the Act and that records that are within the constructive possession of grand juries are not public information subject to disclosure under the Act. *See* Open Records Decision No. 513 (1988). 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 constructive possession and is not subject to the Act. *See id.* Information that is not so held or maintained is subject to the Act and may be withheld only

¹ We 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.

if a specific exception to disclosure is applicable. *See id.* Thus, to the extent that the submitted record that we have marked is in the custody of the district attorney as agent of the grand jury, the record is in the constructive possession of the grand jury and is therefore not subject to disclosure under the Act. However, to the extent that this marked record is not in the custody of the district attorney as agent of the grand jury, we will address your claims regarding this record.

Next, we must address the procedural requirements of section 552.301 of the Government Code. Section 552.301(e) provides that a governmental body that requests an attorney general decision under section 552.301(a) must, within a reasonable time, but not later than the fifteenth business day after the date of receiving the written request, submit to the attorney general, among other items, a copy of the specific information requested or representative samples of it, labeled to indicate which exceptions to disclosure apply to which parts of the documents. *See id.* §552.301(e). You state that the district attorney received this request for information on July 2, 2004. Therefore, the district attorney had until July 23, 2004 to provide us with the specifically requested videotapes that are required to be submitted to us for review under section 552.301(e). To date, however, the district attorney has failed to provide us with these two requested videotapes. Consequently, we conclude that the district attorney failed to comply with the procedural requirements of section 552.301 of the Government Code with regard to the requested videotapes.

Because the district attorney failed to comply with the procedural requirements of section 552.301 in requesting this decision, the requested videotapes are now presumed public. *See Gov't Code § 552.302; see also Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex. App.—Austin 1990, no writ); *City of Houston v. Houston Chronicle Publ'g Co.*, 673 S.W.2d 316, 323 (Tex. App.—Houston [1st Dist.] 1984, no writ); Open Records Decision No. 319 (1982). The district attorney must demonstrate a compelling interest in order to overcome the presumption that the requested videotapes are now public. *See id.* Normally, a compelling interest is demonstrated when some other source of law makes the information at issue confidential or third party interests are at stake. *See Open Records Decision No. 150 at 2* (1977). Although the district attorney claims that these videotapes are excepted from disclosure pursuant to section 552.108 of the Government Code, we note that the district attorney has not demonstrated a compelling interest under this exception to disclosure in this instance that would allow the requested videotapes to be withheld from disclosure. *See Open Records Decision No. 177*(1977) (governmental body may waive statutory predecessor to section 552.108); *but see Open Records Decision No. 586* (1991) (need of another governmental body to withhold requested information may provide compelling reason for nondisclosure under section 552.108 in certain circumstances). Accordingly, we conclude that the district attorney may not withhold any portion of the requested videotapes under section 552.108 of the Government Code. Consequently, the district attorney must release the requested videotapes to the requestor.

We also note that the remaining submitted information includes a "Texas Peace Officer's Accident Report," which is subject to chapter 550 of the Transportation Code.

Section 550.065(b) provides that, except as provided by subsection (c), accident reports are privileged and confidential. *See* Transp. Code § 550.065(b). Section 550.065(c)(4) provides for the release of accident reports to a person who provides two of the following three pieces of information: (1) date of the accident; (2) name of any person involved in the accident; and (3) specific location of the accident. *See* Transp. Code § 550.065(c)(4). Under this provision, the Department of Public Safety or another governmental entity is required to release a copy of an accident report to a person who provides the agency with two or more pieces of information specified by the statute. *See id.* In this instance, we find that the requestor has provided the district attorney with at least two of the three pieces of information required under section 550.065(c)(4). Accordingly, we conclude that the district attorney must release the accident report form that we have marked pursuant to section 550.065(c)(4) of the Transportation Code.

In addition, we note that portions of the remaining submitted information constitute medical records that are subject to the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. The MPA provides that "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." Occupations Code § 159.002(b). 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). Medical records must be released upon the governmental body's receipt of 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. *See* 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. *See* Open Records Decision No. 565 at 7 (1990). We have marked the medical records that are subject to the MPA. The district attorney may only disclose these particular marked records in accordance with the access provisions of the MPA. *See* Occ. Code § 159.005(a)(5), (b); *see also* Open Records Decision Nos. 598 (1991), 546 (1990) (finding that because hospital treatment is routinely conducted under supervision of physicians, documents relating to diagnosis and treatment during hospital stay would constitute protected MPA records). Absent the applicability of an MPA access provision, the district attorney must withhold these particular marked records pursuant to the MPA.

Further, we note that the remaining submitted information contains emergency medical services ("EMS") records. Access to EMS records is governed by the provisions of section 773.091 of the Health and Safety Code. *See* Open Records Decision No. 598 (1991). Section 773.091 provides:

- (b) Records of the identity, evaluation, or treatment of a patient by emergency medical services personnel or by a physician providing medical supervision that are created by the emergency medical services personnel or

physician or maintained by an emergency medical services 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). Thus, except for the information specified in section 773.091(g), EMS records are deemed confidential under section 773.091 and, therefore, may only be released in accordance with chapter 773 of the Health and Safety Code. *See* Health & Safety Code §§ 773.091-.094. We note, however, that 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.” Health & Safety Code §§ 773.092(e)(4), .093. Section 773.093 provides that a consent for release of EMS records 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. We have marked the EMS records that are subject to chapter 773 of the Health and Safety Code. If section 773.092 applies in this instance, the district attorney must release these marked EMS records to the requestor. *See* Health & Safety Code §§ 773.092, .093; *see also* Open Records Decision No. 632 (1995). Otherwise, the district attorney must withhold these marked EMS records pursuant to section 773.091(b) of the Health and Safety Code, except for the information in these records that is not confidential under section 773.091(g).

Next, we note that portions of the remaining submitted information are subject to section 552.022 of the Government Code. Section 552.022 makes certain information public, unless it is expressly confidential under other law. *See* Gov’t Code § 552.022(a). One category of public information under section 552.022 is “information that is also contained in a public court record[.]” *Id.* §§ 552.022(a)(17). Portions of the remaining submitted information, that we have marked, are encompassed by section 552.022(a)(17) and must be released, unless they are confidential under other law. Although the district attorney claims that these portions of the information are excepted from disclosure under sections 552.103, 552.108, and 552.111 of the Government Code, we note that these exceptions to disclosure are discretionary exceptions to disclosure under the Act and, as such, do not constitute “other law” that makes information confidential for purposes of section 552.022.² Accordingly, we conclude that the district attorney may not withhold any

² Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.*, Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive

portion of this particular marked information under section 552.103, 552.108, or 552.111 of the Government Code. We note that the attorney work product privilege is also found in rule 192.5 of the Texas Rules of Civil Procedure. The Texas Supreme Court has held that “[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are ‘other law’ within the meaning of section 552.022.” *In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001). However, the Texas Rules of Civil Procedure only apply to “actions of a civil nature.” *See* Tex. R. Civ. P. 2. Accordingly, because the submitted information pertains to a criminal investigation, we find that the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure does not apply to any portion of this particular marked information and none of it may be withheld from the requestor on that basis.

You claim that social security numbers contained within the submitted information may be excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I).³ These amendments make confidential social security numbers and related records that are obtained or maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See* Open Records Decision No. 622 (1994). The district attorney has cited no law, nor are we aware of any law, enacted on or after October 1, 1990, that authorizes it to obtain or maintain social security numbers. Thus, we have no basis for concluding that these social security numbers are confidential under section 405(c)(2)(C)(viii)(I) of title 42 of the United States Code. We caution the district attorney, however, that section 552.352 of the Government Code imposes criminal penalties for the release of confidential information. Prior to releasing these social security numbers, the district attorney should ensure that they were not obtained and are not maintained by the district attorney pursuant to any provision of law enacted on or after October 1, 1990.

We now address your section 552.108 claim with regard to other portions of the remaining submitted information and the information in the marked EMS records that is not made confidential under section 773.091(g) of the Health and Safety Code. 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 .

attorney-client privilege, section 552.107(1)), 551 (1990) (statutory predecessor to section 552.103 serves only to protect governmental body’s position in litigation and does not itself make information confidential), 522 at 4 (1989) (discretionary exceptions in general), 473 (1987) (governmental body may waive statutory predecessor to section 552.111); *see also 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). Discretionary exceptions, therefore, do not constitute “other law” that makes information confidential for purposes of section 552.022 of the Government Code.

³ Section 552.101 of the Government Code excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. *See* Gov’t Code § 552.101. Section 552.101 encompasses information that is protected from disclosure by other statutes.

. . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]” Gov’t Code § 552.108(a)(1). A governmental body that claims an exception to disclosure under section 552.108 must reasonably explain how and why section 552.108 is applicable to that information. *See id.*; *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Open Records Decision No. 434 at 2-3 (1986). You state that the submitted information pertains to a pending criminal prosecution. Thus, we agree that section 552.108(a)(1) is applicable to the information at issue.

We note, however, that section 552.108 does not except from disclosure basic information about an arrested person, an arrest, or a crime. *See* 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 basic information that must be made available to public, to include detailed description of offense). Accordingly, we conclude that with the exception of basic information that must be released to the requestor, the district attorney may withhold the information that we have marked pursuant to section 552.108(a)(1) of the Government Code. We note, however, that the district attorney maintains the discretion to release all or part of this information that is not otherwise confidential by law.⁴ *See* Gov’t Code §552.007.

You also claim that portions of the submitted information are excepted from disclosure pursuant to section 552.130 of the Government Code. Section 552.130 excepts from disclosure information that relates to a motor vehicle operator’s or driver’s license or permit issued by an agency of this state or a motor vehicle title or registration issued by an agency of this state. *See* Gov’t Code § 552.130. Accordingly, we conclude that the district attorney must withhold the motor vehicle information that we have marked pursuant to section 552.130 of the Government Code, but only if this information constitutes Texas motor vehicle information.

Finally, we note that portions of the submitted information are copyrighted. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. *See* Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *See id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making such copies, the member of the public assumes the duty of compliance with the

⁴ Because we base our ruling with regard to this particular information on section 552.108(a)(1) of the Government Code, we need not address your remaining arguments for this information, except to note that “basic information” may not generally be withheld under section 552.103 of the Government Code. *See* Open Records Decision Nos. 597 (1991), 362 (1983).

copyright law and the risk of a copyright infringement suit.⁵ See Open Records Decision No. 550 (1990).

In summary, to the extent that the submitted record that we have marked is in the custody of the district attorney as agent of the grand jury, the record is in the constructive possession of the grand jury and is therefore not subject to disclosure under the Act. The district attorney must release the requested videotapes to the requestor. The district attorney must release the accident report form that we have marked pursuant to section 550.065(c)(4) of the Transportation Code. Absent the applicability of an MPA access provision, the district attorney must withhold the medical records that we have marked pursuant to the MPA. If section 773.092 of the Health and Safety Code applies in this instance, the district attorney must release the EMS records that we have marked to the requestor. Otherwise, the district attorney must withhold these marked EMS records pursuant to section 773.091(b) of the Health and Safety Code, except for the information in these records that is not confidential under section 773.091(g). Social security numbers contained within the submitted information may be confidential under federal law. With the exception of basic information that must be released, the district attorney may withhold the information that we have marked pursuant to section 552.108(a)(1) of the Government Code. The district attorney must withhold the motor vehicle information that we have marked pursuant to section 552.130 of the Government Code, but only if this information constitutes Texas motor vehicle information. The district attorney must release the remaining submitted information to the requestor; however, in doing so, the district attorney must comply with the applicable copyright law for the portions of the information that are copyrighted.

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

⁵ As our ruling is dispositive, we need not address your remaining arguments.

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,



Ronald J. Bounds
Assistant Attorney General
Open Records Division

RJB/krl

Ref: ID# 208681

Enc. Marked documents

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(w/o enclosures)