



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 11, 2005

Mr. Bruce Sadler
Assistant District Attorney
47th Judicial District of Texas
501 South Fillmore, Suite 5A
Amarillo, Texas 79101

OR2005-06080

Dear Mr. Sadler:

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# 227764.

The District Attorney's Office for the 47th District of Texas (the "district attorney") received a request for information regarding the death of the requestor's granddaughter. You state that some responsive information will be released to the requestor. However, you claim that the remaining requested information is excepted from disclosure pursuant to sections 552.003(1)(B), 552.101, 552.107, and 552.108 of the Government Code.¹ We have also received comments from an attorney for the Northwest Texas Healthcare System and the requestor. *See Gov't Code § 552.304* (providing that interested party may submit comments stating why information should or should not be released). We have considered all of the submitted arguments and reviewed the submitted representative sample of information.²

¹We note that section 552.107, not section 552.101, is the proper exception for claiming the attorney-client privilege. Open Records Decision No. 676 (2002).

²We 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). Here, we do not address any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Initially, we note that a portion of the submitted information is not responsive to the request. In the requestor's comments to this office, the requestor states that she is not seeking certain information, such as peer review reports. Thus, this decision is not applicable to the non-responsive information, and the district attorney need not release the submitted peer review report.

You state that some of the submitted information was "prepared for and presented for the benefit of the Potter County Grand Jury" and is therefore excluded from the Act. This office has concluded that a grand jury is not a governmental body that is subject to the Act, so records that are within the actual or constructive possession of a grand jury are not subject to disclosure under the Act. *See* Gov't Code §§ 552.003(1)(B) (Act's definition of governmental body does not include judiciary), .0035 (access to information collected, assembled, or maintained by or for judiciary is governed by rules adopted by Supreme Court of Texas or other applicable laws and rules); Open Records Decision No. 513 at 3 (1988) (information held by grand jury, which is extension of judiciary for purposes of Act, is not itself subject to Act). When an individual or an 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* Open Records Decision No. 513 at 3. Information that is not so held or maintained is subject to the Act and may be withheld from the public only if a specific exception to disclosure is shown to be 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.*

In this instance, we are unable to determine whether the district attorney maintains the information at issue on its own behalf or as an agent of the grand jury. Therefore, to the extent that the submitted information at issue in Exhibits F and K is in the custody of the district attorney as an agent of the grand jury, it is not subject to disclosure under the Act. The rest of this decision is not applicable to such information. However, to the extent that the information is not in the custody of the district attorney as an agent of the grand jury, it is subject to disclosure under the Act and the ruling below.

Next, you claim that a portion of the submitted information constitutes medical records, access to which is governed by the Medical Practice Act ("MPA"), subtitle B of title 3 of the Occupations Code. Section 159.002 provides in pertinent 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.

Occ. Code § 159.002(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). Furthermore, we have concluded that when a file is created as the result of a hospital stay, all of the documents in the file that relate to diagnosis and treatment constitute either physician-patient communications or records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician. *See* Open Records Decision No. 546 (1990). 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. Medical records pertaining to a deceased individual may be released only on the signed consent of the personal representative of the deceased. Occ. Code § 159.005(a)(5). The consent must specify (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. *See* Open Records Decision No. 565 at 7 (1990). We have marked the medical record information that is subject to the MPA. Absent the applicability of an MPA access provision, the district attorney must withhold this information pursuant to the MPA.

Because your claim under section 552.108 is potentially broadest, we address it next. Section 552.108(a)(2) excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . 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[.]" Section 552.108(a)(2) is applicable only if the information in question relates to a concluded case that did not result in a conviction or a deferred adjudication. You inform us that the remaining submitted information pertains to a criminal investigation that did not result in conviction or deferred adjudication. Based on your representations and our review, we agree that section 552.108(a)(2) is applicable to the remaining submitted information.

However, section 552.108 does not except basic information about an arrested person, an arrest, or a crime. *See* Gov't Code § 552.108(c), *Houston Chronicle Publ'g Co. 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). We believe such basic information refers to the information held to be public in *Houston Chronicle*, including a detailed description of the offense. *See* 531 S.W.2d at 186-87. Thus, the district attorney must release the types of information that are considered to be front page information, even if this information is not

actually located on the front page. See Open Records Decision No. 127 (1976) (summarizing types of information made public by *Houston Chronicle*). With the exception of the basic information, the district attorney may withhold the remaining submitted information based on section 552.108(a)(2). We note that the district attorney has the discretion to release all or part of the information at issue that is not otherwise confidential by law. Gov't Code § 552.007.

In summary, to the extent that the district attorney has custody of any portion of the submitted information as agent of the grand jury, such information is in the grand jury's constructive possession and is not subject to disclosure under the Act. We have marked the information that may be released only in accordance with the MPA. With the exception of basic information, which must be released, the district attorney may withhold the remaining submitted information pursuant to section 552.108(a)(2) of the Government Code.³

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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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).

³As our ruling is dispositive, we do not address the remaining arguments.

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); *Tex. 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,



Debbie K. Lee
Assistant Attorney General
Open Records Division

DKL/seg

Ref: ID# 227764

Enc. Submitted documents

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