ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 15, 2006

Ms. Holly C. Lytle
Assistant County Attorney
El Paso County
500 East San Antonio, Room 503
El Paso, Texas 79901

OR2006-06352

Dear Ms. Lytle:

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# 252423.

The 34th Judicial District Attorney's Office (the "district attorney's office"), which you are representing, received a request from an assistant city attorney with the City of El Paso for a specified case file. You state that the district attorney's office will release most of the responsive information to this requestor.[1] You claim that the submitted information is excepted from disclosure under sections 552.101, 552.108, and 552.111 of the Government Code, as well as rule 192.5 of the Texas Rules of Civil Procedure and article 39.14 of the

[1]We note that information may be transferred between governmental bodies that are subject to the Act without waiving exceptions to the public disclosure of that information or affecting its confidentiality. *See* Attorney General Opinion JM-590 (1986); Open Records Decision No. 661 at 3 (1999). These decisions are based on the well-settled policy of this state that governmental agencies should cooperate with each other in the interest of efficient and economical administration of their statutory duties. *See* Open Records Decision No. 516 (1989). Thus, a transfer of information between state agencies is not a release of the information to the public for the purposes of section 552.007 of the Government Code, which prohibits the selective disclosure of information, or for those of section 552.352 of the Government Code, which provides criminal penalties for the release of information that is considered to be confidential. *Id.*

Texas Code of Criminal Procedure. We have considered your arguments and reviewed the submitted information.

Initially, you claim that some of the submitted information qualifies as grand jury records. We note that the judiciary is expressly excluded from the requirements of the Act. *See* 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 another person or entity acting as an agent for a grand jury are considered to be records in the constructive possession of the grand jury and therefore are not subject to the Act. *See* Open Records Decisions Nos. 513 (1988), 411 (1984), 398 (1983). The fact that information collected or prepared by another person or entity is submitted to the grand jury does not necessarily mean that such information is in the grand jury's constructive possession when the same information is also held in the other person's or entity's own capacity. Information held by another person or entity but not produced at the direction of the grand jury may well be protected under one of the Act's specific exceptions to disclosure, but such information is not excluded from the reach of the Act by the judiciary exclusion. *See* Open Records Decision No. 513. Therefore, to the extent that the information at issue is held by the district attorney's office as an agent of the grand jury, such information is in the grand jury's constructive possession and is not subject to disclosure under the Act. The rest of this decision is not applicable to such information. To the extent that the information at issue is not held by the district attorney's office as an agent of the grand jury, so as to be subject to the Act, we consider it with the remaining submitted information.

Next, we note, and you acknowledge, that the district attorney's office has not complied with the time periods prescribed by section 552.301 of the Government Code in seeking an open records decision from this office. When a governmental body fails to comply with the procedural requirements of section 552.301, the information at issue is presumed public. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (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). To overcome this presumption, the governmental body must show a compelling reason to withhold the information. *See* Gov't Code § 552.302; *Hancock*, 797 S.W.2d at 381.

Sections 552.108 and 552.111 of the Government Code and rule 192.5 of the Texas Rules of Civil Procedure are discretionary exceptions to disclosure that protect a governmental body's interests and may be waived. *See* Gov't Code § 552.007; Open Records Decision Nos. 677 at 10-11 (2002) (attorney work-product privilege under Gov't Code § 552.111 and rule 192.5 of the Texas Rules of Civil Procedure may be waived), 665 at 2 n.5 (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 177 at 3 (1977) (statutory predecessor to Gov't Code § 552.108 subject to waiver). The district attorney's office's claims under sections 552.108 and 552.111 and rule 192.5 are not compelling reasons for non-disclosure under section 552.302. In failing to comply with section 552.301,

the district attorney's office has waived its claims under sections 552.108 and 552.111 of the Government Code and rule 192.5 of the Texas Rules of Civil Procedure. Therefore, none of the submitted information may be withheld under those provisions. Furthermore, the district attorney's office's claim under article 39.14 of the Texas Code of Criminal Procedure is not a compelling reason for non-disclosure because this provision concerns the discovery of information and does not make information confidential. *See, e.g.*, Open Records Decision Nos. 575 (1990), 574 (1990). However, as section 552.101 of the Government Code can provide a compelling reason to withhold information, we will address your arguments under this exception.

Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses information that is made confidential by another statute. Article 20.02(a) of the Texas Code of Criminal Procedure provides that "[t]he proceedings of the grand jury shall be secret." The submitted transcript of the testimony of a grand jury witness is part of the record of the grand jury proceeding.[2] *See Stern v. State*, 869 S.W. 2d 614 at 621 (Tex. App.—Houston [14th Dist.] 1994, writ denied); *see also* Open Records Decision No. 398 (1983). Therefore, the submitted grand jury testimony, which we have marked, is confidential under article 20.02(a) of the Texas Code of Criminal Procedure and must be withheld under section 552.101 of the Government Code. *See* Open Records Decision No. 513 at 4.

We note that the remaining information contains emergency medical services records. Section 552.101 of the Government Code also encompasses 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 emergency medical services personnel or by a physician providing medical

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[2]Release of such information is governed by article 20.02(c) of this code, which provides:

> [a] disclosure of a record made under Article 20.012, a disclosure of a typewritten transcription of that record, or a disclosure otherwise prohibited by Subsection (b) or Article 20.16 may be made by the attorney representing the state in performing the attorney's duties to a grand juror serving on the grand jury before whom the record was made, another grand jury, a law enforcement agency, or a prosecuting attorney, as permitted by the attorney representing the state and determined by the attorney as necessary to assist the attorney in the performance of the attorney's duties. The attorney representing the state shall warn any person the attorney authorizes to receive information under this subsection of the person's duty to maintain the secrecy of the information. Any person who receives information under this subsection and discloses the information for purposes other than those permitted by this subsection is subject to punishment for contempt in the same manner as persons who violate Subsection (b).

Code Crim. Proc. art. 20.02(c).

> 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.

Health & Safety Code § 773.091. Subsection 773.091(g) provides, however, that this confidentiality "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." *Id.* § 773.091(g).

After our review, we find that some of the submitted information consists of records of the identity, evaluation, or treatment of a patient by emergency medical services personnel. You do not indicate that the district attorney's office has received written consent regarding the release of these records. *See id.* § 773.093 (listing elements of consent for release of EMS records). Thus, with the exception of the information subject to section 773.091(g), the district attorney's office must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 773.091 of the Health and Safety Code.

The remaining information also includes medical records. Section 552.101 of the Government Code also encompasses information protected by the Medical Privacy Act (the "MPA"), chapter 159 of the Occupations Code. Section 159.002 of the MPA provides in 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). Further, information that is subject to the MPA also includes information that was obtained from medical records. *See* Occ. Code. § 159.002(a), (b), (c); *see also* Open Records Decision No. 598 (1991).

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 reviewed the remaining information and marked the submitted medical records which may only be released in accordance with the MPA.

We note that the remaining information includes a driver's license number. Section 552.130 of the Government Code provides in relevant part:

> (a) Information is excepted from the requirement of Section 552.021 if the information relates to:
>
> > (1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or]
> >
> > (2) a motor vehicle title or registration issued by an agency of this state[.]

Gov't Code § 552.130(a)(1), (2). Pursuant to section 552.130, the district attorney's office must withhold the driver's license number we have marked.

We also note that the remaining information contains a social security number. Section 552.147 of the Government Code provides that "[t]he social security number of a living person is excepted from" required public disclosure under the Act. Therefore, the district attorney's office must withhold the social security number we have marked under section 552.147 of the Government Code.[3]

In summary, to the extent that some of the submitted information is held by the district attorney's office as an agent of the grand jury, such information is in the grand jury's constructive possession and is not subject to disclosure under the Act. Otherwise, it must be disposed of in accordance with the remainder of this ruling. The submitted grand jury testimony, which we have marked, is confidential under article 20.02(a) of the Texas Code of Criminal Procedure and must be withheld under section 552.101 of the Government Code. With the exception of the information subject to section 773.091(g) of the Health and Safety Code, the district attorney's office must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 773.091 of the Health and Safety Code. The submitted medical records which we have marked may only be released in accordance with the MPA. The district attorney's office must also withhold the

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[3]We note that section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act.

driver's license number and social security number we have marked under sections 552.130 and 552.147 of the Government Code, respectively. The remaining information must be released to the requestor.

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).

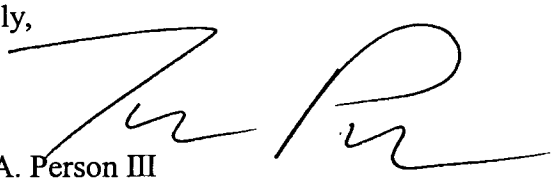
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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 Office of the Attorney General 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. 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,



James A. Person III
Assistant Attorney General
Open Records Division

JAP/sdk

Ref: ID# 252423

Enc. Submitted documents

c: Ms. Jennifer F. Callan
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(w/o enclosures)