



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 27, 2006

Mr. Michael B. Gary
Assistant Criminal District Attorney
Smith County
100 North Broadway, 4th Floor
Tyler, Texas 75702

OR2006-08197

Dear Mr. Gary:

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# 255106.

The Smith County District Attorney's Office (the "district attorney") received a request for information pertaining to a named individual regarding an incident that occurred in January 2004. You claim that the requested information is excepted from disclosure under sections 552.103 and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that some of the submitted information appears to have been obtained pursuant to a grand jury subpoena. 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); *but see* Open Records Decision No. 513 at 4 (defining limits of judiciary exclusion). 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 any of the information at issue is held by the district attorney 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 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 that the submitted information includes arrest warrants and arrest warrant affidavits. Article 15.26 of the Code of Criminal Procedure states "[t]he arrest warrant, and any affidavit presented to the magistrate in support of the issuance of the warrant, is public information." Crim. Proc. Code art. 15.26. The exceptions to disclosure found in the Act do not apply to information that is made public by other statutes. *See* Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1985) (statutory predecessor). Thus, the district attorney must release the arrest warrants and arrest warrant affidavits, which we have marked, in their entirety pursuant to article 15.26 of the Code of Criminal Procedure.

The submitted information also contains a search warrant affidavit, the release of which is governed by article 18.01 of the Code of Criminal Procedure. Article 18.01 provides in part:

(b) No search warrant shall issue for any purpose in this state unless sufficient facts are first presented to satisfy the issuing magistrate that probable cause does in fact exist for its issuance. A sworn affidavit setting forth substantial facts establishing probable cause shall be filed in every instance in which a search warrant is requested. The affidavit is public information if executed, and the magistrate's clerk shall make a copy of the affidavit available for public inspection in the clerk's office during normal business hours.

Crim. Proc. Code art. 18.01(b). This provision makes the search warrant affidavit expressly public if the search warrant has been executed. The submitted documents indicate that the search warrant has been executed. As previously noted, the exceptions found in the Act do not, as a general rule, apply to information that is made public by other statutes. Therefore, pursuant to article 18.01(b) of the Code of Criminal Procedure, the district attorney must release the submitted search warrant affidavit.

Next, we note that the submitted information contains search warrants and other documents that have been filed with a court. Section 552.022 of the Government Code provides in part:

(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:

...

(17) information that is also contained in the public court record[.]

Gov't Code § 552.022(a)(17). Section 552.022(a)(17) makes an executed search warrant and other documents which have been filed with a court expressly public and not excepted from required disclosure under chapter 552 of the Government Code unless they are expressly confidential under other law. *See* Gov't Code § 552.022(a)(17); *see also* *Star-Telegram, Inc. v. Walker*, 834 S.W.2d 54 (Tex. 1992) (documents filed with court are public documents and must be released). Therefore, the district attorney may withhold the executed search warrants and other court filed documents only to the extent they are made confidential under other law. Although you assert that this information is excepted under sections 552.103 and 552.108 of the Government Code, these sections are discretionary exceptions under the Act and are not other laws that make information confidential for purposes of section 552.022. *See 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); Open Records Decision No. 177 (1977) (governmental body may waive statutory predecessor to section 552.108); *see also* Open Records Decision No. 665 at 2 n. 5 (2000) (discretionary exceptions generally). Thus, the search warrants and other court-filed information, which we have marked, may not be withheld under section 552.103 or 552.108 of the Government Code. However, the records at issue include information that is subject to other exceptions in the Act which constitute other law for purposes of section 552.022. Accordingly, we will address those exceptions for the information subject to section 552.022 along with the remaining information.¹

Next, we note that some of the documents subject to section 552.022(a)(17) contain fingerprint information. Section 552.101 of the Government Code excepts from required public disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision,” and encompasses information made confidential by statute. Gov't Code § 552.101. Chapter 560 of the Government Code provides that a governmental body may not release fingerprint information except in certain limited circumstances. *See* Gov't Code §§ 560.001 (defining “biometric identifier” to include fingerprints), 560.002 (prescribing manner in which biometric identifiers must be maintained and circumstances in which they can be released), 560.003 (providing that biometric identifiers in possession of governmental body are exempt from disclosure under Act). Upon review, we find that section 560.002 does not permit disclosure of the submitted fingerprint information in this instance. Therefore, the district attorney must withhold this information, which we have marked, under section 552.101 in conjunction with section 560.003 of the Government Code.

¹The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

The documents subject to section 552.022(a)(17) also include medical records, access to which is governed by the Medical Practice Act (the "MPA"), chapter 159 of the Occupations Code. Section 159.002 of the MPA provides in part as follows:

(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). 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. *Id.* §§ 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 have marked the information that constitutes medical records, and that may only be released in accordance with the MPA.

Chapter 611 of the Health and Safety Code provides for the confidentiality of records created or maintained by a mental health professional. Section 611.002(a) reads as follows:

Communications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.

Health & Safety Code § 611.002(a). Section 611.001 defines a "professional" as (1) a person authorized to practice medicine, (2) a person licensed or certified by the state to diagnose, evaluate or treat mental or emotional conditions or disorders, or (3) a person the patient reasonably believes is authorized, licensed, or certified. *Id.* § 611.001(b). Sections 611.004 and 611.0045 provide for access to mental health records only by certain individuals. *See* Open Records Decision No. 565. We have marked the information that constitutes mental health records, and that may only be released in accordance with sections 611.004 and 611.0045 of the Health and Safety Code.

Next, we note that portions of the documents subject to section 552.022(a)(17), which we have marked, consist of Emergency Medical Services ("EMS") reports of the identity, evaluation, or treatment of patients by EMS personnel. 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.” *Id.* §§ 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. *See id.* § 773.093. If section 773.092 applies in this instance, the district attorney must release the marked EMS records. *See id.* §§ 773.092, .093; *see also* Open Records Decision No. 632 (1995). Otherwise, the district attorney must withhold these 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). As you claim no additional exceptions to disclosure for the remaining information that is subject to section 552.022(a)(17) of the Government Code, and this information is not otherwise confidential by law, it must be released to the requestor.

Turning to the remaining information, section 552.108 of the Government Code states in pertinent part:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure] if:

...

(4) it is information that:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) represents the mental impressions or legal reasoning of an attorney representing the state.

Gov’t Code § 552.108(a)(4). A governmental body must reasonably explain how and why section 552.108 is applicable to the information that the governmental body seeks to withhold under this exception. *See id.* § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Open Records Decision No. 434 at 2-3 (1986).

Sections 552.108(a)(4) is applicable to information that was prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation

or that reflects the mental impressions or legal reasoning of an attorney representing the state. In this instance, you represent that the submitted information consists of the district attorney's mental impressions or legal reasoning in anticipation of trial. Upon review, we agree that the submitted information reveals the attorney's mental impressions and legal reasoning regarding the handling of the requested case file. Accordingly, section 552.108(a)(4) is applicable to the remaining submitted information.

However, section 552.108 is inapplicable to basic information about an arrested person, an arrest, or a crime. Gov't Code § 552.108(c). Basic information refers to the information held to be public in *Houston Chronicle*. See Open Records Decision No. 127 at 3-4 (1976) (summarizing types of information considered to be basic information). Thus, with the exception of basic information that must be released, the district attorney may withhold the remaining information from disclosure under section 552.108(a)(4).² The district attorney has the discretion to release all or part of the information that is not otherwise confidential by law. Gov't Code § 552.007.

In summary, to the extent that a portion of the information at issue was obtained pursuant to a grand jury subpoena and is held by the district attorney as an agent of the grand jury, it consists of records of the judiciary not subject to disclosure under the Act. The district attorney must release the marked arrest warrants and supporting affidavits under article 15.26, and the marked search warrant affidavit under article 18.01 of the Code of Criminal Procedure. The district attorney may release (1) the marked medical records only in accordance with the MPA; (2) the marked mental health records only in accordance with sections 611.004 and 611.0045 of the Health and Safety Code; and (3) the marked EMS records only in accordance with section 773.091(b) of the Health and Safety Code. With the exception of the marked fingerprint information, the district attorney must also release the search warrants and other court-filed information pursuant to section 552.022(a)(17) of the Government Code. With the exception of basic information, the district attorney may withhold the remaining submitted information not subject to section 552.022 under section 552.108(a)(4) of the Government Code.

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

²As our ruling is dispositive, we need not address your remaining argument against disclosure, except to note that basic information is generally not excepted under section 552.103 of the Government Code. See Open Records Decision No. 597 (1991).

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).

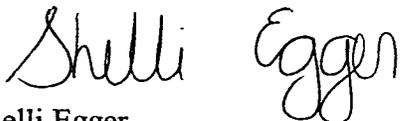
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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,



Shelli Egger
Assistant Attorney General
Open Records Division

SE/sdk

Ref: ID# 255106

Enc. Submitted documents

c: Mr. Steve Spitzer
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(w/o enclosures)