



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 4, 2007

Mr. Christopher W. Ponder
Assistant District Attorney
Tarrant County
401 West Belknap
Fort Worth, Texas 76196-0201

OR2007-05256

Dear Mr. Curry:

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# 277930.

The Tarrant County District Attorney's Office (the "district attorney") received a request for the prosecutor's file on a named individual. You state that the district attorney does not maintain some of the requested information.¹ You claim that the submitted information is excepted from disclosure under sections 552.101, 552.107, 552.108, 552.111, 552.132, and 552.1325 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.²

¹We note that the Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App. -San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

²We understand you to assert that the submitted information is a representative sample of the requested documents. 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.

Initially, we address your argument that certain responsive information consists of grand jury records that are 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 that are within their actual or constructive possession are not subject to 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 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 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.*

You state that in this case, the district attorney acted at the direction of a grand jury as their agent in preparing or collecting some of the responsive information. You have enclosed an affidavit from an Assistant Tarrant County District Attorney attesting to the fact that the information at issue is maintained by the district attorney as an agent of the grand jury and that such information was compiled at the express direction of a Tarrant County Grand Jury. You further state that this affidavit has been presented to this office in lieu of the actual information prepared or collected by the district attorney as the grand jury's agent. *See* Open Records Decision No. 513 at 4-5 (providing that, while district attorney need not submit copies of information obtained pursuant to a grand jury subpoena or information collected at the direction of the grand jury, governmental body should submit affidavit stating that requested information was prepared or collected at the express direction of the grand jury). Based on your representations and the submitted affidavit, we agree that information in the custody of the district attorney as agent of the grand jury is not subject to the Act.

Next, we note that the submitted information includes 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 the following:

(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). Information that is subject to the MPA includes both medical records and information obtained from those medical records. *See* Occ. Code §§ 159.002, .004; Open Records Decision No. 598 (1991). 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). We have further found that when a file is created as the result of a hospital stay, all the documents in the file relating to diagnosis and treatment constitute physician-patient communications or “[r]ecords of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician.” Open Records Decision No. 546 (1990).

When medical records pertain to a minor, such records may only be released upon the parent’s or legal guardian’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, 159.005. Any subsequent release of medical records must be consistent with the purposes for which the governmental body obtained the records. *See id.* § 159.002(c); Open Records Decision No. 565 at 7 (1990). We have marked the documents that constitute medical records. In this instance, the requestor is the parent of the child to whom the medical information pertains. Thus, the requestor may have a right of access to the marked medical records under the MPA. *See* Occ. Code § 159.005(a)(2). The marked medical records may only be released in accordance with the MPA. *See* Open Records Decision No. 598.

Turning to the remaining submitted information, section 552.101 of the Government Code exempts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This exception encompasses information made confidential by statute. Section 261.201 of the Family Code provides in relevant part:

(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, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

Fam. Code § 261.201(a). Upon review, we determine that the remaining submitted information consists of files, reports, records, communications, or working papers used or developed in an investigation under chapter 261. *See id.* § 261.001 (defining “abuse” for purposes of Family Code ch. 261). Thus, this information is within the scope of section 261.201 of the Family Code. You have not indicated that the district attorney has adopted a rule that governs the release of this type of information. Therefore, we assume that no such regulation exists. Given that assumption, we find that the remaining submitted information is confidential pursuant to section 261.201 of the Family Code and must be withheld in its entirety under section 552.101 of the Government Code.³ *See* Open Records Decision Nos. 440 at 2 (1986) (predecessor statute).

In summary, the information in the custody of the district attorney as agent of the grand jury is not subject to the Act. The marked medical records may only be released in accordance with the MPA. The remaining submitted information is confidential pursuant to section 261.201 of the Family Code and must be withheld in its entirety under section 552.101 of the Government Code.⁴

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

³We note, however, that if the Texas Department of Family and Protective Services has created a file on this alleged abuse, the child’s parent(s) may have the statutory right to review that file. *See* Fam. Code § 261.201(g).

⁴As our ruling is dispositive, we need not address your remaining arguments against disclosure.

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,



M. Alan Akin
Assistant Attorney General
Open Records Division

AA/mcf

Ref: ID# 277930

Enc. Submitted documents

c: Ms. Stephanie Rauer
2101 Ruth Street
Arlington, Texas 76010
(w/o enclosures)