



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 5, 2007

Mr. Rick Harrison
District Attorney, Kaufman County
100 West Mulberry
Kaufman, Texas 75142

OR2007-11565

Dear Mr. Harrison:

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 #288435.

The Kaufman County District Attorney's Office (the "district attorney") received a request for a specified case file. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.108, 552.111, 552.130, and 552.147 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

Initially, you inform us that some of the information at issue is held by the district attorney on behalf of a grand jury. 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 is 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), 398 (1983). *But see* ORD 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.

¹While you cite section 552.103 of the Government Code for your argument to withhold Exhibits 2I-K and Exhibits 3I-L as attorney work product, we understand you to raise section 552.111 of the Government Code, as section 552.111 is the proper exception for the substance of your argument.

See ORD 513. Thus, to the extent that the district attorney has possession of Exhibits 2-A and 2-D-F as an agent of the grand jury, such information is in the grand jury's constructive possession and is not subject to the Act. To the extent that the district attorney does not have possession of Exhibits 2-A and 2-D-F as an agent of the grand jury, the information is subject to the Act and must be released unless it falls within an exception to public disclosure. We note that documents filed in a public court record are not subject to the judiciary exclusion.

To the extent that Exhibits 2-D-F are not subject to the judiciary exclusion, we note that they, as well Exhibits 2-C and 3-P, are subject to section 552.101, the Medical Practices Act ("MPA"), and chapter 611 of the Health and Safety Code. 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 section encompasses information protected by other statutes. Exhibits 2-C-F and 3-P consists of medical and mental health records, access to which is governed by the MPA and chapter 611 of the Health and Safety Code. Occ. Code §§ 151.001-165.160. Section 159.002 of the MPA provides in part:

(a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.

(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.

Id. § 159.002(a)-(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). When a file is created as the result of a hospital stay, we have concluded that 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, created or maintained by a physician, for purposes of the MPA. *See* Open Records Decision No. 546 (1990). 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. *See* Occ. Code §§ 159.004, .005. When a patient is deceased, medical records may be released only on the signed consent of the

deceased's personal representative. *See id.* § 159.005(a)(5). The consent in that instance 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. *See id.* §§ 159.004, .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).

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) provides 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 (1990). We note that mental health records may only be released in accordance with the access provisions of these sections. *See, e.g.* Health & Safety Code § 611.004(a)(5) (professional may disclose confidential information to patient's personal representative if patient is deceased).

We have marked the medical and mental health records that are subject to the MPA or chapter 611 of the Health and Safety Code. The district attorney may only disclose Exhibits 2-C-F and 3-P in accordance with the access provisions of the MPA and chapter 611. Absent the applicability of an access provision, the district attorney must withhold these exhibits pursuant to the MPA and chapter 611 of the Health and Safety Code. *See* Open Records Decision No. 598 (1991). We note that some of the submitted medical records pertain to the requestor's daughter. This requestor may have a right of access to his daughter's medical records under the MPA.

Next, we note that the rest of the submitted case file is subject to section 552.022(a) of the Government Code, which provides that:

(a) 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:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108;

Gov't Code § 552.022(a)(1). The submitted information consists of a completed investigation made by the district attorney. A completed investigation must be released under section 552.022(a)(1) unless the information is excepted from disclosure under section 552.108 or expressly confidential under other law. Section 552.111 of the Government Code is a discretionary exception to public disclosure that protects a governmental body's interests and may be waived. *See* Open Records Decision No. 677 at 10 (2002) (attorney work product privilege under section 552.111 may be waived). As such, section 552.111 of the Government Code is not "other law" that makes information confidential for the purposes of section 552.022. Therefore, the district attorney may not withhold any of the submitted information under section 552.111. 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 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, 337 (Tex. 2001). However, the Texas Rules of Civil Procedure apply only to "actions of a civil nature." *See* Tex. R. Civ. P. 2. Thus, because the submitted information relates to a criminal case, the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure does not apply to any of the submitted information. The attorney work product privilege is the only exception you raised for Exhibits 2-I-L and Exhibits 3-I-L; therefore, these exhibits must be released to the requestor in their entirety. However, because information subject to section 552.022(a)(1) may be withheld under sections 552.101, 552.108, and 552.130 we will address these claims.

Section 552.101 encompasses section 11 of article 49.25 of the Code of Criminal Procedure which provides as follows:

The medical examiner shall keep full and complete records properly indexed, giving the name if known of every person whose death is investigated, the place where the body was found, the date, the cause and manner of death, and shall issue a death certificate . . . The records are subject to required public disclosure in accordance with Chapter 552, Government Code, except that a photograph or x-ray of a body taken during an autopsy is excepted from required public disclosure in accordance with Chapter 552, Government Code, but is subject to disclosure:

- (1) under a subpoena or authority of other law; or
- (2) if the photograph or x-ray is of the body of a person who died while in the custody of law enforcement.

Code Crim. Proc. art. 49.25. You assert that Exhibit 2-P is excepted from disclosure under article 49.25. Because neither exception to confidentiality applies to the submitted information in this instance, the autopsy photographs contained within Exhibit 2-P are excepted from required public disclosure under section 11 of article 49.25 of the Code of

Criminal Procedure. The district attorney must withhold Exhibit 2-P under section 552.101 of the Government Code.

You also claim that the information in Exhibits 2-M-N, Exhibits 3-G-H, and Exhibit 3-N is confidential criminal history information that is protected from disclosure under section 552.101 of the Government Code. Criminal history record information (“CHRI”) obtained from the National Crime Information Center (“NCIC”) or the Texas Crime Information Center (“TCIC”) is confidential under section 552.101 in conjunction with federal law and subchapter F of chapter 411 of the Government Code. Federal law governs the dissemination of CHRI obtained from the NCIC network. Federal regulations prohibit the release to the general public of CHRI that is maintained in state and local CHRI systems. *See* 28 C.F.R. § 20.21(c)(1) (“Use of criminal history record information disseminated to noncriminal justice agencies shall be limited to the purpose for which it was given.”) and (c)(2) (“No agency or individual shall confirm the existence or nonexistence of criminal history record information to any person or agency that would not be eligible to receive the information itself.”); *see also* Open Records Decision No. 565 at 10-12 (1990). The federal regulations allow each state to follow its own individual law with respect to CHRI that it generates. *See* ORD 565 at 10-12. Sections 411.083(b)(1) and 411.089(a) of the Government Code authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *See* Gov’t Code § 411.089(b). Any CHRI generated by the federal government or another state may be disclosed only in accordance with the federal regulations. Any CHRI obtained from the Texas Department of Public Safety (the “DPS”) or another criminal justice agency must be withheld as provided by subchapter F of chapter 411 of the Government Code. In those instances where a governmental entity has compiled information that lists an individual as a criminal suspect, arrestee, or defendant, the compiled information takes on a character that implicates the individual’s right to privacy in a manner that the same information in an uncompiled state does not. *See United States Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989).² A compilation of a private citizen’s criminal history is generally not of legitimate concern to the public. We note that only records which list an individual as a criminal defendant, suspect, or arrestee implicate that individual’s privacy rights. We also note that the definition of CHRI does not encompass driving record information maintained by the DPS. *See* Gov’t Code § 411.082(2)(B). An individual’s current involvement in the criminal justice system, including active warrant information, does not constitute criminal history information for purposes of section 552.101.

²Section 552.101 of the Government Code also encompasses the common-law right of privacy. Information must be withheld under section 552.101 in conjunction with common-law privacy when the information is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) of no legitimate public interest. *See Industrial Found. v. Texas Ind. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), cert. denied, 430 U.S. 931 (1977).

Thus, the district attorney must only withhold the information we have marked within Exhibits 2-M-N, 3-G-H, and 3-N under section 552.101 in conjunction with section 411.083 and common-law privacy. We note that common-law privacy is a personal right that lapses upon death, so it does not encompass information that relates to a deceased individual. *See Moore v. Charles B. Pierce Film Enters. Inc.*, 589 S.W.2d 489, 491 (Tex.App-Texarkana 1979, *writ ref'd n.r.e.*); Open Records Decision No. 272 at 1 (1989). Therefore, the district attorney may not withhold any compiled criminal history of the deceased under section 552.101 in conjunction with common-law privacy. The district attorney may not withhold any reports or documents which list an individual as a witness, complainant, or victim of crime under common-law privacy. Further, based on our review of the submitted documents, we find that there is a legitimate public interest in the defendant's criminal history. Therefore, the defendant's compiled criminal history may not be withheld under common-law privacy.

Section 552.101 also encompasses information protected by judicial decisions. You assert that Exhibits 2-G-H and 3-O are excepted by the decision rendered in *Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177, 187 (Tex. Civ. App.—Houston [14th Dist.] 1975, *writ ref'd n.r.e.*). We note, however, that this decision does not make information confidential under the Act. Instead, it construes the statutory predecessor to section 552.108, which currently provides in 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:

(1) release of the information would interfere with the detection, investigation, or prosecution of crime;

(2) 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;

Gov't Code § 552.108(a). A governmental body that claims an exception to disclosure under section 552.108 must reasonably explain how and why this exception is applicable to the information that the governmental body seeks to withhold. *See* Gov't Code § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You have not provided this office with any arguments explaining why Exhibits 2-G-H, 3-G-H, and 3-O are subject to section 552.108. Accordingly, you may not withhold any information within these exhibits under this exception. Because this is the only assertion you make for Exhibits 2-G-H and 3-O, they must be released to the requestor.

Next, we note that the Exhibit 2-O contains a victim's impact statement. Section 552.1325 of the Government Code provides as follows:

(a) In this section:

(1) "Crime victim" means a person who is a victim as defined by Article 56.32, Code of Criminal Procedure.

(2) "Victim impact statement" means a victim impact statement under Article 56.03, Code of Criminal Procedure.

(b) The following information that is held by a governmental body or filed with a court and that is contained in a victim impact statement or was submitted for purposes of preparing a victim impact statement is confidential:

(1) the name, social security number, address, and telephone number of a crime victim; and

(2) any other information the disclosure of which would identify or tend to identify the crime victim.

Gov't Code § 552.1325. The information in Exhibit 2-O consists of a crime victim's impact statement as defined by article 56.03 of the Code of Criminal Procedure. Code Crim. Proc. art. 56.03. We also note that the victim, in this instance, meets the definition of a crime victim under article 56.32 of the Code of Criminal Procedure. *Id.* art. 56.32. We therefore conclude that the district attorney must withhold the identifying information we have marked in the victim impact statement in Exhibit 2-O under section 552.1325 of the Government Code. The remaining portions of the victim's impact statement must be released to the requestor.

You claim that the Texas-issued driver's license numbers that you have marked are excepted from disclosure under 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." Gov't Code § 552.130. Accordingly, the district attorney must withhold most of the Texas driver's license numbers you have marked pursuant to section 552.130 of the Government Code. We note that the purpose of section 552.130 is to protect the privacy interests of individuals. Because the right of privacy lapses at death, the Texas driver's license number of the deceased individual may not be withheld under section 552.130. *See Moore* 589 S.W.2d at 491 (Texas does not recognize relational or derivative right of privacy). Accordingly, the district attorney must only withhold the Texas-issued driver's license information we have marked under section 552.130. We have also marked a Texas-issued license plate number and vehicle identification number that must also be withheld under section 552.130.

Finally, you claim that the social security numbers you have marked are excepted from public disclosure under section 552.147 of the Government Code. Section 552.147 provides that

“[t]he social security number of a living person is excepted from” required public disclosure under the Act. *Id.* § 552.147. Therefore, the district attorney may withhold the social security numbers of living persons you have marked under section 552.147 of the Government Code.

In summary, to the extent the district attorney maintains possession of Exhibits 2-A and 2-D-F as an agent of the grand jury, these documents are excluded from the reach of the Act and need not be released to the requestors. If these exhibits are not being maintained on behalf of the grand jury, they, as well as Exhibits 2-C and 3-P, may only be disclosed in accordance with the access provisions of the MPA and chapter 611 of the Health and Safety Code. The district attorney must withhold Exhibit 2-P under section 552.101 of the Government Code in conjunction with section 49.25 of the Code of Criminal Procedure. The district attorney must withhold the information we have marked within Exhibits 2-M-N, 3-G-H, and 3-N under section 552.101 of the Government Code in conjunction with section 411.083 of the Government Code and common-law privacy. The district attorney must withhold the information we have marked under section 552.1325 of the Government Code. Finally, the district attorney must withhold the Texas-issued motor vehicle information we have marked under section 552.130 of the Government Code, and the district attorney may withhold the social security numbers you have marked under section 552.147 of the Government Code. 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,



Reg Hargrove
Assistant Attorney General
Open Records Division

RJH/eeg

Ref: ID# 288435

Enc. Submitted documents

c: Mr. and Mrs. Sam Wooley
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(w/o enclosures)