



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 6, 2010

Mr. Bill Delmore
Assistant District Attorney
Montgomery County
9th Judicial District
207 West Phillips, Second Floor
Conroe, Texas 77301

OR2010-04814

Dear Mr. Delmore:

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# 374904.

The Montgomery County District Attorney (the "district attorney") received a request for the complete file pertaining to a named individual. You state you will provide most of the information to the requestor. You claim that the submitted information is excepted from disclosure under sections 552.101 and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, you argue that the district attorney constructively holds the information in Appendix A on behalf of the grand jury. The judiciary is expressly excluded from the requirements of the Act. 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. Open Records Decision No. 411 (1984). Further, records kept by a governmental body that is acting as an agent for a grand jury are considered records in the constructive possession of the grand jury, and therefore are also not subject to the Act. Open Records Decisions Nos. 513 (1988), 411 (1984), 398 (1983). *But see* ORD 513 at 4 (defining limits of judiciary exclusion). You state that the information in Appendix A consists of grand jury materials that are being held by the district attorney as an agent of the grand jury, and remain in

constructive possession of the grand jury. Accordingly, Appendix A consists of records of the judiciary that are not subject to disclosure under the Act.

Section 552.101 of the Government Code excepts 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 that other statutes make confidential, such as section 11 of article 49.25 of the Code of Criminal Procedure, which governs the disclosure of autopsy photographs. Section 11 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 full report and detailed findings of the autopsy, if any, shall be a part of the record. Copies of all records shall promptly be delivered to the proper district, county, or criminal district attorney in any case where further investigation is advisable. 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, § 11. There is no indication that the exceptions to confidentiality provided in section 11 are applicable in this instance. Therefore, the district attorney must withhold the autopsy photographs in Appendix E under section 552.101 of the Government Code in conjunction with article 49.25 of the Code of Criminal Procedure.

Section 552.101 also encompasses the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. *See* 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). Information subject to the MPA includes both medical records and information obtained from those medical records. *See* 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). Upon review, we find a portion of the information in Appendix C consists of medical records that are subject to the MPA. Accordingly, we have marked medical records that may only be released in accordance with the MPA. However, you have failed to demonstrate how any of the remaining information in Appendix C constitutes a medical record for purposes of the MPA. Therefore, the remaining information is not confidential under the MPA, and no portion of it may be withheld under section 552.101 on this basis.

Section 552.101 also encompasses section 773.091 of the Health and Safety Code, which makes confidential EMS records. Section 773.091 provides 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 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.

(g) The privilege of confidentiality under this section 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.

Health & Safety Code § 773.091(b), (g). We have marked the information in Appendix C that constitutes EMS records pursuant to section 773.091. Thus, the district attorney must withhold the EMS records we have marked under section 552.101 of the Government Code in conjunction with section 773.091 of the Health and Safety Code, except as specified by section 773.091(g). However, you have failed to demonstrate how any of the remaining information in Appendix C constitutes EMS records for purposes of section 773.091.

Therefore, the remaining information is not confidential under section 773.091, and no portion of it may be withheld under section 552.101 on this basis.

Section 552.101 also encompasses criminal history record information ("CHRI") generated by the National Crime Information Center ("NCIC") or by the Texas Crime Information Center ("TCIC"). Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that states obtain from the federal government or other states. *See* Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *See* Gov't Code § 411.083. Section 411.083 of the Government Code deems confidential CHRI that the Department of Public Safety ("DPS") maintains, except that the DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. *See id.* Sections 411.083(b)(1) and 411.089(a) 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. *Id.* § 411.089(b)(1). Other entities specified in chapter 411 of the Government Code are entitled to obtain CHRI from DPS or another criminal justice agency; however, those entities may not release CHRI except as provided by chapter 411. *See generally id.* §§ 411.090-.127. Upon review, we agree that a portion of the information in Appendix D constitutes CHRI. Accordingly, the district attorney must withhold the information we have marked in Appendix D under section 552.101 of the Government Code in conjunction with chapter 411 of the Government Code. However, you have failed to demonstrate how any of the remaining information constitutes CHRI for purposes of chapter 411; thus, no portion of the remaining information may be withheld under section 552.101 on that basis.

Next, you claim Appendix B is excepted from disclosure under section 552.108 of the Government Code. Section 552.108 provides 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) reflects the mental impressions or legal reasoning of an attorney representing the state.

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from [required public disclosure] if:

...

(3) the internal record or notation:

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

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

Gov't Code § 552.108(a)(4), (b)(3). 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 id.* § 552.301(e)(1)(A); *Ex parte Pruitt*, 552. S.W.2d 706 (Tex. 1977); Open Records Decision No. 434 at 2-3 (1986). You explain that the information in Appendix B constitutes notes written and prepared by the prosecutor in anticipation of or in preparation for trial. Thus, you assert the information reflects the mental impressions and legal reasoning of the prosecutor. Upon review, we agree subsections 552.108(a)(4) and (b)(3) are applicable to Appendix B. Accordingly, the district attorney may withhold Appendix B under section 552.108(a)(4) and (b)(3) of the Government Code.

Next, we note the remaining information in Appendix D contains Texas driver's license numbers.¹ Section 552.130 of the Government Code excepts from disclosure information relating to a Texas motor vehicle driver's license and information relating to a Texas motor vehicle title or registration. Gov't Code § 552.130. The district attorney must withhold the Texas driver's license numbers we have marked under section 552.130 of the Government Code.²

In summary, Appendix A consists of records of the judiciary and is not subject to the Act. The district attorney must withhold Appendix E under section 552.101 of the Government

¹The Office of the Attorney General will raise a mandatory exception, such as section 552.130, on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

²We note this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including Texas driver's license numbers under section 552.130 of the Government Code, without the necessity of requesting an attorney general decision.

Code in conjunction with article 49.25 of the Code of Criminal Procedure. The district attorney may only release the medical records we have marked in accordance with the MPA. The district attorney must withhold the EMS records we have marked under section 552.101 of the Government Code in conjunction with section 773.091 of the Health and Safety Code, except as specified by section 773.091(g). The district attorney must withhold the information we have marked in Appendix D under 552.101 of the Government Code in conjunction with chapter 411 of the Government Code. The district attorney may withhold Appendix B pursuant to sections 552.108(a)(4) and (b)(3) of the Government Code. The district attorney must withhold the Texas driver's license numbers we have marked under section 552.130 of the Government Code. The remaining information must be released.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Nneka Kanu
Assistant Attorney General
Open Records Division

NK/jb

Ref: ID# 374904

Enc. Submitted documents

cc: Requestor
(w/o enclosures)