



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 8, 2011

Ms. Christi Dean
Assistant District Attorney
Dallas County
133 North Riverfront Boulevard, LB-19
Dallas, Texas 75207

OR2011-04862

Dear Ms. Dean:

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# 414123.

The Dallas County District Attorney (the "district attorney") received a request for all records and documents related to the district attorney's prosecution of cause number F05-59563-Q3. You claim the requested information is excepted from disclosure pursuant to sections 552.101, 552.103, 552.108, 552.111, 552.130, and 552.1325 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

¹Although you raise section 552.101 of the Government Code in conjunction with sections 552.130 and 552.1325 of the Government Code, section 552.101 does not encompass other exceptions in the Act. We note 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. Gov't Code § 552.147(b).

²We assume that the "representative sample" of information 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 note the information in Exhibit O consists of grand jury testimony. In addition, some of the information in Exhibit T 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 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* 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* ORD 513. Thus, to the extent the information in Exhibits O and T is held by the district attorney as agent of the grand jury, it consists of records of the judiciary not subject to disclosure under the Act. To the extent the information in Exhibits O and T does not consist of records of the judiciary, we will address your arguments against disclosure of this information.

Next, we note the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

(a) [T]he 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. Thus, this information is subject to section 552.022(a)(1) and must be released unless it is excepted from disclosure under section 552.108 of the Government Code or is expressly made confidential under other law. *See id.* § 552.022(a)(1). You claim sections 552.103 and 552.111 of the Government Code for the submitted information. Sections 552.103 and 552.111 are discretionary exceptions to disclosure that protect a governmental body's interests and may be waived. *See id.* § 552.007; *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 Gov't Code § 552.103); Open Records Decision Nos. 677 at 10-11 (2002) (attorney work-product privilege under section 552.111 may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, sections 552.103 and 552.111

are not other laws that make information confidential for the purposes of section 552.022(a)(1). Therefore, the district attorney may not withhold the submitted information under section 552.103 or section 552.111 of the Government Code. However, because information subject to section 552.022(a)(1) may be excepted under section 552.108, we will consider the district attorney's arguments under that exception for the submitted information. You also raise sections 552.101, 552.130, and 552.1325 of the Government Code, which constitute "other law" for purposes of section 552.022(a)(1). In addition, the attorney work product privilege is found in rule 192.5 of the Texas Rules of Civil Procedure. The Texas Supreme Court has held the Texas Rules of Civil Procedure are "other law" within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). However, rule 192.5 is only applicable to civil litigation, not criminal prosecutions. Thus, the district attorney may not withhold the information under rule 192.5. However, we will also consider the applicability of sections 552.101, 552.130, and 552.1325 of the Government Code for the submitted information.

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 section encompasses information other statutes make confidential, such as the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code, which governs access to medical records. *See Occ. Code §§ 151.001-165.160.* Section 159.002 of the Occupations Code provides in pertinent 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.

Id. § 159.002(b), (c). This office has concluded 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).* This office has also determined when a file is created as the result of a hospital stay, 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 that are created or maintained by a physician. *See Open Records Decision No. 546 (1990).* Medical records must be released upon the patient's signed, written consent, provided 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. Occ. Code §§ 159.004, .005. We have marked medical records in Exhibit T. We note the

requestor may be the authorized representative of the individual whose medical records are at issue. To the extent the medical records we have marked are not records of the grand jury, the requestor may have a statutory right of access to these records, if the requestor provides proper consent in accordance with the MPA. Although you claim these medical records are excepted under section 552.108 of the Government Code, the MPA's specific right of access provision prevails over the Act's general exceptions to disclosure. *See* Open Records Decision No. 451 at 4 (1986) (specific statutory right of access provisions overcome general exceptions to disclosure under statutory predecessor to Act). Thus, to the extent the medical records we have marked are not held by the district attorney as agent of the grand jury, the marked medical records may only be released in accordance with the MPA.

We note the remaining information includes fingerprints, which are subject to section 560.003 of the Government Code. Section 560.003 is also encompassed by section 552.101 of the Government Code and provides that "[a] biometric identifier in the possession of a governmental body is exempt from disclosure under [the Act]." Gov't Code § 560.003; *see id.* § 560.001(1) ("biometric identifier" means retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry). Section 560.002 of the Government Code provides, however, that "[a] governmental body that possesses a biometric identifier of an individual . . . may not sell, lease, or otherwise disclose the biometric identifier to another person unless . . . the individual consents to the disclosure[.]" *Id.* § 560.002(1)(A). Although you seek to withhold the fingerprints under section 552.108 of the Government Code, we note the requestor may have a right of access to the fingerprints as an authorized representative of the individual whose fingerprints are at issue. *See id.* § 560.002(1). Thus, if the requestor is an authorized representative of the individual whose fingerprints are at issue, then he has a right of access to the marked fingerprints pursuant to section 560.002(1)(A) of the Government Code, and the marked fingerprints must be released to the requestor. *See* Open Records Decision Nos. 613 at 4 (1993) (exceptions in Act cannot impinge on statutory right of access to information), 451 (specific statutory right of access provisions overcome general exceptions to disclosure under the Act). If the requestor is not an authorized representative of the individual whose fingerprints are at issue, then the district must withhold the submitted fingerprints under section 552.101 of the Government Code in conjunction with section 560.003 of the Government Code.

Section 552.108 of the Government Code 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:

...

(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 at issue. *See id.* § 552.301(e)(1)(A). In *Curry v. Walker*, 873 S.W.2d 379 (Tex. 1994), the Texas Supreme Court held a request for a district attorney's "entire litigation file" was "too broad" and, quoting *National Union Fire Insurance Co. v. Valdez*, 863 S.W.2d 458 (Tex. 1993), held that "the decision as to what to include in [the file] necessarily reveals the attorney's thought processes concerning the prosecution or defense of the case." *Curry*, 873 S.W.2d at 380.

The present request seeks all information related to the district attorney's prosecution of cause number F05-59563-Q3. You assert the instant request is for the district attorney's entire prosecution file for the case at issue. You state the requested information "represent[s] the mental impressions, opinions, legal theories, and conclusions of the attorneys representing the [s]tate in this case." Based on your representations and our review, we conclude section 552.108(a)(4) of the Government Code is applicable to the remaining information.

We note, however, that section 552.108 does not except from disclosure "basic information about an arrested person, an arrest, or a crime." Gov't Code § 552.108(c). Section 552.108(c) refers to basic "front-page" information held to be public in *Houston Chronicle Publishing Company v. City of Houston*, 531 S.W.2d 177 (Tex. App.—Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). *See* Open Records Decision No. 127 (1976) (summarizing types of information considered to be basic information). Thus, with the exception of basic information, the district attorney may withhold the remaining information under section 552.108(a)(4) of the Government Code and the court's ruling in *Curry*.³

In summary, to the extent the information in Exhibits O and T is held by the district attorney as agent of the grand jury, it constitutes records of the judiciary and is not subject to the Act. To the extent the medical records we have marked are not held by the district attorney as agent of the grand jury, the marked medical records may only be released in accordance with the MPA. If the requestor is an authorized representative of the individual whose fingerprints are at issue, the marked fingerprints must be released to the requestor pursuant to section 560.002(1)(A) of the Government Code. If the requestor is not an authorized

³As our ruling is dispositive, we need not address your remaining arguments against disclosure.

representative of the individual whose fingerprints are at issue, then the district must withhold the submitted fingerprints under section 552.101 of the Government Code in conjunction with section 560.003 of the Government Code. With the exception of basic information, the district attorney may withhold the remaining information under section 552.108(a)(4) of the Government Code.

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,



Jennifer Burnett
Assistant Attorney General
Open Records Division

JB/dls

Ref: ID# 414123

Enc. Submitted documents

c: Requestor
(w/o enclosures)