



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 8, 2011

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

OR2011-18106

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# 438318.

The Montgomery County District Attorney's Office (the "district attorney") received a request for all information related to a specified incident. You state you have released some information to the requestor with social security numbers, credit card numbers, license plate numbers, and driver's license numbers redacted.¹ You claim a portion of the submitted information is not subject to the Act and that the remaining information is excepted from

¹We note section 552.147(b) 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). In addition, we note Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including Texas driver's license and license plate numbers under section 552.130 of the Government Code and insurance policy numbers under section 552.136 of the Government Code, without the necessity of requesting an attorney general decision. However, on September 1, 2011, the Texas legislature amended sections 552.130 and 552.136 to allow a governmental body to redact the information described in subsections 552.130(a)(1) and (a)(3) and subsection 552.136(b), respectively, without the necessity of seeking a decision from the attorney general. See Act of May 30, 2011, 82nd Leg., R.S., S.B. 602, § 22 (to be codified at Gov't Code § 552.130(c)), § 27 (to be codified at Gov't Code § 22 552.136(c)). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.130(e) and section 552.136(e). See Act of May 30, 2011, 82nd Leg., R.S., S.B. 602, § 22 (to be codified at Gov't Code § 552.130(d), (e)), § 27 (to be codified at Gov't Code § 22 552.136(e)). Thus, the statutory amendments to sections 552.130 and 552.136 of the Government Code superceded Open Records Decision No. 684 on September 1, 2011. Therefore, a governmental body may only redact information subject to subsections 552.130(a)(1) and (a)(3) in accordance with section 552.130 and subsection 552.136(a) in accordance with section 552.136, not Open Records Decision No. 684.

disclosure pursuant to sections 552.101 and 552.108 of the Government Code. We have considered your arguments and reviewed the submitted information.

Initially, we note a portion of the submitted information was subject to a previous request for information, in response to which this office issued Open Records Letter No. 2011-15701 (2011). In that decision, we ruled the grand jury record is a record of the judiciary and is not subject to the Act and that the district attorney must withhold the information you indicated under section 552.101 of the Government Code in conjunction with article 42.12 of the Code of Criminal Procedure and in conjunction with federal law and chapter 411 of the Government Code. We also determined the district attorney may withhold the information you indicated under section 552.108(a)(4) of the Government Code. As we have no indication that the law, facts, or circumstances on which the prior ruling was based have changed, the district attorney may continue to rely on that ruling as a previous determination and withhold or release any previously ruled upon information in accordance with that prior ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). To the extent the submitted information was not previously ruled upon, we will consider your arguments against disclosure.

You state the information in Appendix E, which consists of a grand jury oath, is held by the district attorney as an agent of the grand jury and is a record of the judiciary. The judiciary is expressly excluded from the requirements of the Act. Gov't Code § 552.003(1)(B). This office has determined that for the purposes of the Act, a grand jury 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 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. *See* Open Records Decision Nos. 513 (1988), 411 (1984), 398 (1983). *But see* ORD 513 at 4 (defining limits of judiciary exclusion). Thus, we find the information in Appendix E consists of a record of the judiciary, and therefore is 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. Article 42.12 of the Code of Criminal Procedure is applicable to pre-sentence investigation reports and provides in part:

- (j) The judge by order may direct that any information and records that are not privileged and that are relevant to a report required by Subsection (a) or Subsection (k) of this section be released to an officer conducting a presentence investigation under Subsection (i) of this section or a postsentence report under Subsection (k) of this section. The judge may also

issue a subpoena to obtain that information. A report and all information obtained in connection with a presentence investigation or postsentence report are confidential and may be released only:

- (1) to those persons and under those circumstances authorized under Subsections (d), (e), (f), (h), (k), and (l) of this section;
- (2) pursuant to Section 614.017, Health and Safety Code; or
- (3) as directed by the judge for the effective supervision of the defendant.

Crim. Proc. Code art. 42.12 § 9(j). Accordingly, the district attorney must withhold the pre-sentence investigation report in Appendix D pursuant to section 552.101 in conjunction with article 42.12 of the Code of Criminal Procedure.

Section 552.101 of the Government Code also encompasses chapter 411 of the Government Code, which makes confidential criminal history record information (“CHRI”) generated by the National Crime Information Center or by the Texas Crime Information Center. *See* Gov’t Code § 411.083(a). Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI states obtain from the federal government or other states. Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual laws with respect to the CHRI it generates. *See id.* Section 411.083 of the Government Code deems confidential CHRI the Department of Public Safety (“DPS”) maintains, except DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. *See* Gov’t Code § 411.083. 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. Thus, any CHRI generated by the federal government or another state may not be made available to the requestor except in accordance with federal regulations. *See* ORD 565. Furthermore, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 in conjunction with chapter 411, subchapter F of the Government Code. We note section 411.083 does not apply to active warrant information or other information relating to one’s current involvement with the criminal justice system. *See* Gov’t Code § 411.081(b) (police department allowed to disclose information pertaining to person’s current involvement in the criminal justice system). Further, CHRI does not include driving record information. *See id.* § 411.082(2)(B) (term CHRI does not include driving record information). Accordingly, the district attorney must withhold the information we have marked in Appendix C under section 552.101 of the Government Code in conjunction with federal law and chapter 411 of the Government Code. However, none of the remaining information you seek to withhold in Appendix C is CHRI for purposes of chapter 411, and it may not be withheld under section 552.101 on that basis.

Section 552.101 of the Government Code 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). 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). 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). The submitted information contains medical records subject to the MPA. Accordingly, unless the district attorney receives written consent for release of those records that complies with sections 159.004 and 159.005 of the MPA, the district attorney must withhold the medical records we have marked in Appendix F pursuant to section 552.101 of the Government Code in conjunction with the MPA. However, we find the remaining information you contend is subject to the MPA in Exhibit F consists of billing records and does not consist of medical records for purposes of the MPA. Thus, the remaining information may not be withheld under section 552.101 of the Government Code in conjunction with the MPA.

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.

Gov't Code § 552.108(a)(4). 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 the information in Appendix B constitutes information held and prepared by an attorney representing the state 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 section 552.108(a)(4) is applicable to Appendix B. Accordingly, the district attorney may withhold Appendix B under section 552.108(a)(4) of the Government Code.

Section 552.101 of the Government Code also encompasses the common-law right of privacy, which protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The types of information considered intimate or embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. This office has also found some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy. *See* Open Records Decision No. 455 (1987) (information pertaining to prescription drugs, specific illnesses, operations and procedures, and physical disabilities protected from disclosure). Upon review, we find the information we have marked is highly intimate or embarrassing and not of legitimate public concern. Thus, the district attorney must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy.

We note a portion of the remaining information is subject to section 552.130 of the Government Code.² Section 552.130 provides information relating to a motor vehicle operator's license, driver's license, motor vehicle title, or registration issued by an agency

²The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

of this state, another state, or country is excepted from public release. Act of May 24, 2011, 82nd Leg., R.S., S.B. 1638, § 4 (to be codified as an amendment to Gov't Code § 552.130). Accordingly, the district attorney must withhold the information we have marked under section 552.130 of the Government Code in Appendix C.

In summary, the district attorney may continue to rely on Open Records Letter No. 2011-15701 (2011) as a previous determination and withhold or release the information in accordance with that ruling. The grand jury record in Appendix E is a record of the judiciary and is not subject to disclosure under the Act. The district attorney must withhold the pre-sentence investigation report in Appendix D pursuant to section 552.101 in conjunction with article 42.12 of the Code of Criminal Procedure and the information we have marked in Appendix C under section 552.101 of the Government Code in conjunction with federal law and chapter 411 of the Government Code. The district attorney must also withhold the medical records we have marked in Appendix F pursuant to section 552.101 of the Government Code in conjunction with the MPA, unless the district attorney receives written consent for release of those records that complies with sections 159.004 and 159.005 of the MPA. The district attorney may withhold Appendix B under section 552.108(a)(4) of the Government Code. The district attorney must withhold the information we have marked in Appendix F under section 552.101 of the Government Code in conjunction with common-law privacy and the information we have marked in Appendix C under section 552.130 of the Government Code. The district attorney must release the remaining information.

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/agn

Ref: ID# 438318

Enc. Submitted documents

c: Requestor
(w/o enclosures)