



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 12, 2012

Mr. Robert N. Bland, IV
District Attorney
Ector County
300 North Grant, Room 305
Odessa, Texas 79761

OR2012-10791

Dear Mr. Bland:

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# 458614.

The Ector County District Attorney's Office (the "district attorney's office") received a request for information related to a specified case. You claim a portion of the submitted information is not subject to the Act. You also 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. We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

You argue some of the requested information consists of grand jury records and is, therefore, in the actual or constructive possession of the grand jury. The judiciary is expressly excluded from the requirements of the Act. *Id.* § 552.003(1)(B). This office has determined 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, 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. See ORD 513. Thus, to the extent the information at issue is in the custody of the district attorney's office as an agent for the grand jury, these records are in the grand jury's constructive possession and are not subject to the Act. This decision does not address the public availability of such information. However, to the extent this information is not in the custody of the district attorney's office as an agent for the grand jury, we will address your claimed exceptions to its disclosure.

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. Section 552.101 encompasses section 773.091 of the Health and Safety Code. Section 773.091 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). Except for the information specified in section 773.091(g), emergency medical services ("EMS") records are deemed confidential and may be released only in accordance with chapter 773 of the Health & Safety Code. *See id.* §§ 773.091, .094. Upon review, we find the information we have marked consists of EMS records subject to section 773.091(b). We note records that are confidential under section 773.091 may be disclosed to "any person who bears a written consent of the patient or other persons authorized to act on the patient's behalf for the release of confidential information." *Id.* §§ 773.092(e)(4), .093. Section 773.093 provides a consent for release of EMS records must specify (1) the information or records to be covered by the release; (2) the reasons or purpose for the release; and (3) the person to whom the information is to be released. Although you raise section 552.108 for the EMS record, the general exceptions found in the Act cannot impinge on a statutory right of access to information. *See Open Records Decision No. 613 at 4 (1993) (exceptions in Act cannot impinge on a statutory right of access to information); see also Open Records Decision No. 451 (1986) (specific statutory right of access provisions overcome general exceptions to disclosure under the Act).* Thus, if the district attorney's office receives the required consent, the marked EMS records must be released in its entirety pursuant to sections 773.092 and 773.093 of the Health and Safety

Code. If the district attorney's office does not receive the required consent for release, then except for any information subject to section 773.091(g), which is not confidential, the marked EMS records must be withheld under section 552.101 of the Government Code in conjunction with section 773.091 of the Health and Safety Code. We will address your claim under section 552.108 of the Government Code for the information subject to section 773.091(g) and the remaining information.

We note the remaining information contains medical records subject to the Medical Practice Act (the "MPA"), Occ. Code §§ 151.001-168.202. Section 552.101 also encompasses the MPA, which governs access to medical records. Section 159.002 of the MPA provides in 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 also has concluded that 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 receipt of the patient's signed, written consent, provided the consent specifies (1) the information to be covered by the release, (2) the reasons or purposes for the release, and (3) the person to whom the information is to be released. *See* Occ. Code §§ 159.004, .005. After the death of a patient, medical records may be released only on the signed written consent of the deceased individual's personal representative. *Id.* § 159.005(a)(5). 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). The submitted information contains medical records subject to the MPA. Although you seek to withhold these medical records under section 552.108 of the Government Code, a specific statutory right of access provision prevails over general exceptions to disclosure under the Act. *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). Accordingly, the medical records we have marked must be withheld under section 552.101 of the

Government Code in conjunction with the MPA, unless the district attorney's office receives written consent for release of those records that complies with sections 159.004 and 159.005 of the MPA.

Section 552.108(a)(2) of the Government Code excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . 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)(2). Section 552.108(a)(2) is applicable only if the information at issue relates to a concluded criminal case that did not result in a conviction or deferred adjudication. 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 the governmental body seeks to withhold. *See id.* § 552.301(e)(1)(A). You state the remaining information relates to an investigation that was referred to the district attorney's office and taken to a grand-jury. You further explain a no-bill was returned by the grand jury. Based on this representation and our review, we conclude section 552.108(a)(2) is applicable to the remaining information, including the information subject to section 773.091(g).

We note 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). Basic information refers to the information held to be public in *Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). We note basic information does not include the names of victims or witnesses who are not also the complainant. *See* Open Records Decision No. 127 at 3-4 (1976). However, basic information does include an arrestee's social security number, name, alias, race, sex, age, occupation, address, police department identification number, and physical condition. *See id.* Thus, with the exception of basic information, the district attorney's office may withhold the remaining information under section 552.108(a)(2).

We understand you to claim section 552.101 of the Government Code in conjunction with common-law privacy for the basic information. Section 552.101 encompasses the common-law right of privacy, which protects information that is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *Id.* at 681-82. This office has found a compilation of an individual's criminal history is highly embarrassing information, the publication of which would be highly objectionable to a reasonable person. *Cf. U.S. Dep't of Justice v. Reporters Comm. For Freedom of the Press*, 489 U.S. 749, 764 (1989) (when considering prong regarding individual's privacy interest, court recognized distinction between public records found in courthouse files and local police stations and compiled summary of information and noted that individual has significant privacy interest in

compilation of one's criminal history). Furthermore, we find a compilation of a private citizen's criminal history is generally not of legitimate concern to the public. Upon review, we find no portion of the basic information constitutes a compilation of an individual's criminal history. Thus, none of this information may be withheld under section 552.101 on that ground.

In summary, to the extent the information at issue is in the custody of the district attorney's office as an agent for the grand jury, it is in the grand jury's constructive possession and is not subject to the Act. If the district attorney's office receives the required consent, then the district attorney's office must release the marked EMS records in its entirety pursuant to sections 773.092 and 773.093 of the Health and Safety Code. If the district attorney's office does not receive the required consent, then, except for the information subject to section 773.091(g) of the Health and Safety Code, the district attorney's office must withhold the marked EMS records under section 552.101 of the Government Code in conjunction with section 773.091(b) of the Health and Safety Code. The medical records we have marked must be withheld under section 552.101 of the Government Code in conjunction with the MPA, unless the district attorney's office receives written consent for release of those records that complies with sections 159.004 and 159.005 of the MPA. With the exception of basic information, which must be released, the district attorney's office may withhold the remaining information, including the information subject to section 773.091(g) of the Health and Safety Code, under section 552.108(a)(2) 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,



Vanessa Burgess
Assistant Attorney General
Open Records Division

VB/dls

Ref: ID# 458614

Enc. Submitted documents

c: Requestor
(w/o enclosures)