



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

May 3, 2016

Ms. M. Ann Montgomery-Moran
Assistant County & District Attorney
County of Ellis
109 South Jackson
Waxahachie, Texas 75165

OR2016-10009

Dear Ms. Montgomery-Moran:

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# 608264.

The Ellis County Sheriff's Office (the "sheriff's office") received a request for disciplinary information pertaining to a named officer and information pertaining to a specified incident. You state you have released some information. You claim some of the submitted information is excepted from disclosure under sections 552.101, 552.108, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

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). A governmental body claiming section 552.108(a)(2) must demonstrate that the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. *See id.* § 552.301(e)(1)(A) (governmental body must provide comments explaining why exceptions raised should apply to information requested). We note section 552.108 is generally not applicable to the records of an internal affairs investigation that is purely administrative in nature and that does not involve the investigation or prosecution of crime. *See City of Fort Worth v. Cornyn*, 86 S.W.3d 320 (Tex. App.—Austin 2002, no pet.); *Morales v. Ellen*, 840 S.W.2d 519, 525-26 (Tex. Civ. App.—El Paso 1992, writ denied) (statutory predecessor to section 552.108 not applicable to internal

investigation that did not result in criminal investigation or prosecution); *see also* Open Records Decision No. 350 at 3-4 (1982).

You state the information at issue, which you have marked, pertains to a concluded criminal investigation that did not result in conviction or deferred adjudication. Based on your representation and our review, we conclude the information we have marked is subject to section 552.108(a)(2) of the Government Code.¹ However, we find the remaining information was generated as part of an internal investigation conducted by the sheriff's office that was purely administrative in nature. Therefore, we find the sheriff's office has failed to demonstrate the applicability of section 552.108(a)(2) to the remaining information. Accordingly, the sheriff's office may not withhold the remaining information at issue under section 552.108(a)(2) of the Government Code.

Section 552.101 of the Government Code excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses the Medical Practice Act ("MPA"), subtitle B of title 3 of the Occupations Code, which governs release of medical records. *See* Occ. Code §§ 151.001-168.202. Section 159.002 of the MPA provides, in relevant 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 id.* §§ 159.002, .004. 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). We have further found when a file is created as a result of a hospital stay, all the documents in the file referring to diagnosis and treatment constitute physician-patient communications or "[r]ecords of the identity,

¹As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

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 submitted information, which we have marked, we was created by nurses. The sheriff’s office must withhold these documents only if they were created under the supervision of a physician under section 552.101 of the Government Code in conjunction with the MPA. If the documents created by the nurses were not created under the supervision of a physician, they are not subject to the MPA and the sheriff’s office may not withhold them under section 552.101 on that basis.

In summary, the sheriff’s office may withhold the information we have marked under section 552.108(a)(2) of the Government Code. The sheriff’s office must withhold the information created by nurses, which we have marked, under section 552.101 of the Government Code in conjunction with the MPA only if the documents were created under the supervision of a physician. If the documents were not created under the supervision of a physician, the sheriff’s office may not withhold them under section 552.101 of the Government Code on that basis. The sheriff’s office must release the remaining information.²

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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Paige Lay
Assistant Attorney General
Open Records Division

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²We note the requestor has a right of access to some of the information being released. Thus, if the sheriff’s office receives another request for this information from a different requestor, the sheriff’s office must seek another ruling from this office.

Ref: ID# 608264

Enc. Submitted documents

c: Requestor
(w/o enclosures)