



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

December 30, 1998

Mr. Eric M. Bost  
Commissioner  
Texas Department of Human Services  
P.O. Box 149030  
Austin, Texas 78714-9030

OR98-3278

Dear Commissioner Bost:

You have asked whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 103171

The Department of Human Services (the "department") has asked whether certain documents are confidential under provisions in article 4495b of Vernon's Texas Civil Statutes and chapter 161 of the Health and Safety Code, and thus are excepted from disclosure under section 552.101 of the Government Code. Chapter 552 of the Government Code, the Open Records Act, generally provides that information collected, assembled, or maintained by or for a governmental body is subject to public disclosure. Gov't Code § 552.002. However, information that is made confidential by law is not subject to public disclosure. *Id.* § 552.101.

We note initially that it is our understanding that you do not have a current request, but that you are concerned as to what information should be withheld in response to future requests for records. We assume the submitted documents are representative of the types of records at issue.<sup>1</sup> See Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988). You identify the documents submitted to this office as (1) a nursing home employee sign-in sheet for in-service training, (2) federal form HCFA 2567<sup>2</sup>, (3) a complaint report, (4) an incident report, (5) signed statements from nursing home employees, and (6) an employee

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<sup>1</sup>An attorney representing certain nursing homes argues in her brief that "all correspondence and accompanying documentation" exchanged between the department and the nursing homes is confidential. This opinion deals with the records presented by the department as representative of the types of records that are actually at issue.

<sup>2</sup>This is a U.S. Department of Health and Human Services Health Care Financing Administration form that identifies the health care provider, provides a summary statement of deficiencies, and shows the provider's plan of correction.

warning notice. Each document is stamped "privileged and confidential peer review/medical committee document." Each document is also stamped with citations to section 5.06 of article 4495b of Vernon's Texas Civil Statutes and to section 161.031 of the Health and Safety Code.<sup>3</sup>

The complaint report, incident report, signed statements, and employee warning notice are documents that concern complaints and incidents investigated by the department under subchapter E of chapter 242 of the Health and Safety Code. Subchapter E pertains to investigations of reported neglect or abuse at convalescent and nursing homes. Health and Safety Code section 242.127 provides that "[a] report, record, or working paper used or developed in an investigation made under this subchapter and the name of any person making a report under this subchapter are confidential and may be disclosed only for purposes consistent with the rules adopted by the board or designated agency." By rule, the department provides that all reports, records, and working papers used or developed in a nursing home investigation are confidential, except that "[c]ompleted written investigation reports are open to the public, provided the report is de-identified."<sup>4</sup> 40 T.A.C. 19.2010(a)(1). The documents labeled as (3), (4), (5), and (6) are confidential and may not be disclosed, pursuant to section 242.127 of the Health & Safety Code.<sup>5</sup>

The remaining types of records at issue are (1) the nursing home employee sign-in sheet for in-service training, and (2) federal form HCFA 2567. We now consider whether the sign-in sheets are confidential under provisions in either article 4495b of Vernon's Texas Civil Statutes or chapter 161 of the Health and Safety Code. We note initially that the department does not indicate that the sign-in sheets are made confidential under section 242.127 of the Health and Safety Code as reports, records, or working papers used or developed during an investigation. If the sign-in sheets are part of a subsection E investigation, they are confidential and may not be disclosed.

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<sup>3</sup>The records are also stamped as being confidential under section 2 of article 4525b of Vernon's Texas Civil Statutes. Section 2(a) provides that "all proceedings of a nursing peer review committee are confidential and all communications made to a nursing peer review committee are privileged." However, section 1A provides that nursing peer review committees must have a specific make-up of voting and other members depending on which type of nursing practice is under review. We note that the records do not appear to be part of a proceeding under article 4525b nor does the nursing home in its correspondence to this office argue that the records are part of a nursing peer review committee proceeding as defined under article 4525b. Thus, we do not further address article 4525b.

<sup>4</sup>De-identification includes "removing all names and other personally identifiable data, including any information from witnesses and others furnished to DHS as part of the investigation." 40 T.A.C. § 19.2010(a)(1). Although you did not submit to this office a completed, de-identified investigation report, we note that such reports are public information that must be disclosed. *Id.* It is our understanding that the department releases to the public only the written, de-identified summary and does not disclose any attachments to the report.

<sup>5</sup>Since these types of documents are confidential pursuant to section 242.127, we need not address other provisions of law that might be applicable to these records.

The sign-in sheets contain the names, titles, departments, and shift schedules of employees attending in-service training programs for credit and also list the dates and topics of the in-service training. The nursing home asserts that the sign-in sheets are “confidential peer review/medical committee” information.<sup>6</sup>

Sections 5.06 and 161.032 contain provisions making certain types of information confidential. Section 5.06(g) states that, “[e]xcept as otherwise provided by this Act, all proceedings and records of a medical peer review committee are confidential, and all communications made to a medical peer review committee are privileged.” Section 161.032(a) provides that “records and proceedings of a medical committee are confidential.” However, neither section 5.06 nor section 161.032 make confidential “records made or maintained in the regular course of business by a hospital, health maintenance organization, medical organization, university medical center or health science center, or extended care facility.” Health & Safety Code § 161.032(b); see *Memorial Hosp.-the Woodlands v. McCown*, 927 S.W.2d 1, 10 (Tex. 1996) (“The reference to section 5.06 in section 161.032 is a clear signal that records should be accorded the same treatment under both statutes in determining if they were made ‘in the regular course of business.’”).

In *Barnes v. Whittington*, 751 S.W.2d 493, 496 (Tex. 1988), the Texas Supreme Court indicated that “routinely accumulated information” unless submitted or created in connection with a committee’s deliberative process, does not constitute confidential committee records. In *Jordan v. Court of Appeals for Fourth Supreme Judicial Dist.*, 701 S.W.2d 644, 648 (Tex. 1985), the court stated that records “gratuitously submitted to a committee or which have been created without committee impetus and purpose are not protected.”<sup>7</sup> See *Memorial Hosp.-the Woodlands v. McCown*, 927 S.W.2d 1 at 9-10

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<sup>6</sup>Section 1.03(6) of article 4495b defines a medical peer review committee or a professional review body as:

a committee of a health-care entity, the governing board of a health-care entity, or the medical staff of a health-care entity, provided the committee or medical staff operates pursuant to written bylaws that have been approved by the policy-making body or the governing board of the health-care entity and authorized to evaluate the quality of medical and health-care services or the competence of physicians, including those functions specified by Section 85.204, Health and Safety Code, and its subsequent amendments. Such a committee includes the employees and agents of the committee, including assistants, investigators, intervenors, attorneys, and any other persons or organizations that serve the committee in any capacity.

Section 161.031(a)(5) of the Health and Safety Code provides that a “medical committee” includes committees of extended care facilities. The term also includes ad hoc committees appointed to conduct specific investigations. *Id.*

<sup>7</sup>*Barnes* and *Jordan* both relied upon the predecessor statute to 161.032 of the Health & Safety Code, section 3 of article 447d, Vernon’s Texas Civil Statutes, which provided, in part, that “records made or maintained in the regular course of business” were not confidential.

(discussing business records and holdings in *Barnes and Jordan*). Thus, even if records are submitted to or created by a medical peer review or medical committee, the records are not generally confidential if made or maintained in the regular course of business. Health & Safety Code § 161.032(b).

The sign-in sheets are the type of information that is accumulated and maintained in the regular course of business.<sup>8</sup> It has not been demonstrated that the sign-in sheets are records that were created or were submitted to a medical peer review or medical committee as part of the committee's deliberative process. This office will not assume, based merely upon a stamped notation on submitted documents asserting confidentiality under a particular statute, that the documents in fact fall within the framework of a statute and are thereby confidential. Based upon the information provided this office, we must conclude that the sign-in sheets are not confidential under either section 5.06 of article 4495b of Vernon's Texas Civil Statutes or section 161.032 of the Health and Safety Code.

The remaining type of information to be addressed is the federal form HCFA 2567, which is a summary statement of deficiencies and the provider's plan of correction for the deficiencies. The nursing home asserts that the "provider's plan of correction" portion of the form is "confidential peer review/medical committee" information. There are federal requirements for certification and participation in the Medicaid program. Section 488.325(a) of title 42 of the Code of Federal Regulations provides that certain information "must be made available to the public, upon the public's request." The information required to be made public includes, among other items:

- (1) Statements of deficiencies and providers' comments.
- (2) A list of isolated deficiencies that constitute no actual harm, with the potential for minimal harm.
- (3) Approved plans of correction.
- (4) Statements that the facility did not submit an acceptable plan of correction or failed to comply with the conditions of imposed remedies.
- (5) Final appeal results.
- (6) Notice of termination of a facility.
- (7) Medicare and Medicaid cost reports.

Federal law requires the department to release the de-identified form HCFA 2567. 42 CFR § 488.325(d) (disclosing agency must release information including statements of deficiencies and plans of correction). Since federal provisions govern the public disclosure of the federal form HCFA 2567, even if there were some conflict with state law concerning

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<sup>8</sup>In one of the briefs this office received, a party asserts that the records at issue are committee records maintained for the sole purpose of improving the quality of health care. We assume that a facility might keep records of educational programs offered to staff members in order to show compliance with state or federal guidelines, 42 C.F.R. § 488.303 (requiring periodic educational programs for the staff in nursing facilities caring for Medicaid patients), or for other purposes.

medical peer review or medical committee records, the federal provisions would govern. *See English v. General Elec. Co.*, 110 S.Ct. 2270, 2275 (1990) (state law preempted to extent it actually conflicts with federal law). Thus, federal forms HCFA 2567 are public documents that may not be withheld from disclosure.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink, appearing to read 'Ruth H. Soucy', with a stylized flourish at the end.

Ruth H. Soucy  
Assistant Attorney General  
Open Records Division

RHS/rho

Ref.: ID# 103171

Enclosures: Submitted documents

cc: Ms. Jennifer L. Rangel  
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(w/o enclosures)