



May 14, 1999

Ms. Priscilla A. Lozano
The University of Texas System
201 West 7th Street
Austin, Texas 78701-2981

OR99-1334

Dear Ms. Lozano:

You have asked us to reconsider a portion of our decision in Open Records Letter No. 99-0467 (1999). We assigned your request for reconsideration ID#124127.

In Open Records Letter No. 99-0467 (1999), we ruled that you had shown the applicability of section 552.103(a) on the basis of a reasonable anticipation of litigation. We also explained in our ruling that when all parties to the anticipated litigation have access to records, no section 552.103(a) interest generally exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). We noted that the records submitted to this office contained a transcribed record from a proceeding attended by the opposing party to the anticipated litigation or that party's legal representative. We thus concluded that the opposing party to the anticipated litigation had access to the transcribed report so that the record is not protected from disclosure under section 552.103(a). You have asked us to review this portion of our ruling to determine the applicability to the record of provisions in article 4495b of Vernon's Texas Civil Statutes and chapter 161 of the Health and Safety Code.

Section 5.06 of article 4495b of Vernon's Texas Civil Statutes and section 161.032 of the Health and Safety Code 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." In your letter of February 18, 1999, you state that the transcribed record submitted to this office is

confidential because it “was prepared under the direction of a properly constituted medical peer review body.” It is our understanding from your original letter of November 18, 1998, that this committee was involved in deliberations concerning a complaint made against a physician.

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) of the Health and Safety Code provides that a “medical committee” includes a hospital, medical organization, a university medical school or health science center, a health maintenance organization, or an extended care facility. The term also includes ad hoc committees appointed to conduct specific investigations. *Id.* § 161.031(b).

We note that neither section 5.06 nor section 161.032 makes 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.”¹ *See Memorial Hosp.-the Woodlands*, 927 S.W.2d at 9-10 (discussing business records and holdings in

¹*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.

Barnes and Jordan). Thus, the records are not generally confidential if made or maintained in the regular course of business. Health & Safety Code § 161.032(b).

We have reviewed the transcribed record and your argument. Based upon your assertions to this office that the transcript at issue was created by this medical committee as part of its deliberative process, we agree that the transcript is confidential and must be withheld from disclosure. If you have questions about this ruling, please contact our office.

Sincerely,

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/ch

Ref: ID# 124127

encl. Submitted documents

cc: Mr. John W. Raglund
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(w/o enclosures)