



July 18, 2001

Mr. George D. Cato
Deputy General Counsel
Texas Department of Health
1100 West 49th Street
Austin, Texas 78756-3199

OR2001-3110

Dear Mr. Cato:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 149598.

The Texas Department of Health (the "department") received a request for any complaints at a specified hospital. You claim that the marked information is excepted from disclosure under section 552.101 of the Government Code. You state that all other information has been or will be released to the requestor. We have considered the exception you claim and reviewed the submitted information.

You assert that portions of the submitted information are confidential under section 552.101 in conjunction with a provision of the Medical Practice Act ("MPA"), section 159.002(b) of the Occupations Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by statute. Section 159.002(b) of the Occupations Code provides the following:

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.

Thus, access to medical records is governed by provisions outside the Public Information Act. See Open Records Decision No. 598 (1991). The MPA provides for both confidentiality of medical records and certain statutory access requirements. Occ. Code §§ 159.002, .003. Medical records may be released only in accordance with the MPA. Open Records Decision No. 598 (1991). You represent that the marked information was obtained from medical records. After reviewing the marked information, we agree that the portions you marked are subject to the MPA. Thus, the department may only release this information in accordance with the MPA.

You also contend that portions of the submitted information, which you marked, are excepted under section 552.101 in conjunction with section 161.032 of the Health and Safety Code. Section 161.032 provides in relevant part:

(a) The records and proceedings of a medical committee are confidential and are not subject to court subpoena. . . . Records, information, or reports of a medical committee . . . and records, information, or reports provided by a medical committee . . . to the governing body of a public hospital . . . are not subject to disclosure under Chapter 552, Government Code.

...

(c) This section . . . do[es] not apply to records made or maintained in the regular course of business by a hospital[.]

Health & Safety Code § 161.032(a), (c). In interpreting the predecessor to this section, the Texas Supreme Court in *Jordan v. Court of Appeals*, 701 S.W.2d 644, 647-48 (Tex. 1985), stated that “the statutory language, ‘records and proceedings’ means those documents generated by the committee in order to conduct open and thorough review. In general, this privilege extends to documents that have been prepared by or at the direction of the committee for committee purposes.” The *Jordan* court found that the privilege extends to “minutes of committee meetings, correspondence between members relating to the deliberation process and any final committee product, such as recommendations.” *Jordan*, 701 S.W.2d at 648.

After reviewing the information at issue, we agree that the portion derived from medical staff executive committee minutes reveals, on its face, that the information was obtained from records of a medical committee and is privileged under section 161.032 of the Health and Safety Code. *See* Open Records Decision No. 591 (1991) (Texas court decisions construing section 161.032 of Health and Safety Code establish that minutes of a medical committee are confidential; therefore, minutes of hospital's Quality Management Committee are within scope of confidentiality provision). However, we do not believe that you have demonstrated, nor can we determine, that the remaining information at issue was obtained from records prepared by or at the direction of a medical committee for committee purposes. Thus, the remaining information at issue may not be withheld under section 552.101 in conjunction with section 161.032 of the Health and Safety Code. We have marked the information the department must withhold under section 552.101 in conjunction with section 161.032 of the Health and Safety Code.

You also claim that the submitted reports are the result of a Medicare survey. You explain that the department is the Medicare state survey agency pursuant to an agreement with the federal Health Care Financing Administration (HCFA). You assert that section 1306(a)(1) of Title 42 of the United States Code prohibits the disclosure of any file, record, report, or

other paper, or any information, obtained at any time by the head of the Department of Health and Human Services (“DHHS”) or by any officer or employee of DHHS in the course of discharging the duties of the head of DHHS. Further, you also cite to 42 CFR § 401.101(a)(1)(b)(c) and the HCFA State Operations Manual for the proposition that section 1306(a)(1) applies to survey agencies. You have also enclosed a copy of section 3308 of the HCFA State Operations Manual which allows a state agency to disclose the official Medicare/Medicaid report of a survey but must redact the following information: (1) the name of any patient; (2) medical information about any identifiable patient; (3) the identity of a complainant; (4) the address of anyone other than the owner of the facility; or (5) information which could be defamatory toward any identifiable person. Based on your representations that the reports are the result of a Medicare survey, we conclude that the department must withhold the identities of the patients and an address which you have marked.

In summary, we conclude that the department must withhold the MPA information and the identities of patients that you have marked under section 552.101 of the Government Code. The department must also withhold the information that we have marked under section 552.101 in conjunction with section 161.032 of the Health and Safety Code. The department must release the remaining submitted information.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body’s intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general’s Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Jennifer H. Bialek
Assistant Attorney General
Open Records Division

JHB/sdk

Ref.: ID# 149598

Enc.: Submitted documents

c: Ms. Patsy McFadden
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(w/o enclosures)