



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 27, 2011

Ms. Janet Smith
Assistant General Counsel
Texas Department of State Health Services
P.O. Box 149347
Austin, Texas 78714

OR2011-01472

Dear Ms. Smith:

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# 407404 (DSHS File 18252-2011).

The Texas Department of State Health Services (the "department") received a request for the personnel and disciplinary files for the requestor's client as well as a specified peer review report, witness statements, and statements attributed to the requestor's client regarding a specified incident. You state the department has made some responsive information available to the requestor. You claim the remaining responsive information is excepted from disclosure under sections 552.101 and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.101 of the Government Code excepts from required public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses statutory confidentiality provisions such as section 48.101 of the Human Resources Code. Section 48.101 pertains to the disclosure of reports of abuse, neglect, or exploitation of elderly and disabled persons in certain facilities. This section provides in pertinent part as follows:

(a) The following information is confidential and not subject to disclosure under Chapter 552, Government Code:

(1) a report of abuse, neglect, or exploitation made under this chapter;

(2) the identity of the person making the report; and

(3) except as provided by this section, all files, reports, records, communications, and working papers used or developed in an investigation made under this chapter or in providing services as a result of an investigation.

(b) Confidential information may be disclosed only for a purpose consistent with this chapter and as provided by department or investigating state agency rule and applicable federal law.

...

(d) The executive commissioner [of the Texas Health and Human Services Commission] shall adopt rules providing for the release, on request, to a person who is the subject of a report of abuse, neglect, or exploitation or to that person's legal representative of otherwise confidential information relating to that report. The department or investigating state agency shall edit the information before release to protect the confidentiality of information relating to the reporter's identity and to protect any other individual whose safety or welfare may be endangered by disclosure.

Hum. Res. Code § 48.101(a), (b), (d). You state the investigative report you marked relates to an investigation conducted by the Texas Department of Family and Protective Services under chapter 48 of the Human Resources Code. *See id.* § 48.252(a)(1), 40 T.A.C. § 711.1. Based upon your representation and our review, we agree this report was used or developed in an investigation under chapter 48. Such information must not be released to the public, except for a purpose consistent with chapter 48 or as provided by a department or investigating state agency rule or federal law. *See* Hum. Res. Code § 48.101(b-g) (permitting release of confidential information only in certain circumstances). You do not indicate, nor does it appear, that an exception to confidentiality applies in this instance. Accordingly, we conclude the department must withhold the report you marked pursuant to section 552.101 of the Government Code in conjunction with section 48.101 of the Human Resources Code.

Section 576.005 of the Health and Safety Code also is encompassed by section 552.101 of the Government Code. Section 576.005 provides that "[r]ecords of a mental health facility that directly or indirectly identify a present, former, or proposed patient are confidential unless disclosure is permitted by other state law." Health and Safety Code § 576.005. Upon review, we agree the information you marked consists of records of a mental health facility. Accordingly, we agree the confidentiality provision of section 576.005 applies to the information you marked. You do not indicate any other state law would permit disclosure of this information in this instance. Therefore, the department must withhold the information you have marked under section 552.101 of the Government Code in conjunction with section 576.005 of the Health and Safety Code.

Section 552.101 of the Government Code also encompasses section 161.032 of the Health and Safety Code. Section 161.032 provides in part:

(a) The records and proceedings of a medical committee are confidential and are not subject to court subpoena.

...

(c) Records, information, or reports of a medical committee [or] medical peer review committee, . . . and records, information, or reports provided by a medical committee [or] medical peer review committee. . . to the governing body of a public hospital, hospital district, or hospital authority are not subject to disclosure under Chapter 552, Government Code.

Health & Safety Code § 161.032(a), (c). A “medical committee” is defined as any committee, including a joint committee of a hospital, medical organization, university medical school or health science center, health maintenance organization, extended care facility, a hospital district, or a hospital authority. *See id.* § 161.031(a). The term also encompasses “a committee appointed ad hoc to conduct a specific investigation or established under state or federal law or rule or under the bylaws or rules of the organization or institution.” *Id.* § 161.031(b).

The precise scope of section 161.032 has been the subject of a number of judicial decisions. *See, e.g., Memorial Hosp.-The Woodlands v. McCown*, 927 S.W.2d 1 (Tex. 1996); *Barnes v. Whittington*, 751 S.W.2d 493 (Tex. 1988); *Jordan v. Fourth Supreme Judicial Dist.*, 701 S.W.2d 644 (Tex. 1986). These cases establish that “documents generated by the committee in order to conduct open and thorough review” are confidential. *Jordan*, 701 S.W.2d at 647-48. This protection extends “to documents that have been prepared by or at the direction of the committee for committee purposes.” *Id.* at 648. However, this protection does not extend to documents “gratuitously submitted to a committee” or “created without committee impetus and purpose.” *Id.* at 648; *see also* Open Records Decision No. 591 (1991) (construing statutory predecessor to section 161.032). We note that section 161.032 does not make confidential “records made or maintained in the regular course of business by a hospital[.]” Health & Safety Code § 161.032(f); *see Memorial Hosp.—The Woodlands*, 927 S.W.2d at 10 (stating that reference to statutory predecessor to section 160.007 in section 161.032 is clear signal that records should be accorded same treatment under both statutes in determining if they were made in ordinary course of business).

You explain the remaining information consists of records of the department’s Nursing Peer Review Committee (the “committee”), which you contend is a medical committee. You state that based on the committee’s review of this information, it recommended the matter be referred to the Texas Board of Nursing. We understand the information at issue was not prepared in the regular course of business, but rather, was created at the direction of the superintendent of the hospital at issue for use by the committee. Based on your

representations and our review, we agree the committee constitutes a medical committee as defined by section 161.031 and find that the information you have marked under section 161.032 is confidential. Thus, this information must be withheld under section 552.101 of the Government Code in conjunction with section 161.032(a) of the Health and Safety Code.

In summary, the department must withhold the information you marked under section 552.101 of the Government Code in conjunction with section 48.101 of the Human Resources Code and sections 576.005 and 161.032 of the Health and Safety Code. As our ruling is dispositive, we need not address your remaining argument against disclosure.

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,



Bob Davis
Assistant Attorney General
Open Records Division

RSD/tf

Ref: ID# 407404

Enc. Submitted documents

c: Requestor
(w/o enclosures)