

ECTOR COUNTY, TEXAS  
TRACEY BRIGHT  
ECTOR COUNTY ATTORNEY

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OPEN RECORDS DIVISION

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OPINION COMMITTEE

July 7, 2003

**RQ-0077-GA**

Honorable Greg Abbott  
Attorney General of Texas  
Opinions Division  
P.O. Box 12548  
Austin, Texas 78711-2548

FILE # ML-43180-03  
I.D # 43180

VIA RETURN RECEIPT REQUESTED #7106 4575 1291 1231 5709

**RE: REQUEST FOR OPINION**

Dear General Abbott:

As the County Attorney of Ector County, I am respectfully requesting your official opinion concerning a county commissioner's access to records.

Health insurance is provided to the employees of Ector County as an employment benefit. Except for "stop loss" coverage on large claims, Ector County is self-insured on the payment of claims.

It was recently disclosed that a former Ector County Commissioner had not made his retiree dependent health coverage premium payments for 22 months. It was also disclosed that he had entered into an agreement with the head of the Ector County Insurance Department whereby he could pay his monthly retiree dependent coverage premiums in the future and make payments against his arrears at the same time. It is unclear as to whether or not the ex-commissioner in question signed up for the dependent coverage when he retired.

The Commissioners Court voted to place the head of the Insurance Department on administrative leave without pay.

The Ector County Judge has refused to allow the individual county commissioners to review the documents surrounding this transaction claiming that such a review would be a violation of the privacy rights of the ex-commissioners' wife pursuant to HIPAA and the Medical Practices Act. He also has indicated that the only way a

Commissioner can look at records is if the Judge agrees or upon a majority vote of the Commissioners' Court.

The individual County Commissioners are not requesting the records in question be made public, only that they be allowed to review them to fulfill their elective duties, e.g. determining that cause and extent of the problem, discipline of the employee who made the mistake, protection of the County finances, etc.

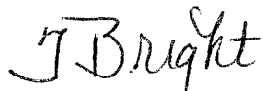
The situation will likely come under investigation by law enforcement.

My questions are as follows:

- 1) Are the individual County Commissioners allowed to access and review all of the records of the ex-commissioner's insurance status including his and his wife's signup documents, claims, and premiums payment histories? In this regard, would there be any documents that the County Commissioners could not access and review?
- 2) Are the individual County Commissioners allowed to access and review the records in question, in spite of an ongoing criminal investigation, if appropriate measures are taken to protect the integrity and security of the records?

I have submitted a brief with this request and will be happy to provide any additional information you wish.

Yours truly,



Tracey Bright

TB:ct  
Enc.

## BRIEF IN SUPPORT OF OPINION REQUEST

The Texas Constitution and Statutes provide that the affairs of county government are governed by the commissioners court. *Tex. Const. Art. 5, sec. 18(b)*; *Tex. Local Gov't Code Ann. Sec. 81.001 et. seq.* (Vernon 1988 and Supp 1997). The powers and duties of commissioners court include aspects of legislative, executive, administrative and judicial functions. *Commissioners Court of Titus County v. Agan (sup. 1991) 940 SW2nd 77*. However, the county can only act through its commissioner court and individual members of the court have no authority to bind the county by their separate actions or agreements. *Nueces County v. De Pena (App. 13 Dist. 1997) 953 SW2nd 835*, rehearing overruled.

Texas law provides that each elected county officer is the custodian of the records created or received by that county officer's office. *V.T.C.A., Government Code sec. 552.201 (a)*; *V.T.C.A., Local Gov't Code sec. 201.003*.

In the instant case, the Ector County Commissioners Court would be the custodian of records since Ector County is self-insured on its health care coverage and the responsibility of management falls on the commissioners court. Even if the Ector County Judge is considered the custodian of the records, ready access to them by the Ector County Commissioners is required for them to perform their constitution and statutory duties. For instance, how can the commissioners know if the insurance plan is being run properly if they cannot see the records of transactions within the plan? If the head of the Insurance Department did something improper, how can the commissioners fix the problem and properly discipline the employee, if they cannot see the records of what she did?

As the administrative head of the county government, the commissioners court possesses broad implied powers to accomplish its legitimate directives. *Cosby v. County Com'rs of Randall County (App. 7 Dist. 1986) 712 SW2nd 248*, ref. n.r.e. It would obviously be impossible to carry out their duties if they cannot access information concerning county business.

Within the framework of the functioning of a county court the county judge is considered a participant but his status as a presiding officer is considered ministerial. *Hambro v. Neiderhofer (cir. App. 1935) 83 SW2nd 685*.

The position of the Ector County Judge that the medical records in question are protected from view by the other commissioners because of the confidentiality requirements of the Medical Practices Act and HIPAA are dispelled in the acts themselves. An exception to

the privilege of confidentiality of medical information is provided in subsection (6) of the Medical Practices Act, *Tex. Occupations Code sec. 159.004*, which provides an exception for “a person, corporation of government agency involved in the payment or collection of fees for medical services provided by a physician”. The Health Insurance Portability and Accountability Act of 1996 (HIPPA), *42 USC sec. 1320 d-2 (Supp IV 1998)* provides an exception to medical records confidentiality for payment services as well as “health care operations”, which include administrative, financial, legal and quality improvement activities for covered entity. *45 C.F.R. sec. 164.506*. I have enclosed a copy of a circular from the U.S. Government which explains these exceptions to privacy in more detail.

It is obvious that neither of the Acts protect the disclosure of the information in question, when that disclosure is to the individual county commissioners who are the trustees and administrators of the Ector County Health Insurance Plan.

The Open Records Act, *V.T.C.A., Government Code sec. 552.201 et. seq.*, provides for various exceptions to an open records request, e.g. an ongoing criminal investigation. However, none of these exceptions should apply since these records are not being requested for public access but for revelation to the Ector County Commissioners to assist them in the performance of their duties.

Respectfully submitted,

A handwritten signature in cursive script that reads "Tracey Bright".

Tracey Bright  
Ector County Attorney