



**THE ATTORNEY GENERAL  
OF TEXAS**

September 29, 1989

**JIM MATTOX  
ATTORNEY GENERAL**

Mr. W. Kent Johnson  
Director, Legal Services  
Texas Department of Mental Health  
and Mental Retardation  
P. O. Box 12668  
Austin, Texas 78711-2668

Dear Mr. Johnson:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S. Your request was assigned ID# 5984; this decision is OR89-321.

Under the Open Records Act, all information held by governmental bodies is open unless the information falls within one of the act's specific exceptions to disclosure. The act places on the custodian of records the burden of proving that records are excepted from public disclosure. If a governmental body fails to claim an exception, the exception is ordinarily waived unless the information is deemed confidential under the act. See Attorney General Opinion JM-672 (1987). The act does not require this office to raise and consider exceptions that you have not raised.

The Texas Department of Mental Health and Mental Retardation has received a request for copies of two documents known as "program review reports" of the Tarrant County MHMR Services Center and the MHMR Authority of Harris County prepared by the department's Office of Standards and Quality Assurance. Copies of both the Harris County and Tarrant County reports were delivered for our review.

You contend that both reports are excepted from public disclosure under section 3(a)(1) of the Open Records Act, which protects information deemed confidential by law and by article 4447d, V.T.C.S., which provides the following in relevant part:

Sec. 3. The records and proceedings of any committee or joint committee of a

hospital, medical organization, university medical school, university health science center, health maintenance organization . . . or extended care facility, whether appointed on an ad hoc basis to conduct a specific investigation or established under state or federal law or regulations or under the by-laws, rules or regulations of such organization or institution, shall be confidential and shall be used by such committee and members thereof only in the exercise of the proper functions of the committee and shall not be public records and shall not be available for court subpoena; provided, however, that nothing herein shall apply to records made or maintained in the regular course of business by a hospital, health maintenance organization, or extended care facility.

Under the Open Records Act, a governmental body requesting a decision from this office bears not merely the burden of stating which exceptions apply to the requested information, but also the burden of explaining why such exceptions apply. See Open Records Decision No. 252 (1980). Your letter requesting this decision fails to explain why the requested reports come within the privilege created by section 3 of article 4447d. The Texas Supreme Court has recently held that the privilege created by this privilege extends only to information generated by a hospital committee in its investigation or review process. Barnes v. Whittington, 751 S.W.2d 493, 496 (Tex. 1988). Information is protected by the privilege if it is sought by or brought to the attention of the committee for the purposes of an investigation, review, or other deliberative proceeding. Id. Records kept in connection with the treatment of individual patients and the business and administrative documents of a hospital apart from committee deliberations are not protected. Texarkana Memorial Hospital v. Jones, 551 S.W.2d 33, 35 (Tex. 1977). The privilege may not be claimed unless it is shown that a hospital committee actually existed. See Gulf Coast Regional Blood Center v. Houston, 745 S.W.2d 557 (Tex. App. - Fort Worth 1988, no writ).

Your letter does not explain whether the report was prepared by "any committee or joint committee" of a hospital or any of the other medical units described in the statute.

Mr. W. Kent Johnson  
September 29, 1989  
Page 3

The fact that the report was prepared by the department's Office of Standards and Quality Assurance suggests that it was not prepared by the staff of a particular hospital or medical organization. Your letter also fails to disclose that the report was not prepared in the regular course of business of a hospital so as to bring it within the privilege. Consequently, we are unable to conclude that the reports are embraced by the "hospital committee privilege" of article 4447d and thereby excepted by section 3(a)(1) of the Open Records Act. The Harris and Tarrant County reports are therefore subject to public disclosure and must be released to the requestor.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please refer to OR89-321.

Yours very truly,

*Open Government Section*  
*of the Opinion Committee*   
Open Government Section  
of the Opinion Committee  
Prepared by Steve Aragon  
Assistant Attorney General

SA/bc

Ref.: ID# 5984  
ID# 5999  
ID# 6244  
ID# 6947  
ID# 7140

cc: Ms. Denise Gamino  
Staff Writer  
Austin American-Statesman  
P. O. Box 670  
Austin, Texas 78767