



DAN MORALES
ATTORNEY GENERAL

Office of the Attorney General
State of Texas

July 10, 1991

Mr. Jeff W. Ryan
Cowles & Thompson
Irving Hospital Authority
4000 NCNB Plaza
901 Main Street
Dallas, Texas 75202

Open Records Decision No. 591

Re: Whether a patient has a right under section 3B(a) of the Open Records Act to see peer review committee documents pertaining to him (RQ-33)

Dear Mr. Ryan:

You ask about the availability of certain records of the Irving Hospital Authority (hereinafter "the hospital") under the Open Records Act, article 6252-17a, V.T.C.S. On October 4, 1990, the hospital received a request for information from a mother in regard to the medical care her child received in the hospital's emergency room. The mother sought information relating to her child as well as information about the doctor and other staff members who attended the child. The hospital eventually supplied some of the information sought, but informed the mother that most of the information sought was made confidential either by section 161.032 of the Health and Safety Code, by section 5.06(g) of the Medical Practice Act, article 4495b, V.T.C.S., or by section 3(a)(2) of the Open Records Act. The mother's lawyer then wrote letters to the hospital and to this office, urging that the hospital had a duty to make the records available. On November 13, on behalf of the hospital, you sought the opinion of this office in regard to the availability of the records in question.

If a governmental body¹ receives a request for information that it considers to be excepted from required public disclosure, the governmental body must seek a decision from the attorney general in regard to the availability of the information within ten days of its receipt of the request. V.T.C.S. art. 6252-17a, § 7(a). If a decision is not so requested, the information is presumed to be public. *Id.* This presumption of openness can be overcome only if the government provides

¹A hospital authority created pursuant to article 4437e, V.T.C.S., is a governmental body for purposes of the Open Records Act. Attorney General Opinion H-554 (1975).

compelling reasons to withhold the information. *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex. App.--Austin 1990, no writ). The presumption of openness does not arise, however, if information is made confidential by law. V.T.C.S. art. 6252-17a, § 10(a). Because the information submitted to us is made confidential by law, the compelling reason standard is inapplicable here, even though the hospital did not submit a timely request for an attorney general opinion.²

The documents you have submitted for our review include records of the Membership and Credentials Committee of the Medical Staff regarding the credentials and privileges of the physician who treated the child in the emergency room (hereinafter "credentials file") and minutes of meetings of the hospital's Quality Management Committee. You claim that those documents are within the scope of section 161.032 of the Health and Safety Code, which makes the "records and proceedings of a medical committee" confidential, and section 5.06(g) of article 4495b, V.T.C.S., which makes "all proceedings and records of a medical peer review committee" confidential.

Under section 161.031(a) of the Health and Safety Code, a "medical committee" includes, among many other things, any committee of a hospital. It includes an ad hoc committee appointed to conduct a specific investigation as well as a committee established under the bylaws or rules of the hospital. Health & Safety Code § 161.031(b). The records and proceedings of a medical committee are confidential, *id.* § 161.032(a), but the confidentiality does not extend to "records made or maintained in the regular course of business by a hospital." *Id.* § 161.032(c). The precise scope of those provisions has been the subject of a

²In your request for a decision from this office, you claim that the information at issue is excepted from required public disclosure under sections 3(a)(1) and 3(a)(3) of the Open Records Act. In a letter of November 27, 1990, you raise section 3(a)(11), which allows a governmental body to withhold advice, opinion, and recommendation and in a letter of January 25, 1991, you raise section 3(a)(3), the litigation exception. Neither of those exceptions was timely raised, and you offer no compelling reasons for withholding information under those exceptions. Nor can previous decisions of this office regarding sections 3(a)(3) and 3(a)(11) be considered previous determinations in regard to the applicability of sections 3(a)(3) and 3(a)(11) to the documents you have submitted, since the availability of both section 3(a)(3) and section 3(a)(11) must be determined on a case-by-case basis. See generally *Houston Chronicle Publishing Co. v. Mattox*, 767 S.W.2d 695, 698 (Tex. 1989); Open Records Decision No. 435 (1986) (regarding previous determinations).

number of judicial decisions.³ *Barnes v. Whittington*, 751 S.W.2d 493 (Tex. 1988); *Jordan v. Court of Appeals for the Fourth Supreme Judicial Dist.*, 701 S.W.2d 644 (Tex. 1986); *Hood v. Phillips*, 554 S.W.2d 160 (Tex. 1977); *Texarkana Memorial Hosp., Inc. v. Jones*, 551 S.W.2d 33 (Tex. 1977); *Doctor's Hosp. v. West*, 765 S.W.2d 812 (Tex. App.--Houston [1st Dist.] 1988, no writ); *Goodspeed v. Street*, 747 S.W.2d 526 (Tex. App.--Fort Worth 1988, no writ). Those cases establish that the minutes of a medical committee are confidential. Therefore, the minutes of the hospital's Quality Management Committee are within the scope of the confidentiality provision. *Barnes, supra*; *Jordan, supra*; *Texarkana Memorial Hospital, supra*.⁴

The confidentiality provision in section 5.06(g) of the Medical Practice Act applies to a narrower category of committees than does the confidentiality provision of section 161.032 of the Health and Safety Code. It applies to the records of a "Medical peer review committee," which is defined 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.

³The decisions construing the medical committee confidential provisions refer to the earlier statutory designation, article 4447d, § 3, V.T.C.S. In this opinion we have referred to those provisions by their current statutory designation, section 161.032 of the Health and Safety Code.

⁴Under *Barnes*, however, the information in the credentials file would not necessarily be within the scope of the confidentiality provision since in *Barnes* the court concluded that the confidentiality privilege extended only to information generated by a hospital committee in its investigation or review process and that routine administrative records gratuitously submitted to a hospital credentials committee were therefore not within the scope section 161.032. We need not consider the application of the *Barnes* standard to the credentials file in question, however, because that file is confidential under section 5.06(g) of the Medical Practice Act, regardless of whether it would be confidential under section 161.032 of the Health and Safety Code.

V.T.C.S. art. 4495b, § 1.03(a)(6). Thus, unlike section 161.032, section 5.06(g) does not apply to ad hoc committees. Further, it applies only to committees established by written bylaws for specified purposes. You have submitted documents showing the hospital's bylaws establishing the Membership and Credentials Committee of the Medical Staff as the body responsible for reviewing information relating to the competence of applicants and of hospital staff members. Thus, the committee is a medical peer review committee for purposes of section 5.06(g). The remaining issue is whether the documents in the credentials file you have submitted are covered by the confidentiality privilege of section 5.06(g).

Although section 5.06(g) applies to a narrower class of committees than does section 161.032, section 5.06(g) applies to a broader class of records. It applies to "all proceedings and records of a medical peer review committee,"⁵ and contains no exception, as does section 161.032, for "records made or maintained in the regular course of business." That exception in section 161.032 led the court in *Barnes* to conclude that routine administrative records gratuitously submitted to a hospital credentials committee were not within the scope of the confidentiality provision. See n.4. *supra*. The absence of such an exception in section 5.06(g) indicates that that confidentiality provision applies to routine administrative documents generated by or for a properly constituted committee.⁶ All of the documents in the credentials file at issue appear on their face to fit that description. We conclude, therefore, that the credentials file you have submitted to us is within the scope of section 5.06(g).

The mother's lawyer has urged, however, that even if the documents are covered by section 161.032 or section 5.06(g), the documents are nonetheless available to the child's mother because of section 3B(a) of the Open Records Act, which provides a person has special right of access to "records held by a governmental body that contain information relating to the person that is protected from public disclosure by laws intended to protect that person's privacy interests."

⁵Thus, section 5.06(g), like section 161.032, applies to the minutes of a peer review committee.

⁶In this opinion it is only necessary to consider whether the confidentiality provision of section 5.06(g) covers routine administrative records that are generated by or for a medical peer review committee. We do not address whether the confidentiality provision covers routine administrative documents that are not generated by or for a medical peer review committee but nonetheless find their way to a peer review committee. See generally *Barnes, supra*; *Jordan, supra*; *Texarkana Memorial Hospital, supra*; *Hood, supra*.

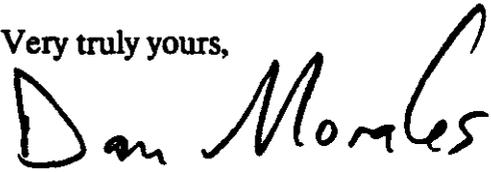
The issue, then, is whether the confidentiality provisions of section 161.032 and 5.06(g) are intended to protect a patient's privacy. The Texas Supreme Court has said that the substance of section 161.032 "reflects a legislative judgment that the overall quality of medical care will be elevated by shielding certain in-house evaluations from public disclosure. Medical professionals are more likely to come forward with information about professional incompetence and misbehavior when protected from personal liability or public disclosure." *Barnes, supra*, at 497. In regard to peer review documents generally, one court has said, "Constructive professional criticism cannot occur in an atmosphere of apprehension that one doctor's suggestion will be used as a denunciation of a colleague's conduct in a malpractice suit." *Bredice v. Doctors Hosp., Inc.*, 50 F.R.D. 249, 250 (D.C. Cir. 1970). Also, many peer review committee records, such as most of the material in the credentials file at issue here, do not refer to individual patients. We think it is clear, therefore, that the main purpose of the medical committee and peer review confidentiality provisions is to encourage frank discussion and evaluation. See generally *Butler, Hospital Peer Review Committees: Privileges of Confidentiality and Immunity*, 23 S. Tex. L.J. 45, 49-53 (1982). It follows that section 3B of the Open Records Act does not give a person that is the subject of documents made confidential by section 161.032 of the Health and Safety Code or section 5.06(g) of the Medical Practice Act a special right of access to those documents. Therefore, the committee records you have submitted to us may not be released to the requestor.

You have also submitted to us the personnel files of two nurses. You claim that the documents may be withheld under section 3(a)(2) of the Open Records Act, which protects "information in personnel files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Information may be withheld under section 3(a)(2) only if it contains highly intimate or embarrassing facts about a person's private affairs such that its release would be objectionable to a reasonable person and if the information is of no legitimate concern to the public. *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546, 550 (Tex. App.--Austin 1983, writ ref'd n.r.e.). We have marked the information in the personnel files that meets that standard. See generally Open Records Decision Nos. 545 (1990) (regarding personal financial information); 455 (1987) (regarding personal health matters); 226 (1979) (tax information). We have also marked information that must be withheld under section 5.08 of the Medical Practice Act, article 4495b, V.T.C.S. The rest of the information must be released.

SUMMARY

The main purpose of the confidentiality provision of section 161.032 of the Health and Safety Code and section 5.06(g) of article 4495b, V.T.C.S., the Medical Practice Act, is to encourage frank discussion, not to protect patient privacy. Therefore, a patient whose treatment is the subject of such records has no special right of access to such records under section 3B(a) of the Open Records Act.

Very truly yours,

A handwritten signature in black ink that reads "Dan Morales". The signature is written in a cursive style with a large, sweeping "D" and "M".

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