



Office of the Attorney General
State of Texas

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ATTORNEY GENERAL

Mr. Dennis R. Jones, M.S.W., M.B.A.
Commissioner

Texas Department of Mental Health
& Mental Retardation

P.O. Box 12668

Austin, Texas 78711-2668

Open Records Decision No. 595

Re: Scope of the confidentiality provision
for peer review records in article 4495b,
section 5.06(g), and scope of right of
access under article 5547-300, section
57(b) (RQ-84)

Dear Commissioner Jones:

You have received a request under the Open Records Act, article 6252-17a, V.T.C.S., for information in regard to the death of a client at the Fort Worth State School, a residential facility of the Department of Mental Health and Mental Retardation (MHMR). The requested material is within the scope of a confidentiality provision that applies to records of the "identity, diagnosis, evaluation, or treatment of any person which are maintained in connection with the performance of any program or activity relating to mental retardation." V.T.C.S. art. 5547-300, § 57(a). Certain persons, however, have a right of access to such records.¹ *Id.* § 57(b). In the case of a deceased person, any person who has the written consent of the person's executor or administrator has a right of access to the records. The requestor in this instance has presented the written consent of the

¹You have not suggested that any of the requested documents are outside of the scope of the special right of access; rather you argue that they are made confidential by provisions applicable to records of medical peer review committees.

deceased person's parents, who apparently are the executors or administrators of his estate.²

Despite the parents' statutory right of access to the records in question, you seek to withhold some of the records under provisions in the Medical Practice Act that make records of a "medical peer review committee" confidential.³ V.T.C.S. art. 4495b, § 5.06(g); *see id.* art. 6252-17a, § 3(a)(1) (Open Records Act incorporates statutory confidentiality provisions). Under the Medical Practice Act "all proceedings and records of a medical peer review committee are confidential." V.T.C.S. art. 4495b, § 5.06(g). You assert that the Death Review Committee is a medical peer review committee and that the requested records are records "of" the committee. In order for the Death Review Committee to qualify as a medical peer review committee for purposes of the Medical Practice Act, it must satisfy three tests: (1) it must operate pursuant to written bylaws that have been approved by the policy-making body or the governing board of the health-care entity; (2) it must be authorized to evaluate the quality of medical and health-care services or the competence of physicians; and (3) it must be a committee of a "health-care entity." *Id.* § 1.03(a)(6).

The first issue is whether the committee operates pursuant to written bylaws that have been approved by the policy-making body or the governing board of the health-care entity. You explain that the Fort Worth State School Death Review Committee operates pursuant to rules promulgated by MHMR. 25 T.A.C. § 405.272. The term "bylaw" generally refers to a rule adopted by a corporation and governing the conduct of corporate affairs. *Brown v. National Loan & Inv. Co.*, 139 S.W.2d 364, 367 (Tex. Civ. App.--El Paso 1940, writ dismissed, judgment corrected). Rules adopted by a state agency for operation of a state facility serve much the same function for a state agency as bylaws do for private corporations. *See* V.T.C.S. art.

²The consent form identifies the parents as the "personal representatives" of their deceased son. The term "personal representative" includes executors and administrators, Probate Code § 3(aa), and we assume the parents used the term to indicate their status as executors or administrators of their son's estate. *See generally* V.T.C.S. art. 5561h, § 4(b)(4) ("personal representative" of deceased person has right of access to mental health records made confidential under this provision).

³You also seek to withhold the requested records under section 3(a)(3) of the Open Records Act, which applies to records related to litigation to which the state is a party. Section 3(a)(3) cannot, however, be invoked to overcome a statutory right of access. *See* Open Records Decision No. 431 (1985).

6252-13a, § 3(7) (defining "rule"). Since the Death Review Committee is a committee of a facility of a state agency, we conclude that the fact that the Death Review Committee operates pursuant to formal agency rules satisfies the requirement that it operate pursuant to written bylaws.

The second issue is whether the Death Review Committee is authorized to evaluate the quality of medical and health-care services or the competence of physicians. The purpose of the Death Review Committee is to "recommend amendments to facility policy and procedure which will improve the delivery of services." 25 T.A.C. § 405.272(a). You inform us that client care at the Fort Worth State School includes medical care. Thus, the committee's authority to evaluate delivery of services includes the authority to evaluate the quality of medical and health-care services.

The final issue in determining whether the Death Review Committee is a medical peer review committee is whether the Fort Worth State School is a "health-care entity." The term "health-care entity" includes

an entity, including a health maintenance organization, group medical practice, nursing home, health science center, university medical school, or other health-care facility, that provides medical or health-care services and that follows a formal peer review process for the purposes [sic] of furthering quality medical or health care.

V.T.C.S. art. 4495b, § 1.03(5)(B). Because the Fort Worth State School provides medical services, it functions at least in part as a "health-care entity" as long as it follows a "formal peer review process for the purpose of furthering quality medical or health care." There is no statutory definition of "formal peer review process." The best statutory guideline for interpreting this requirement is the definition of "medical peer review committee," which requires that a medical peer review committee operate pursuant to written bylaws and that it be authorized to evaluate health-care services. We conclude, therefore, that a "formal peer review process for the purpose of furthering quality medical or health care" is a process by which a committee or other body of the health-care entity evaluates health-care services in accordance with written bylaws. Therefore, as long as the Death Review Committee actually followed the process set out in its bylaws to evaluate its medical services, the Fort Worth State School would be functioning as a "health-care entity" for

purposes of the medical peer review committee provisions of the Medical Practice Act.

Because the Death Review Committee may come within the definition of medical peer review committee in the Medical Practice Act, we must next address the issue of whether the records you have submitted for our review are records "of" a medical peer review committee. In Open Records Decision No. 591 (1991) we considered the scope of the confidentiality provision set out in section 5.06(g) of the Medical Practice Act. We concluded that any records generated by or for a medical peer review committee were records "of" a medical peer review committee.⁴ The report of the Death Review Committee, which you submitted for our review, was clearly generated by the committee, but we do not think it was generated by or for the committee in its capacity as a medical peer review committee. As indicated above, the Death Review Committee qualifies as a medical peer review committee when it evaluates the quality of medical care in the Fort Worth State School. The report at issue, however, is an investigation and evaluation of events that transpired while a client was involved in routine activities. The client was under the supervision of Fort Worth State School personnel at the time of the incident in question. We do not believe that supervision of clients while engaged in routine activities at a facility such as the Fort Worth State School generally constitutes health care within the meaning of section 5.06(g) of the Medical Practice Act. We conclude, therefore, that the Death Review Committee was not functioning as a medical peer review committee in regard to the matter at issue.⁵ Therefore, you

⁴Open Records Decision No. 591 compared the scope of section 5.06(g) of the Medical Practice Act with the scope of the privilege for records of a "medical committee" under section 161.032 of the Health and Safety Code. The decision noted that although section 161.032 covered a broader range of committees, it contained more restrictive language regarding the type of records covered by the privilege. The decision determined that that difference in language indicated that section 5.06(g) was not as narrow as the Texas Supreme Court interpreted section 161.032 to be in *Barnes v. Whittington*, 751 S.W.2d 493 (Tex. 1988). We note that a recent federal rules decision applied the standards developed under section 161.032 in a case in which both section 161.032 and section 5.06(g) were at issue. *Manthe v. Vanbolden*, 133 F.R.D. 497 (N.D. Tex. 1991). In doing so, the court simply noted that section 5.06(g) applied to a narrower range of committees than did section 161.032. The court did not consider the possibility that section 5.06(g) applied to a broader range of records. Thus, it considered the scope of the privilege only in terms of the case law regarding section 161.032.

⁵You also cite section 161.032 of the Health and Safety Code as a basis for withholding some of the requested records. Section 161.032 makes the records of a "medical committee" confidential. A "medical committee" includes any committee of an "extended care facility." Although the statute does not define "extended care facility," we think it is implicit that the term refers to a facility that provides extended *medical care*. As we discussed, the Fort Worth State School provides extended medical care

may not withhold the report or the other documents at issue under section 5.06(g) of the Medical Practice Act.

SUMMARY

Records generated by or for the Death Review Committee of the Fort Worth State School are within the scope of the confidentiality provision in the Medical Practice Act only when the records are generated by or for the committee for purposes of evaluating medical care at the state school. V.T.C.S. art. 4495b, § 5.06(g). That confidentiality provision prevails over the right of access set out in article 5547-300, section 57(b). Records that were reviewed by the Death Review Committee but were not generated by or prepared for the sole use of the committee are not made confidential by the Medical Practice Act.

Very truly yours,



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as well as other types of care. We think it is clear, though, that the privilege for records of a "medical committee" would apply only to a committee that was concerned with the medical care of clients at the Fort Worth State School. Thus, section 161.032 does not apply to the records at issue here.

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