



May 9, 2000

Ms. Nora Bender
Acting Open Records Coordinator
Texas Department of Mental
Health and Mental Retardation
P.O. Box 12668
Austin, Texas 78711-2668

OR2000-1790

Dear Ms. Bender:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 135114.

The Department of Mental Health and Mental Retardation (the "department") received a request from the parents of a deceased department patient for his medical records as well as investigation reports related to his death. You claim that the requested information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Sections 552.301 and 552.302 of the Government Code require a governmental body to release requested information or to request a decision from the attorney general and state the exceptions that apply within ten business days of receiving a request for information the governmental body wishes to withhold. When a governmental body fails to request a decision and state the exceptions that apply within ten business days of receiving a request for information, the information at issue is presumed public and must be released. *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex. App.--Austin 1990, no writ); *City of Houston v. Houston Chronicle Publ'g Co.*, 673 S.W.2d 316, 323 (Tex. App.--Houston [1st Dist.] 1984, no writ); Open Records Decision No. 319 (1982). The governmental body must show a compelling interest to withhold the information to overcome this presumption. Gov't Code § 552.302. Normally, a compelling interest is that some other source of law makes the information confidential or that third party interests are at stake. Open Records Decision No. 150 at 2 (1977).

You assert that the department received the open records request on February 24, 2000. We received your request for an opinion via hand delivery on March 10, 2000, more than ten business days from the date of the request. The requested information is presumed public absent a compelling reason to overcome the presumption.

Exhibit A consists of Abuse and Neglect reports responsive to the request. The department contends these documents are confidential pursuant to Human Resources Code section 48.101 and section 417.511 of title 25 of the Texas Administrative Code. Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Section 48.101 of the Human Resources Code pertains to disclosure of information about reports of abuse, neglect, or exploitation of elderly and disabled persons in certain facilities. Section 48.101 reads in 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 rule and applicable federal law.

...

(d) The department or investigating state agency by rule shall provide for 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. [omitted]

(e) The department or investigating state agency may adopt rules relating to the release of information contained in the record of a deceased individual who was the subject of an investigation conducted by the department or investigating state agency or to whom the department has provided protective services. The rules must be consistent with the purposes of this chapter and any applicable state or federal law.

We believe that the information at issue, which you state is a Department of Protective and Regulatory Services Adult Protective Services Facility Abuse and Neglect Investigative Report, along with attachments, is confidential pursuant to section 48.101(a) of the Human

Resources Code. *See* 40 T.A.C. § 710.12 (reports, records, and working papers used by or developed in the investigative process and the resulting final report regarding abuse and neglect are confidential). Consequently, the information must not be disclosed to the public, except for a purpose consistent with chapter 48 of the Human Resources Code, or as provided by department rule or federal law. *See* Hum. Res. Code § 48.101(b). *See id.* § 48.101(c), (d), (e), (f) (permitting release of confidential information in certain circumstances). As you have not indicated an applicable rule, the information must be withheld.

Exhibit B consists of the clinical death review performed pursuant to Administrative Code sections 405.265 and 405.269 following the death of a patient. Occupations Code section 160.005 provides that a peer review report is confidential and not subject to disclosure under the Public Information Act (the "Act"). Health and Safety Code section 161.032 states:

(a) 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.

The Clinical Death Review at Exhibit B is a confidential peer review report and not subject to disclosure. The department must withhold the report.

Exhibit C consists of information related to the Nursing Peer Review Committee investigation findings. Occupations Code section 303.006(a) provides:

Except as otherwise provided by this chapter, a nursing peer review committee proceeding is confidential and any communication made to a nursing peer review committee is privileged.¹

Section 303.007(b) lists the entities to whom the peer review committee may disclose information. The requestor does not appear to be among those listed as authorized recipients of confidential records and proceedings of the committee or privileged communications made to the committee.²

¹In similar contexts, the legislature has used the term "privileged" to mean "confidential" when applied to communications. *See* Health & Safety Code § 773.091. *See also* Fam. Code § 231.108. (Confidentiality of Records and Privileged Communications).

²We note that included in Exhibit C is an autopsy report. Autopsy reports prepared by a medical examiner are expressly made public by Code of Criminal Procedure article 49.25, § 11. While the department cannot release confidential information, the requestors can gain access to this information through a proper request to the medical examiner.

Exhibit D consists of personnel records of a licensed vocational nurse (“LVN”) who was the subject of a Clinical Death Review and a Nursing Peer Review. We note that personnel records of a state employee are subject to disclosure pursuant to the Act. However, the requestors did not specify that they sought personnel files. Instead, the file is responsive to a request for information related to investigations of the patient’s death. The personnel file was attached to the LVN’s rebuttal statements presented to the peer review committee during the course of its investigation. Because communications to and from a nursing peer review committee are privileged, the department must not release the personnel file at Exhibit D under section 303.006 of the Occupations Code.³

The responsive information identified at Exhibit E consists of the documentation of a Root Cause Analysis investigation triggered by a Sentinel Event Report. Exhibit F is an excerpt from the Administrator of the Day Log which was attached to the Sentinel Event Report. The department asserts that the investigation qualifies as a medical peer review and that the information is confidential. Medical peer review is defined by the Medical Practice Act (the “MPA”) to mean “the evaluation of medical and health care services” Occ. Code § 151.002(a)(7). A medical peer review committee is “a committee of a health care entity, . . . or the medical staff of a health care entity, that operates under written bylaws approved by the policy-making body or the governing board of the health care entity and is authorized to evaluate the quality of medical and health care services” Occ. Code § 151.002(a)(8). Section 160.007 of the MPA states that, “[e]xcept as otherwise provided by this subtitle, each proceeding or record of a medical peer review committee is confidential, and any communication made to a medical peer review committee is privileged.” Occ. Code § 160.007.

Subchapter D of Subtitle H of the Health and Safety Code also speaks to the issue of medical peer review. Included in the definition of the term “medical committee” is any committee of a hospital, a hospital district, or a hospital authority. Health & Safety Code § 161.031(a)(1),(6),(7). The term includes a committee appointed ad hoc to conduct a specific investigation. Health & Safety Code § 161.031(b). As stated in our analysis of Exhibit B, section 161.032 provides that information related to a medical committee or medical peer review committee is not subject to disclosure under Chapter 552. Health & Safety Code § 161.032(a).

The information you have submitted reveals that a Root Cause Analysis is designed to study a problem identified by a Sentinel Event to improve systems and processes associated with patient care. The mechanism for conducting the analysis is by a committee of health care professionals. We concur with your assessment that the Sentinel Event Report and Root Cause Analysis investigation are protected by medical peer review and medical committee confidentiality. However, section 161.032 further provides that “this section and [chapter

³Personnel records of public employees are generally subject to disclosure. *See* Open Records Decision Nos. 444 at 5-6 (1986), 405 at 2-3 (1983). The personnel file at issue is subject to disclosure pursuant to a proper request.

160 of the Occupations Code]⁴ do not apply to records made or maintained in the regular course of business by a hospital, health maintenance organization, medical organization, university medical center or health science center, or extended care facility.” Health & Safety Code § 161.032(b); *see Memorial Hosp.-the Woodlands v. McCown*, 927 S.W.2d 1, 10 (Tex. 1996) (stating that reference to statutory predecessor to section 160.007 in section 161.032 is clear signal that records should be accorded the same treatment under both statutes in determining if they were made in regular course of business).

In *Barnes v. Whittington*, 751 S.W.2d 493, 496 (Tex. 1988), the Texas Supreme Court indicated that “routinely accumulated information” unless submitted or created in connection with a committee’s deliberative process, does not constitute confidential committee records. In *Jordan v. Court of Appeals for Fourth Supreme Judicial Dist.*, 701 S.W.2d 644, 648 (Tex. 1985), the court stated that records “gratuitously submitted to a committee or which have been created without committee impetus and purpose are not protected.”⁵ *See McCown*, 927 S.W.2d 1 at 9-10 (discussing business records and holdings in *Barnes* and *Jordan*). Thus, even if records are submitted to or created by a medical peer review or medical committee, the records are not generally confidential if made or maintained in the regular course of business. Health & Safety Code § 161.032(b).

It appears that some of the documents were made during the regular course of hospital business. Consequently, we do not believe that these records are protected under either section 160.007 or section 162.032. We have marked the documents that you must release.

Exhibit F is a routine Administrator of the Day Log of significant daily events. Two of the events described in the log are responsive to the request; four are not and, further, contain information protected by common law privacy under section 552.101. Following redaction of information not responsive to the request, the department must release the report.

Exhibit G consists of the decedent’s medical records. Section 159.002 of the MPA provides:

A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided in this chapter.

Occ. Code § 159.002(b). Section 159.005(a)(5) provides that a personal representative of a deceased patient can sign a written consent for release of the confidential information. The Occupations Code does not define “personal representative.” However, in Open Records Decision No. 632 (1995), we addressed this question in a similar context. In that decision,

⁴Section 5.06, Medical Practice Act (formerly Article 4495b, V.T.C.A.).

⁵*Barnes* and *Jordan* both relied upon the predecessor statute to section 161.032 of the Health & Safety Code, section 3 of article 447d, Vernon’s Texas Civil Statutes, which provided, in part, that “records made or maintained in the regular course of business” were not confidential.

we determined the Emergency Medical Services Act (Health & Safety Code Chapter 773) afforded the same confidentiality, exceptions, and requirements for release of information as does the MPA. *Id.* at 2 (citing Open Records Decision No. 598 at 3 n.2 (1991)). We determined that the term “personal representative,” in the context of providing access to confidential records of a decedent, means “executors and administrators” as defined by the Probate and Tax Codes. ORD 632 at 4. However, we concluded that “while letters testamentary and of administration may be accepted as sufficient evidence of the appointment and qualification of the personal representative of an estate, *see* Prob. Code § 186, a personal representative seeking records governed by [the Emergency Medical Services Act] may establish by some other means, for example, by affidavit, his or her personal representative status.” *Id.* at 5.

We believe the circumstances considered in Open Records Decision 632 are analogous to those before us. The MPA provides for release of confidential medical records to the personal representatives of the decedent. Proof of “personal representative” status can be made through letters testamentary or of administration, by affidavit, or by some other reasonable means. Based on the records submitted for our review, we are unable to determine whether either of the requestors may be considered a personal representative of the deceased. The department must make that determination before concluding it can release or withhold the requested medical records.

In summary, although you have not complied with the Act’s deadlines, you have provided compelling reasons why most of the requested information must not be disclosed. The department must withhold all of the requested information except those portions of Exhibits E and F which we have identified. The department must determine whether the requestors are the personal representatives of the decedent before releasing the requested medical records. Again, we note that our determination regarding much of the requested information is constrained by the request itself: peer review investigations are legally protected activities; the information submitted to a peer review committee may be subject to disclosure in a different context. That is, by requesting information contained in investigation reports, the requestors have limited their access to otherwise public information.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general

have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Michael J. Burns
Assistant Attorney General
Open Records Division

MJB/ljp

Ref: IC# 135114

Encl. Submitted documents

cc: Mr. James Habel
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(w/o enclosures)