



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

February 7, 2007

Mr. James Downes  
Assistant County Attorney  
Harris County  
2525 Holly Hall, Suite 190  
Houston, Texas 77054

OR2007-01566

Dear Mr. Downes:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 271179.

The Harris County Hospital District (the "district") received a request for "a copy of Ben Taub Hospital's plan of corrective action it is submitting to the Center for Medicare/Medicaid Program." 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.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. You assert that the submitted information is excepted from disclosure under section 552.101 of the Government Code in conjunction with sections 160.007 of the Occupations Code and 161.032 of the Health and Safety Code. Section 160.007 of the Occupations Code 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." See Occ. Code § 160.007. Medical peer review is defined by the MPA to mean "the evaluation of medical and health care services, including evaluation of the qualifications of professional health care practitioners and of patient care rendered by those practitioners." *Id.* § 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[.]" *Id.* § 151.002(a)(8).

Section 161.032 of the Health and Safety Code provides in part:

(a) The records and proceedings of a medical committee are confidential and are not subject to court subpoena.

...

(c) Records, information, or reports of a medical committee . . . and records, information, or reports provided by a medical committee . . . to the governing body of a public hospital . . . are not subject to disclosure under Chapter 552, Government Code.

Health & Safety Code § 161.032(a), (c). Section 161.031(a) defines a “medical committee” as “any committee . . . of (1) a hospital. . . .” *Id.* § 161.031(a)(1). Section 161.031(b) provides that the “term includes a committee appointed ad hoc to conduct a specific investigation or established under state or federal law or rule or under the bylaws or rules of the organization or institution.” *Id.* § 161.031(b). Section 161.0315 provides in relevant part that “[t]he governing body of a hospital [or] medical organization . . . may form a medical peer review committee, as defined by Section 151.002, Occupations Code, or a medical committee, as defined by Section 161.031, to evaluate medical and health care services. . . .” *Id.* § 161.0315(a).

However, neither section 160.007 nor section 161.032 makes confidential “records made or maintained in the regular course of business by a hospital[.]” *Id.* § 161.032(f); *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 accorded same treatment under both statutes in determining if they were made in regular course of business). The phrase “records made or maintained in the regular course of business” has been construed to mean records that are neither created nor obtained in connection with a medical committee’s deliberative proceedings. *See McCown*, 927 S.W.2d at 9-10 (Tex. 1996) (discussing *Barnes v. Whittington*, 751 S.W.2d 493 (Tex. 1988), and *Jordan v. Court of Appeals for Fourth Supreme Judicial Dist.*, 701 S.W.2d 644 (Tex. 1985)).

You state that the information in the submitted Centers for Medicare and Medicaid Services (“CMS”) 2567 forms<sup>1</sup> is confidential under sections 160.007 of the Occupations Code and 161.032 of the Health and Safety Code. We conclude, however, that information contained in these forms, which are completed by the district as part of the Medicare survey

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<sup>1</sup>We note that federal law requires that, once the provider has had a reasonable opportunity to review the CMS 2567 forms evaluating its performance, the Texas Department of Health must release such forms with the identifying information of individual patients, physicians, and other medical practitioners, or other individuals redacted. 42 U.S.C. § 1306(e), (f); 42 C.F.R. § 401.126, .133. However, federal law does not similarly compel the provider to release this form to the public. *See* electronic mail transmission from Patricia Mantoan, attorney, United States Department of Health and Human Services, to Caroline E. Cho, Assistant Attorney General, Open Records Division (March 10, 2006) (on file with the Open Records Division).

process pursuant to federal law, does not qualify as information or records of a medical peer review committee or medical committee for the purpose of evaluating medical and health care services. *Cf. Capital Senior Mgmt. 1, Inc. v. Tex. Dep't of Human Servs.*, 132 S.W.3d 71, 79 (Tex.App.—Austin 2004, pet. denied) (rejecting argument that inspection documents, including CMS 2567 forms, created by either the state or federal government, were based upon reports or proceedings of a peer review committee; rather, such documents dealt with reports of abuse or neglect and the nursing home's follow-up and were not the product of committee's deliberative process). We therefore find that such information may not be withheld under section 552.101 in conjunction with either section 160.007 of the Occupations Code or section 161.032 of the Health and Safety Code.

Section 552.101 encompasses the Medical Practice Act ("MPA"), chapter 159 of the Occupations Code. You assert that some of the submitted information is confidential under section 159.002 of the MPA, which provides in relevant part:

(b) 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 by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Occ. Code § 159.002(b), (c). Information that is subject to the MPA includes both medical records and information obtained from those medical records. *See Occ. Code §§ 159.002, .004; Open Records Decision No. 598 (1991)*. Medical records must be released upon the patient's signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. Occ. Code §§ 159.004, .005. Section 159.002(c) also requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. *Open Records Decision No. 565 at 7 (1990)*. Medical records may be released only as provided under the MPA. *Open Records Decision No. 598 (1991)*. We understand that some of the information in the CMS 2567 forms has been directly obtained from medical records that were created by treating physicians. *See Occ. Code §§ 159.002, .004; Open Records Decision Nos. 598 (1991), 546 (1990) (because hospital treatment is routinely conducted under supervision of physicians, documents relating to diagnosis and treatment during hospital stay would constitute protected MPA records)*. Accordingly, we have marked the information that may be released only in accordance with the MPA.

You also argue that section 241.152 of the Health and Safety Code is applicable to parts of the remaining information. Section 552.101 also encompasses section 241.152, which states in relevant part:

(a) Except as authorized by Section 241.153, a hospital or an agent or employee of a hospital may not disclose health care information about a patient to any person other than the patient or the patient's legally authorized representative without the written authorization of the patient or the patient's legally authorized representative.

Health & Safety Code § 241.152(a). Section 241.151(2) of the Health and Safety Code defines "health care information" as "information recorded in any form or medium that identifies a patient and relates to the history, diagnosis, treatment, or prognosis of a patient." Health & Safety Code § 241.151(2). Upon review, we find that part of the information the district highlighted on pages 5 and 6 is confidential under this provision. The district must withhold the information we have marked under section 241.152. No other part of the highlighted information may be withheld on this basis.

The district asserts that parts of the information the district highlighted on pages 5 through 8 are excepted under section 611.002(a), which reads as follows:

Communications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.

Health & Safety Code § 611.002. Upon review, we find that no part of the remaining information may be withheld on this basis.

Lastly, you raise section 552.101 in conjunction with common law privacy for parts of the remaining information. Common law privacy protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The types of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. In addition, this office has found that some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common law privacy. Open Records Decision No. 455 (1987). Upon review, we find that no portion of the remaining information constitutes highly intimate or embarrassing information of an identifiable person under section 552.101 in conjunction with common law privacy. Accordingly, no portion of the remaining information may be withheld on that basis.

In summary, we have marked the information that may only be released in accordance with the MPA. The district must withhold the information we have marked under section 241.152 of the Health and Safety Code in conjunction with section 552.101. The remaining information must be released.

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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Office of the Attorney General at (512) 475-2497.

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,

A handwritten signature in black ink that reads "Kara A. Batey". The signature is written in a cursive style with a large, looping final flourish.

Kara A. Batey  
Assistant Attorney General  
Open Records Division

KAB/krl

Ref: ID# 271179

Enc. Submitted documents

c: Mr. Vicente Arenas  
KHOU TV Anchor/Reporter  
1945 Allen Parkway  
Houston, Texas 77019  
(w/o enclosures)