



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 13, 2012

Mr. Allan S. Graves
Adams, Lynch & Loftin, P.C.
3950 Highway 360
Grapevine, Texas 76051-6741

OR2012-02256

Dear Mr. Graves:

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# 445275 (File No. 11491).

The Tarrant County Hospital District (the "district"), which you represent, received a four-part request for information regarding a named physician during a specified time period. You inform us the district has no resignation letters responsive to part two of the request.¹ You claim the rest of 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 information you submitted. We also have considered the comments we received from the requestor. *See* Gov't Code § 552.304 (any person may submit written comments stating why information at issue in request for attorney general decision should or should not be released).

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. This exception encompasses information other statutes make confidential. You claim section 552.101 in conjunction with section 160.007 of the Occupations Code and

¹We note the Act does not require a governmental body to release information that did not exist when it received a request or create responsive information. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

section 161.032 of the Health and Safety Code. Section 160.007 of the Occupations Code provides in part:

(a) Except 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.

(b) If a judge makes a preliminary finding that a proceeding or record of a medical peer review committee or a communication made to a committee is relevant to an anticompetitive action, or to a civil rights proceeding brought under 42 U.S.C. Section 1983, the proceeding, record, or communication is not confidential to the extent it is considered relevant.

Occ. Code § 160.007(a)-(b).² For purposes of section 160.007, “medical peer review” is defined by the Medical Practice Act, subtitle B of title 3 of the Occupations Code (the “MPA”), to mean “the evaluation of medical and health care services, including evaluation of the qualifications and professional conduct of professional health care practitioners and of patient care provided by those practitioners.” *Id.* § 151.002(a)(7). A medical peer review committee is “a committee of a health care entity, the governing board 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 or the competence of physicians[.]” *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, medical peer review committee, or compliance officer and records, information, or reports provided by a medical committee, medical peer review committee, or compliance officer to the governing body of a public hospital, hospital district, or hospital authority are not subject to disclosure under [the Act].

...

²We note the medical peer review privilege, formerly found at section 5.06 of Vernon’s Texas Civil Statutes, is now codified as section 160.007 of the Occupations Code. *See* Act of May 13, 1999, 76th Leg., R.S., ch. 388, § 6 (Vernon) (enacting Occupations Code).

(f) This section and Subchapter A, Chapter 160, Occupations Code, 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, hospital district, hospital authority, or extended care facility.

Health & Safety Code § 161.032(a), (c), (f). For purposes of section 161.032, a “medical committee” is defined as any committee, including a joint committee, of a hospital, a medical organization, a university medical school or health science center, a health maintenance organization licensed under chapter 843 of the Insurance Code, an extended care facility, a hospital district, or a hospital authority, *see id.* § 161.031(a), as well as “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 of the Health and Safety Code states “[t]he governing body of a . . . hospital district . . . 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).

The precise scope of section 161.032 has been the subject of a number of judicial decisions. *See, e.g., Memorial Hosp.-The Woodlands v. McCown*, 927 S.W.2d 1 (Tex. 1996); *Barnes v. Whittington*, 751 S.W.2d 493 (Tex. 1988); *Jordan v. Fourth Supreme Judicial Dist.*, 701 S.W.2d 644 (Tex. 1986). These cases establish that “documents generated by the committee in order to conduct open and thorough review” are confidential. This protection extends “to documents that have been prepared by or at the direction of the committee for committee purposes,” but does not extend to documents “gratuitously submitted to a committee” or “created without committee impetus and purpose.” *See Jordan*, 701 S.W.2d at 647-48; *see also* Open Records Decision No. 591 (1991) (construing statutory predecessor to Health and Safety Code § 161.032). Section 161.032 does not make confidential “records made or maintained in the regular course of business by a . . . university medical center or health science center[.]” Health & Safety Code § 161.032(f); *see McCown*, 927 S.W.2d at 10 (stating that reference in Health and Safety Code § 161.032 to statutory predecessor to Occ. Code § 160.007 is clear signal that records should be accorded same treatment under both statutes in determining if they were made in ordinary 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.

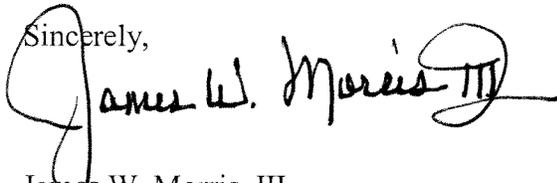
Based on the background materials you provided, we understand the district does business as the JPS Health Network (“JPS”), and the submitted information pertains to a physician associated with JPS. Based on the background materials, your representations, and the affidavits you provided, we also understand the information at issue was created or is maintained by or on behalf of the district’s Medical Practice and Physician Excellence Committees. Having considered your representations and reviewed the background

materials, the affidavits, and the submitted information the district seeks to withhold, we conclude the information at issue is confidential under section 161.032 of the Health and Safety Code. Therefore, the district must withhold the submitted information on that basis under section 552.101 of the Government Code. As we are able to make this determination, we need not address the applicability of section 160.007 of the Occupations Code, except to acknowledge the requestor's argument that section 160.007(b) provides an exception to the confidentiality of peer review records "[i]f a judge makes a preliminary finding that a proceeding or record of a medical peer review committee or a communication made to a committee is relevant to . . . a civil rights proceeding brought under 42 U.S.C. Section 1983[.]" Occ. Code § 160.007(b). Although the requestor contends the submitted information is relevant to such a proceeding, the requestor neither informs us nor has provided any documentation indicating that any judge has made such a finding. *See In re Ching*, 32 S.W.3rd 306, 310-13 (Tex. App.—Amarillo 2000) (orig. proceeding) (construing Occ. Code § 160.007(b)).

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

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in black ink that reads "James W. Morris III". The signature is written in a cursive style with a large, stylized initial "J".

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/em

Ref: ID# 445275

Enc: Submitted documents

c: Requestor
(w/o enclosures)