



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

May 9, 2012

Ms. Erin A. Higginbotham  
For Dallas County Hospital District d/b/a Parkland Health and Hospital System  
Denton, Navarro, Rocha & Bernal, P.C.  
2500 West William Cannon Drive, Suite 609  
Austin, Texas 78745

OR2012-06811

Dear Ms. Higginbotham:

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# 451786.

The Dallas County Hospital District d/b/a Parkland Health & Hospital System (the "district"), which you represent, received four requests for a report by Alvarez & Marsal Healthcare Industry Group ("A&M"), and two subsequent requests for a performance improvement plan or corrective action plan produced by A&M. You claim that the submitted information is excepted from disclosure under sections 552.101 and 552.111 of the Government Code.<sup>1</sup> We have considered the exceptions you claim and reviewed the submitted information. We have also received and considered comments from an attorney representing one of the requestors. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

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<sup>1</sup>Although you raise section 241.152 of the Health and Safety Code in conjunction with section 552.101, you have not presented arguments explaining how section 241.152 applies to the submitted information, as required by section 552.301. *See* Gov't Code § 552.301(e)(1)(A). Thus, this ruling does not address section 241.152 of the Health and Safety Code.

Initially, we note that a small portion of the submitted information, which we have marked, is not responsive to the requests for information regarding A&M's report because it was created after the dates of these requests or does not pertain to the report created by A&M. This ruling does not address the public availability of non-responsive information, and the district is not required to release non-responsive information in response to these requests.

Next, we note the responsive information is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). The submitted information consists of completed reports that are subject to subsection 552.022(a)(1). The district must release the completed reports pursuant to subsection 552.022(a)(1) unless they are excepted from disclosure under section 552.108 of the Government Code or are made confidential under the Act or other law. *See id.* § 552.022(a)(1). You seek to withhold the submitted information under section 552.111 of the Government Code. However, section 552.111 is a discretionary exception and does not make information confidential under the Act. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (governmental body may waive section 552.111). Therefore, the submitted reports may not be withheld under section 552.111 of the Government Code. However, as section 552.101 of the Government Code makes information confidential under the Act, we will consider your arguments under this section for the completed reports.

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. This exception encompasses information protected by other statutes, such as section 160.007 of the Occupations Code and section 161.032 of the Health and Safety Code. Section 160.007 of the Occupations Code provides, in relevant 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.

Occ. Code § 160.007(a). A medical peer review committee is "the governing board 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). However, the governing body of a hospital district acts as a medical peer review committee only

(i) in relation to the governing body’s evaluation of the competence of a physician or the quality of medical and health care services provided by the public hospital, hospital authority, or hospital district; and

(ii) to the extent that the evaluation under Subparagraph (i) involves discussions or records that specifically or necessarily identify an individual patient or physician.

*Id.* § 151.002(a)(8)(B); *see also* Attorney General Opinion JC-0108 (1999) (actions of governing body of hospital district may qualify for medical peer review privilege, but only to extent specific patient or physician is identified). Section 161.032 of the Health and Safety Code addresses the broader category of medical committees, and provides in relevant 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].

...

(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 this confidentiality provision, a “‘medical committee’ includes any committee, including a joint committee, of . . . a hospital district[.]” *Id.* § 161.031(a). The term also encompasses “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 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 the “medical committee” provision 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.” *Jordan*, 701 S.W.2d at 647-48. Protection does not extend to documents “gratuitously submitted to a committee” or “created without committee impetus and purpose.” *Id.* at 648; *see also* Open Records Decision No. 591 (1991) (construing, among other statutes, statutory predecessor to section 161.032).

You assert the submitted information constitutes confidential records of a medical peer review committee and medical committee under section 160.007 of the Occupations Code and section 161.032 of the Health and Safety Code. You explain that the requested reports were created by A&M as a consulting member and agent of the district’s medical and medical peer review committees for the purpose of quality assurance and improvement. We note that in order to avoid termination of the district’s Medicare Provider Agreement, the district entered into a Systems Improvement Agreement (“SIA”) with the Centers for Medicare and Medicaid Services (“CMS”). As part of the SIA, the district agreed to engage an Independent Consultative Expert to survey the district’s operations against the Medicare Conditions of Participation regulations, issue a report on the district’s gaps and failures, submit an Action Plan outlining the steps the district would have to take in order to get back in compliance with Medicare regulations, and review and update CMS on the district’s progress regarding the plan. The district chose A&M to serve as the Independent Consultative Expert pursuant to the SIA. Although the district claims A&M is a consulting member and agent of the district’s medical and medical peer review committees, we note that pursuant to the SIA, the district had to get CMS’s approval to hire A&M as the independent expert. Furthermore, the written reports created by A&M had to be submitted to CMS for review before the district could receive a copy of the reports. The SIA also states that CMS may require the independent expert to revise the reports if CMS deems necessary. CMS must also approve the action plan created by A&M and may require the independent expert to revise the plan at the district’s expense. Thus, we find the district hired A&M at the direction of CMS in order to prevent Medicare termination. Upon review, we find you have failed to demonstrate that A&M is an agent of a medical committee or medical peer review committee of the district. Furthermore, you have not demonstrated that the reports created by A&M were created at the impetus or direction of any medical or medical peer review committee of the district. *See Jordan v. Court of Appeals for Fourth Supreme Judicial Dist.*, 701 S.W.2d 493, 496 (Tex. 1988) (providing that records “gratuitously submitted to a committee or which have been created without committee impetus and purpose are not protected” under predecessor to section 161.032 of the Health and Safety Code). Thus, we

find none of the submitted information is confidential under section 160.007 of the Occupations Code or section 161.032 of the Health and Safety Code and the district may not withhold it on these basis.

Next, you contend the submitted information is confidential under section 611.002 of the Health and Safety Code. Section 552.101 of the Government Code also encompasses section 611.002, which is applicable to mental health records and provides in pertinent part:

(a) 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.

(b) Confidential communications or records may not be disclosed except as provided by Section 611.004 or 611.0045.

Health & Safety Code § 611.002(a)-(b); *see also id.* § 611.001 (defining “patient” and “professional”). Upon review, we find none of the information consists of mental health records for purposes of section 611.002. Accordingly, the district may not withhold any of this information under section 552.101 of the Government Code on the basis of section 611.002(a) of the Health and Safety Code.

Section 552.101 also encompasses section 576.005 of the Health and Safety Code, which provides “[r]ecords of a mental health facility that directly or indirectly identify a present, former, or proposed patient are confidential unless disclosure is permitted by other state law.” *Id.* § 576.005. You contend a portion of the submitted information consists of records of a mental health facility that directly or indirectly identify a patient. Upon review, we find you have failed to demonstrate any of the submitted information constitutes records of a mental health facility subject to section 576.005. Therefore, none of the submitted information may be withheld under section 552.101 of the Government Code in conjunction with section 576.005 of the Health and Safety Code.

Section 552.101 also encompasses the Medical Practice Act (the “MPA”), subtitle B of title 3 of the Occupations Code. The MPA is applicable to medical records. *See Occ. Code* §§ 151.001-168.202. Section 159.002 of the MPA provides in part:

(a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.

(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.

*Id.* § 159.002(a)-(c). Information that is subject to the MPA includes both medical records and information obtained from those medical records. *See id.* §§ 159.002, .004; Open Records Decision No. 598 (1991). This office has determined the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). Upon review, we find none of the submitted information constitutes medical records for the purposes of the MPA. Thus, no portion of the submitted information may be withheld under section 552.101 of the Government Code in conjunction with the MPA.

You also claim that a portion of the submitted information is subject to section 773.091 of the Health and Safety Code. Section 552.101 encompasses section 773.091, which provides in relevant part:

(b) Records of the identity, evaluation, or treatment of a patient by emergency medical services personnel or by a physician providing medical supervision that are created by the emergency medical services personnel or physician or maintained by an emergency medical services provider are confidential and privileged and may not be disclosed except as provided by this chapter.

Health & Safety Code § 773.091(b). You assert some of the submitted information is confidential under section 773.091. The information at issue, however, was not created by emergency medical services (“EMS”) personnel or by a physician providing medical supervision. Consequently, you have failed to demonstrate how the information at issue constitutes records of the identity, evaluation, or treatment of a patient created by EMS personnel or a physician providing medical supervision. Accordingly, none of the submitted information may be withheld under section 552.101 of the Government Code in conjunction with section 773.091 of the Health and Safety Code. As you raise no other exceptions to disclosure, the submitted responsive information must be released.

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](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, appearing to read "Jeffrey W. Giles". The signature is written in a cursive style with a horizontal line extending to the right.

Jeffrey W. Giles  
Assistant Attorney General  
Open Records Division

JWG/dls

Ref: ID# 451786

Enc. Submitted documents

c: 4 Requestors  
(w/o enclosures)