



**Office of the Attorney General
State of Texas**

DAN MORALES
ATTORNEY GENERAL

September 3, 1993

David R. Smith, M.D.
Commissioner
Texas Department of Health
1100 West 49th Street
Austin, Texas 78756-7111

Letter Opinion No. 93-74

Re: Whether, pursuant to section 161.032 of the Health and Safety Code, the records and proceedings of the Committee on Maternal and Child Health, a committee of the Texas Medical Association, are confidential and exempt from discovery, even under court subpoena, and related questions (RQ-379)

Dear Dr. Smith:

You have asked us whether section 161.032 of the Health and Safety Code and section 5.06(j) of the Medical Practice Act, V.T.C.S. article 4495b, apply to the records of a committee on maternal and child health that a nonprofit, incorporated professional medical association has established. If either of these provisions apply, the committee's records and proceedings are confidential and are not subject to discovery or subpoena, although the provisions of the Medical Practice Act will protect more of the committee's records than the provisions of the Health and Safety Code.

You state that your questions relate to the confidentiality, privilege, and discoverability of information pertaining to maternal and child health and maternal and child deaths as submitted to and retained by a medical peer review committee. We understand you to refer specifically to the Committee on Maternal and Child Health (the committee) that the Texas Medical Association (TMA) has established under TMA's formal bylaws (the TMA bylaws). Chapter 11.554 of the TMA bylaws states in pertinent part as follows:

Committee on Maternal and Child Health. The purposes of this committee shall be (1) to collect, review, and draw appropriate conclusions from data on maternal and perinatal morbidity and mortality within the state and to review and comment on governmental laws, regulations, and activities which impact on maternal and child health in the state; (2) to serve as the Association's source of advice concerning maternal and child health problems; (3) to provide liaison with other professional and lay groups working in this field; and (4) to define problems and make

recommendations concerning the quantity, quality, and utilization of health care services for women and children in Texas.

Texas Medical Ass'n, Constitution & Bylaws ch. 11.554, at 21 (Nov. 1991). You state that, to accomplish its purposes, this committee must receive information and medical records concerning maternal and infant deaths. However, you claim that "[t]he ability of this particular committee to accomplish its purpose has been greatly impaired due to the fear of involuntary disclosure of information concerning maternal and infant deaths to persons outside the committee who could, and have, used this information to institute litigation."

Section 161.032 of the Health and Safety Code reads as follows:

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

(b) The records and proceedings may be used by the committee and the committee members only in the exercise of proper committee functions.

(c) This section does not apply to records made or maintained in the regular course of business by a hospital, health maintenance organization, or extended care facility.¹

(Footnote added.) Section 161.031 defines "medical committee" as "any committee . . . of . . . (2) a medical organization." Health & Safety Code § 161.031(a)(2).

Similarly, section 5.06 of the Medical Practice Act (the "act"), V.T.C.S. article 4495b, protects records of a medical peer review committee from discovery, even under court subpoena. Section 5.06 states in pertinent part as follows:

(g) Except as otherwise provided by this Act, all proceedings and records of a medical peer review committee are privileged. . . .

(j) Unless disclosure is required or authorized by law, records or determinations of or communications to a medical peer review

¹We note that section 161.032(c) excepts "records made or maintained in the regular course of business" from the protection subsection (a) affords to a medical committee's records and proceedings. Section 161.032(a) thus does not protect records that a hospital, health maintenance organization, or extended care facility has made in the regular course of its business and that now are in the custody of the committee. See *Jordan v. Fourth Ct. App.*, 701 S.W.2d 644, 647-48 (Tex. 1985) (stating that section 161.032(a) does not protect documents that have been created without committee impetus and purpose); *Texarkana Memorial Hosp., Inc. v. Jones*, 551 S.W.2d 33, 35 (Tex. 1977) (and sources cited therein) (stating that section 161.032(a) does not protect records kept in connection with treatment of individual patients as well as business and administrative files and papers).

committee are not subject to subpoena or discovery and are not admissible as evidence in any civil judicial or administrative proceeding without waiver of the privilege of confidentiality executed in writing by the committee.

Section 1.03(a)(6) defines "medical peer review committee" as

a committee of a health-care entity, . . . provided the committee or medical staff operates pursuant to written bylaws that have been approved by the policy-making body or the governing board of the health-care entity and authorized to evaluate the quality of medical and health-care services or the competence of physicians.

"Health-care entity," as the act uses the term, includes "a professional society or association, or committee thereof, of physicians that follows a formal peer review process for the purpose of furthering quality medical or health care." V.T.C.S. art. 4495b, § 1.03(a)(5)(C). This office has determined 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. Open Records Decision No. 595 (1991) at 3.

In Open Records Decision No. 591 (1991), this office distinguished between section 161.032 of the Health and Safety Code and V.T.C.S. article 4495b, section 5.06(g). The decision first pointed out that the confidentiality provision in section 5.06(g) applies only to the records of a "medical peer review committee," while section 161.032 applies to a "medical committee." Open Records Decision No. 591 at 3. Consequently, section 5.06(g) of the act applies to a narrower category of committees than does section 161.032 of the Health and Safety Code. *Id.* While section 5.06(g) applies to a narrower class of committees than does section 161.032, section 5.06(g) applies to a broader class of records. *Id.* at 4. Section 5.06(g) applies to "all proceedings and records of a medical peer review committee"; unlike section 161.032 of the Health and Safety Code, section 5.06(g) does not except records that a hospital, health maintenance organization, or extended care facility has made or maintained in the regular course of business. *Id.* Thus, the confidentiality provision applies to routine administrative documents that a properly constituted committee has generated, or that have been generated for the committee. *Id.* *But see supra* note 1 (noting that Health & Safety Code § 161.032(c) excepts records that hospital, health maintenance organization, or extended care facility makes or maintains in regular course of business).

To determine whether the proceedings and records of the TMA's Committee on Maternal and Child Health are not subject to subpoena under either section 161.032 of the Health and Safety Code or section 5.06(j) of the Medical Practice Act, V.T.C.S. article 4495b, we would have to determine whether the committee constituted a "medical committee" or a "medical peer review committee" within the context of the respective

statutes. Your question, however, assumes that a court has issued a subpoena for information in the possession of the committee. Determining whether a court properly may issue a subpoena for particular documents involves the resolution of questions of fact, a responsibility that is beyond the purview of the opinion committee. Furthermore, the attorney general will not issue an opinion that is in effect an appeal of a judicial opinion (Attorney General Opinion JM-287 (1984) at 2 (quoting Attorney General Opinion O-1847 (1940)), nor will the attorney general issue an opinion that attempts to construe a court order. See Open Records Decision No. 560 (1990) at 3. We therefore decline to consider whether the records and proceedings of the committee are subject to subpoena.

S U M M A R Y

Because the opinion process cannot be used to overrule or construe a court order, we decline to consider whether, under section 161.032 of the Health and Safety Code and section 5.06(j) of the Medical Practices Act, V.T.C.S. article 4495b, the records and proceedings of the Texas Medical Association's Committee on Maternal and Child Health are subject to court subpoena.

Very truly yours,



Rick Gilpin
Deputy Chief
Opinion Committee