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OPINION COMMITTEE

Mike Stafford
Harris County Attorney

October 20, 2006

The Honorable Greg Abbott
Attorney General of Texas
Supreme Court Building
P.O. Box 12548
Austin, Texas 78711-2548

FILE # ML-45035-06
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RQ-0545-GA

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Attention: Opinion Committee

Re: Whether the Medical Examiner is authorized to recoup costs incurred when the Medical Examiner permits a tissue procurement organization to use the Medical Examiner's facility and resources; C.A. File No. 06GEN1474

Ladies and Gentlemen:

We request your opinion as to whether the Harris County Medical Examiner is authorized to charge tissue procurement organizations an amount calculated to reimburse the Medical Examiner for the actual costs that the Medical Examiner incurs when the Medical Examiner elects to permit a tissue procurement organization to use the Medical Examiner's facility and related resources to recover tissue pursuant to section 693.002(b) of the Texas Health and Safety Code. Our Memorandum Brief is attached. We respectfully request your expedited review and opinion on this matter.

Sincerely,

MIKE STAFFORD
County Attorney

By:


MARVA GAY
Assistant County Attorney

MEMORANDUM BRIEF

The Harris County Medical Examiner (the "ME") permits qualified tissue procurement organizations ("TPOs") to use the ME's facility and resources to remove tissue believed to be clinically usable for transplants or other therapy or treatment pursuant to section 693.002(b) of the Texas Health and Safety Code, discussed below. When the ME permits a TPO to use the ME's facility, the ME provides the TPO not only with space, but also with the services of staff and other resources necessary to assure that the TPO removes tissue in accordance with the ME's established protocols.

Procedures and statutes that relate to tissue procurement differ from those that relate to organ procurement. Section 693.001 of the Texas Health and Safety Code defines "visceral organ" as "the heart, kidney, liver, or other organ or tissue that requires a patient support system to maintain the viability of the organ or tissue." See TEX. HEALTH & SAFETY CODE ANN. §693.001 (Vernon 2003). However, the tissue that is recovered from decedents is usually skin, bone, *dura mater*, heart valves, veins and corneas, which do not require a life support system to maintain viability. TPOs remove the skin, bone, and corneas in an aseptic recovery field. At the request of the TPO, the ME removes *dura mater* and releases it to the TPO technician waiting on-site at the ME facility.

Organs are typically removed at a hospital in a sterile environment while the patient is connected to a life support system, not at the ME's facility. Section 693.002(a) of the Texas Health and Safety Code relates to organ procurement agencies and sets the maximum amount that a medical examiner may recover from an organ procurement agency when a medical examiner is present at the hospital to examine the body prior to organ removal. See TEX. HEALTH & SAFETY CODE ANN. § 693.002(a)(6) (Vernon Supp. 2006). In contrast, section 693.002(b) of the Texas Health and Safety Code relates to TPOs and is silent as to the amount that the ME may recover from a TPO when the ME, at his discretion, permits a TPO to use the ME's facility, staff, and resources for tissue removal.

TPOs, including some located outside Harris County, increasingly vie with each other to recover tissue from decedents at the ME's facility. The ME's staff is challenged to referee disputes over which competing TPOs may use the ME's facility and staff, when, and how. The ME's staff must monitor and control the TPOs' use of resources including medical records, equipment, and decedent blood samples. The ME pathologists spend additional time on many donor cases as they work around the remnants of recovery surgery during the postmortem examination and as they communicate with the TPOs regarding preliminary cause of death information. The presence of TPOs in the ME's facility places a burden on the ability of the ME's office to perform duties mandated by law. Consequently, the ME may be obliged to either deny TPOs access to the ME's facility or, alternatively, recover the actual costs that the ME incurs in providing TPOs with the use of the ME's facility and related services.

Section 693.002(b) of the Texas Health and Safety Code sets out when a medical examiner may permit a TPO to remove tissue as follows:

- (b) On a request from a qualified tissue procurement organization, as defined in Section 692.002, the medical examiner may permit the removal of tissue believed to be clinically usable for transplants or other

therapy or treatment from a decedent who died under circumstances requiring an inquest if consent is obtained pursuant to Section 693.003 or, if consent is not required by that section, no objection by a person listed in Section 693.004 is known by the medical examiner. If the medical examiner denies removal of the tissue, the medical examiner shall explain in writing the reasons for the denial. The medical examiner shall provide the explanation to:

- (1) the qualified tissue procurement organization; and
- (2) the person listed in Section 693.004 who consented to the removal.

TEX. HEALTH & SAFETY CODE ANN. § 693.002(b) (Vernon Supp. 2006) [*emphasis added*]. The use of the word “may” indicates that the ME is under no obligation under the law to permit a TPO to remove tissue. Rather, section 693.002(b) of the Texas Health and Safety Code indicates that the ME, at his discretion, may permit a TPO to remove tissue believed to be clinically usable for transplants or other therapy or treatment from a decedent who died under circumstances requiring an inquest if consent is obtained pursuant to section 693.003 of the Texas Health and Safety Code or, if consent is not required by that section, no objection by a person listed in section 693.004 of the Texas Health and Safety Code is known by the ME. If the ME denies removal of the tissue, the ME must explain in writing the reasons for the denial and provide the explanation to the TPO and the person who consented to removal. *See also* the Code Construction Act at TEX. GOV'T CODE ANN. § 311.011 (Vernon 2005). Nothing in section 693.002(b) of the Texas Health and Safety Code limits the reasons that a medical examiner might deny removal of tissue. Therefore, it appears that the ME may deny a TPO's request to use the ME's facility to recover tissue because, for instance, the ME does not have sufficient space or resources to accommodate the request without disruption to the operation of the ME's office; the TPO has failed to abide by the ME's protocols; or for other reasons related to the operation of the ME's office and the performance of the ME's statutory duties.

In a 2005 opinion relating to the duties of a justice of the peace under section 693.002 of the Texas Health and Safety Code, the Attorney General stated:

... section 693.002(c) vests a justice of the peace with the discretion to permit or deny the removal of tissue. *See* TEX. HEALTH & SAFETY CODE ANN. § 693.002(c) (Vernon Supp. 2005).

Op. Tex. Att'y Gen. No. GA-0389 (2005), at 12. Section 693.002(c) of the Texas Health and Safety Code applies to a justice of the peace and is similar in wording to section 693.002(b) of the Texas Health and Safety Code, which applies to a medical examiner. Section 693.002(c) of the Texas Health and Safety Code reads as follows:

If the autopsy is not being performed by a medical examiner, the justice of the peace, county judge, or designated physician may permit the removal of tissue in the same manner as a medical examiner under Subsection (b). If removal of the anatomical gift is denied, the justice of the peace, county judge, or physician shall provide the written explanation required by Subsections (b)(1) and (2).

TEX. HEALTH & SAFETY CODE ANN. § 693.002(c) (Vernon Supp. 2006) [*emphasis added*]. Therefore, based on the above-quoted 2005 Attorney General opinion, it appears that section 693.002(b) of the Texas Health and Safety Code vests a medical examiner with the discretion to permit or deny the removal of tissue in the same manner as section 693.002(c) of the Texas Health and Safety Code vests a justice of the peace with the discretion to permit or deny the removal of tissue. *See* Op. Tex. Att’y Gen. No. GA-0389 (2005), at 12.

The Texas Supreme Court has held that the general principle prohibiting public officials from charging fees for the performance of their official duties does not prohibit them from charging for their services for acts that they are under no obligation, under the law, to perform as follows:

... The general principle prohibiting public officials from charging fees for the performance of their official duties does not prohibit them from charging for their services for acts that they are under no obligation, under the law, to perform. *Morris v. Kasling*, 79 Tex. 141, 15 S.W. 226, 11 L.R.A. 398; *Burlingame v. Hardin County*, 180 Iowa 919, 164 N.W. 115; *Northrop v. Ballard*, 169 Mass. 295, 47 N.W. 1000, 61 Am.St.Rep. 286; *State v. Holm*, 70 Neb. 606, 97 N.W. 821, 64 L.R.A. 131; *United States v. Mosby*, 133 U.S. 273, 10 S.Ct. 327, 33 L.Ed 625; 46 C.J., p. 1017; 22 R.C.L., p. 540.

Moore v. Sheppard, 144 Tex. 537 (1946) [*emphasis added*]. Following the rationale in *Moore v. Sheppard*, the ME would not be prohibited from recovering costs for services that the ME is under no obligation under the law to perform. *See also* Op. Tex. Att’y Gen. No. GA-0364 (2005).

Article III, section 52 of the Texas Constitution restricts the ability of a county to provide a free facility and services to a private corporation and states, in pertinent part, as follows:

Except as otherwise provided by this section, the Legislature shall have no power to authorize any county . . . to lend its credit or to grant public money or thing of value in aid of, or to any individual, association or corporation whatsoever,

TEX. CONST. art. III, § 52(a). The purpose of the restriction in article III, section 52(a) of the Texas Constitution is to prevent the gratuitous application of funds to private use. *See Brazoria County v. Perry*, 537 S.W.2d 89, 90-91 (Tex. Civ. App.—Houston [1st Dist.] 1976, no writ). *See also* Op. Tex. Att’y Gen. Nos. JC-0080 (1999) at 2, JC-0011 (1999) at 2, JM-1229 (1990) at 5, and JM-1194 (1990) at 1-2 (listing many constitutional provisions that prohibit the grant of public funds and lending of public credit to private individuals or organizations). Counties have been permitted to provide a private entity with space in a public building where convenient or necessary to carry out a county purpose. *See Sullivan v. Andrews County*, 517 S.W.2d 410 (Tex. Civ. App.—El Paso 1974, writ ref’d n.r.e.) (county leased clinic to physicians); *Dodson v. Marshal*, 118 S.W.2d 621 (Tex. Civ. App.—Waco 1938, writ dism’d) (space in courthouse leased

to individual for concession stand). *See also* Op. Tex. Att'y Gen. Nos. MW-200 (1980) (county provided rent free space in courthouse to employees credit union), and H-912 (1976) (contract with physician to practice in county medical clinic). *See also* Op. Tex. Att'y Gen. No. MW-373 (1981) at 5. Counties have only those powers expressly or impliedly granted by the constitution and statutes. *See Canales v. Laughlin*, 214 S.W.2d 451 (Tex. 1948); and *Anderson v. Wood*, 152 S.W.2d 1084 (Tex. 1941).

The Attorney General has determined that the basic test for determining if an expenditure is made for a public purpose is:

- (1) whether the expenditure or grant promotes a public purpose of the particular governmental body;
- (2) whether the governmental body receives an adequate *quid pro quo* in exchange for its expenditure or grant, and
- (3) whether the governmental body maintains control over the transaction sufficient to ensure that its public purpose will be accomplished.

Tex. Att'y Gen. LA-008 (1996), at 2. *See also* Op. Tex. Att'y Gen. Nos. DM-317 (1995), DM-256 (1993), DM-67 (1991), DM-66 (1991), and JM-1146 (1990). Harris County Commissioners Court has not made the required determinations regarding public purpose, *quid pro quo*, or control in relation to TPOs' use of the ME's facility, services, and resources. Furthermore, the ME does not maintain control over how TPOs ultimately use or distribute recovered tissue. For instance, tissue recovered at the ME's facility may ultimately be distributed in other states and may be used for commercial research or cosmetic purposes serving no public purpose of Harris County. The ME does not maintain control over TPOs' use of recovered tissue to ensure that a public purpose of Harris County is accomplished. Based on the above facts and authorities, it appears that the Texas Constitution prohibits the ME from providing a TPO with free use of the ME's facility, services, and related resources in the absence of a finding by Commissioners Court that (1) the TPO's use of the ME's facility, services, and resources serves a public purpose of Harris County; (2) Harris County receives adequate *quid pro quo*; and (3) the ME maintains sufficient control over the use of recovered tissue to ensure that the public purpose will be accomplished. *See also* Op. Tex. Att'y Gen. Nos. JC-0011 (1999) at 2-3, and JM-1229 (1990) at 6 (a grant or loan of credit to a private entity contravenes the constitution if it serves no public purpose or if the governing body fails to attach conditions to ensure that the public purpose will be accomplished).