

CONDITIONALLY GRANT; and Opinion Filed March 2, 2016.



**In The
Court of Appeals
Fifth District of Texas at Dallas**

No. 05-15-01554-CV

IN RE ROCKWALL REGIONAL HOSPITAL, LLC, Relator

**On Appeal from the County Court at Law No. 1
Dallas County, Texas
Trial Court Cause No. CC-14-02687-A**

MEMORANDUM OPINION

**Before Justices Lang, Fillmore, and Brown
Opinion by Justice Fillmore**

In this original proceeding, Relator Rockwall Regional Hospital, LLC (the Hospital) requests a writ of mandamus directing the trial court to vacate its December 16, 2015 order requiring the Hospital to produce certain documents the Hospital contends are protected from discovery by the medical peer review committee and medical committee privileges. After inspecting the documents *in camera*, we conclude the trial court abused its discretion by ordering the documents produced and the Hospital does not have an adequate remedy by appeal. Accordingly, we conditionally grant the writ.¹

¹ The Hospital named as respondents in this proceeding both the Honorable D'Metria Benson, the presiding judge of Dallas County Court at Law No. 1, and the Honorable Ted Akin, the visiting judge who signed the December 16, 2015 order. The proper respondent in a mandamus action is "the person against whom relief is sought" and, for judicial orders, is generally the "judge who made the ruling." *In re Schmitz*, 285 S.W.3d 451, 453 (Tex. 2009) (orig. proceeding); *see also Remington Arms Co., Inc. v. Caldwell*, 850 S.W.2d 167, 168 n.1 (Tex. 1993) (proper respondent in challenge to discovery sanction was assigned judge who issued order rather than presiding judge of court in which case was filed). Judge Akin is, therefore, the proper respondent in this case.

Background

The Hospital is a physician-owned hospital, and real party in interest Gambreezi P.A. held some of the shares in the Hospital. Dr. Joel Ciarochi, a principal in Gambreezi, was granted clinical privileges to perform anesthesia services at the Hospital. After Ciarochi terminated his relationship with the anesthesia practice through which he provided services to the Hospital, the Hospital attempted to purchase Gambreezi's shares pursuant to a buy-back provision in the contract between the Hospital and Gambreezi.²

Dissatisfied with the Hospital's calculation of the compensation Gambreezi was entitled to receive for its shares, Gambreezi sued the Hospital on August 13, 2014, asserting claims for breach of contract, unjust enrichment, conversion, and money had and received. Ciarochi subsequently requested that he be allowed to review his credentialing file at the Hospital. On December 24, 2014, the Hospital's counsel sent a letter to Gambreezi's counsel, stating he had contacted the Hospital's "representative" and Ciarochi would be allowed to review, but not copy, his credentialing file.

Believing another physician, Dr. Timothy Bray, received more favorable compensation for his shares when he terminated his affiliation with the Hospital than was offered to it, Gambreezi sent requests for production to the Hospital seeking documents relating to the Hospital's buy-back of shares from Bray. As relevant to this original proceeding, Gambreezi's requests for production either explicitly requested or were broad enough to require the Hospital to produce both Ciarochi's and Bray's peer review or credentialing files. The Hospital objected that the files for both doctors were protected by the medical peer review committee and medical committee privileges.

² The Hospital contends it successfully completed the buy-back of Gambreezi's shares while Gambreezi maintains it is still a shareholder in the Hospital. This dispute is not an issue in this original proceeding.

Gambreezi moved to compel production of the peer review or credentialing files. At the hearing on the motion to compel before the Honorable D'Metria Benson, the parties stipulated a prima facie case existed for the applicability of the medical peer review committee and medical committee privileges. Gambreezi, however, asserted that not all documents in a physician's peer review or credentialing file were protected from production by the privileges and "hospitals tend to cloak things that aren't truly peer review and say that they're privileged." The Hospital provided a privilege log for the documents contained in the peer review or credentialing files for Ciarochi and Bray. Gambreezi identified fifty-three pages of documents from the privilege log that it contended were not entitled to protection from production under the medical peer review committee or medical committee privileges. After reviewing the identified pages *in camera*, the Honorable Ted Akin ordered two pages need not be produced, one page should be produced in redacted form, and the remaining fifty pages should be produced.

The Hospital filed this petition for writ of mandamus, stating it was producing four pages of the documents as ordered by the trial court, but contending the remaining pages it was ordered to produce were protected by the medical peer review committee and medical committee privileges. The Hospital submitted a sealed record containing the disputed documents for our review. Gambreezi responded to the Hospital's petition, arguing the Hospital (1) waived the privileges by allowing Ciarochi to review his credentialing file during the pendency of the litigation and by producing four pages of documents from Bray's credentialing file, and (2) failed to show the documents it seeks to protect fall within the scope of either the medical peer review committee or the medical committee privilege.

Standard for Granting Mandamus Relief

To be entitled to mandamus relief, a relator must demonstrate the trial court abused its discretion and there is no adequate remedy by appeal. *In re Prudential Ins. Co.*, 148 S.W.3d

124, 135–36 (Tex. 2004) (orig. proceeding). A discovery order that compels production of privileged documents is an abuse of discretion by the trial court. *See In re Nat'l Lloyds Ins. Co.*, 449 S.W.3d 486, 488 (Tex. 2014) (per curiam) (orig. proceeding); *In re Living Ctrs. of Tex., Inc.*, 175 S.W.3d 253, 255–56 (Tex. 2004) (orig. proceeding). Further, “[m]andamus is proper when the trial court erroneously orders the disclosure of privileged information because the trial court’s error cannot be corrected on appeal.” *In re Mem’l Hermann Hosp. Sys.*, 464 S.W.3d 686, 697–98 (Tex. 2015) (orig. proceeding) (quoting *In re E.I. DuPont de Nemours*, 136 S.W.3d 218, 223 (Tex. 2004) (per curiam) (orig. proceeding)); *see also In re Tex. Health Res.*, 472 S.W.3d 895, 900 (Tex. App.—Dallas 2015, orig. proceeding) (“Clearly, once privileged information is disclosed, there is no way to retrieve it; therefore, mandamus is an appropriate remedy to prevent the publication of confidential documents.” (quoting *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 424 (Tex. App.—Houston [14th Dist.] 1993, orig. proceeding)).

Medical Peer Review Committee Privilege

The Hospital asserted the medical peer review committee privilege applied to all the documents that are the subject of this proceeding. The parties stipulated in the trial court that there was a prima facie case for the applicability of the medical committee peer review privilege. *See In re Mem’l Hermann Hosp. Sys.*, 464 S.W.3d at 698 (party asserting privilege has burden to establish by testimony or affidavit a prima facie case for privilege). The Hospital tendered to the trial court both a privilege log identifying the documents and the privileges asserted as to each of them and the documents for an *in camera* review. *See id.* The burden then shifted to Gambreezi to refute the privilege claim. *See Marathon Oil Co. v. Moye*, 893 S.W.2d 585, 591 (Tex. App.—Dallas 1994, orig. proceeding); *In re Rio Grande Reg’l Hosp.*, No. 13-11-00058-CV, 2011 WL 1844453, at *2 (Tex. App.—Corpus Christi Mar. 14, 2011, orig. proceeding) (per curiam) (mem. op.).

The governing body of a hospital is permitted by Texas law to form a medical peer review committee to evaluate the hospital's medical and health care services. TEX. HEALTH & SAFETY CODE ANN. § 161.0315(a) (West Supp. 2015). “A medical peer review committee includes ‘a committee of a health care entity [including a hospital licensed under Chapter 241 or 577 of the Health and Safety code] . . . or the medical staff of a health care entity’ that (1) ‘operates under written bylaws’ approved by either the policy-making or governing board of the health care entity, and (2) ‘is authorized to evaluate the quality of medical and health care services or the competence of physicians.’” *In re Mem'l Hermann Hosp. Sys.*, 464 S.W.3d at 698 (quoting TEX. OCC. CODE ANN. § 151.002(a)(8) (West Supp. 2015)); *see also* TEX. OCC. CODE ANN. § 151.002(a)(5) (defining “health care entity” and “medical peer review”); § 151.002(a)(7) (medical peer review committee evaluates medical services, including qualifications of practitioners and patient care given by those practitioners); *In re Higby*, 414 S.W.3d 771, 780 (Tex. App.—Houston [1st Dist.] 2013, orig. proceeding [mand. denied]). The “vitally important purpose” of the medical peer review committee privilege is “to promote the improvement of health care and treatment of patients through review, analysis, and evaluation of the work and procedures of medical entities and personnel who staff them.” *In re Higby*, 414 S.W.3d at 779–80 (quoting *In re Tollison*, 92 S.W.3d 632, 635 (Tex. App.—El Paso 2002, orig. proceeding [mand. denied])). “The overarching purpose of the [medical peer review committee privilege] is to foster a free, frank exchange among medical professionals about the professional competence of their peers.” *Irving Healthcare Sys. v. Brooks*, 927 S.W.2d 12, 17 (Tex. 1996).

Except as otherwise provided by the statute, “each proceeding or record of a medical peer review committee is confidential, and any communication made to a medical peer review committee is privileged.” TEX. OCC. CODE ANN. § 160.007(a) (West 2012). The medical committee peer review privilege extends to initial credentialing of a physician by a medical

committee, *Mem'l Hosp.—The Woodlands v. McCown*, 927 S.W.2d 1, 3–4 (Tex. 1996) (orig. proceeding), as well as to the medical committee's subsequent review of physicians for reappointment or re-credentialing. *Brownwood Reg'l Hosp. v. Eleventh Court of Appeals*, 927 S.W.2d 24, 27–28 (Tex. 1996) (per curiam) (orig. proceeding); *see also In re Mem'l Hermann Hosp. Sys.*, 464 S.W.3d at 699. It also protects documents “generated” by a committee or “prepared by or at the direction of the committee for committee purposes,” the minutes and recommendations of the committee, and the committee's inquiries about a physician to outside sources and responses thereto. *In re Mem'l Hermann Hosp. Sys.*, 464 S.W.3d at 699; *Mem'l Hosp.—The Woodlands*, 927 S.W.2d at 10.

However, if the information is not confidential, it is not subject to the privilege. *In re Mem'l Hermann Hosp. Sys.*, 464 S.W.3d at 699. “For example, the ‘records made or maintained in the regular course of business by a hospital . . . [or] medical organization’ are not covered by section 160.007 [of the occupations code] and therefore are not confidential under that section.” *Id.* at 699–700 (quoting TEX. HEALTH & SAFETY CODE ANN. § 161.032(f) (West 2012)).³ Further, “simply passing a document through a peer review committee does not make it privileged.” *In re Mem'l Hermann Hosp. Sys.*, 464 S.W.3d at 699 (quoting *In re Living Ctrs. of Tex., Inc.*, 175 S.W.3d at 257). The privilege also does not prevent a party from discovering from a nonprivileged source material that has been presented to the medical peer review committee. *Id.*

Gambreezi argues the documents the trial court ordered the Hospital to produce are ordinary business records that fall outside the scope of the medical committee peer review privilege. The business records exception to the medical committee peer review privilege applies to records kept in connection with the treatment of individual patients as well as the

³The fact a medical peer review committee reviewed such records is protected. *In re Mem'l Hermann Hosp. Sys.*, 464 S.W.3d at 700 n.31.

business and administrative files and papers apart from committee deliberations. *Texarkana Mem'l Hosp., Inc. v. Jones*, 551 S.W.2d 33, 35 (Tex. 1977). Records maintained by a medical peer review committee in connection with the credentialing process are not routine business records. *Mem'l Hosp.—The Woodlands*, 927 S.W.2d at 11.

We have reviewed *in camera* the documents labeled RRH-In Camera-001–005 and 007–048. The documents on their face relate to the credentialing or re-credentialing process for Ciarochi and to a variance report review that was contained in Bray's credentialing file. Accordingly, the documents are protected by the medical peer review committee privilege. *See In re Mem'l Hermann Hosp. Sys.*, 464 S.W.3d at 699–700; *In re Higby*, 414 S.W.3d at 780.

Gambreezi next contends that, even if the documents were initially encompassed within the medical peer review committee privilege, the Hospital waived the privilege by producing, after this mandamus proceeding was filed, four pages of documents from Bray's credentialing file and by allowing Ciarochi to review his credentialing file during the pendency of the litigation. Section 160.007(e) of the occupations code provides, in relevant part:

Unless disclosure is required or authorized by law, a record or determination of or a communication to a medical peer review committee is not subject to subpoena or discovery and is not admissible as evidence in any civil judicial or administrative proceeding without waiver of the privilege of confidentiality executed in writing by the committee.

TEX. OCC. CODE ANN. § 160.007(e). The written waiver must be signed by the chair, vice chair, or secretary of the affected medical peer review committee. *Id.* The person seeking access to privileged information must plead and prove waiver of the privilege. *Id.* § 160.007(g); *see also In re Rio Grande Reg'l Hosp.*, 2011 WL 1844453, at *4 (burden was on party seeking discovery “to produce evidence indicating that a waiver *did* take place”).

Gambreezi argues the December 24, 2015 letter from the Hospital's counsel indicating the Hospital's “representative” had agreed Ciarochi could review his credentialing file was a

written waiver of the privilege. However, the letter from the Hospital's counsel was not executed by the chair, vice chair, or secretary of the Hospital's medical peer review committee and does not meet the requirements of section 160.007(e) of the occupations code. *See* TEX. OCC. CODE ANN. § 160.007(g). Accordingly, we conclude the letter did not waive the medical peer review committee privilege as to the documents in Ciarochi's credentialing file. *See, e.g., In re Univ. of Tex. Heath Ctr. at Tyler*, 33 S.W.3d 822, 827 (Tex. 2000) (per curiam) (orig. proceeding) (voluntary production of information about medical peer review committee's recommendations in response to discovery request did not waive privilege where waiver was not in accordance with requirements of statute); *In re Rio Grande Reg'l Hosp.*, 2011 WL 1844453, at *4 (statute requires waiver of medical peer review committee privilege to be in writing and executed by committee).

Gambreezi also asserts the Hospital waived the medical peer review committee privilege by allowing Ciarochi to review his credentialing file and then failing to comply with the "snap-back" provision of rule of civil procedure 193.3(d).⁴ "The snap-back provision was designed to protect the inadvertent disclosure of privileged material in order to reduce the cost and risk involved in document production." *In re Christus Spohn Hosp. Kleberg*, 222 S.W.3d 434, 438–39 (Tex. 2007) (orig. proceeding). "Under Rule 193.3(d), the production of documents without the intent to waive a claim of privilege does not waive the claim." *Id.* We have already concluded the Hospital did not waive the statutory privilege by allowing Ciarochi to review his credentialing file. Further, Ciarochi was not allowed to copy any documents from his

⁴ Rule of civil procedure 193.3(d) provides, in relevant part:

Privilege Not Waived by Production. A party who produces material or information without intending to waive a claim of privilege does not waive that claim under these rules or the Rules of Evidence if—within ten days or a shorter time ordered by the court, after the producing party actually discovers that such production was made—the producing party amends the response, identifying the material or information produced and stating the privilege asserted. If the producing party thus amends the response to assert a privilege, the requesting party must promptly return the specified material or information and any copies pending any ruling by the court denying the privilege.

TEX. R. CIV. P. 193.3(d).

credentialing file, so there are no documents to return to the Hospital pursuant to rule of civil procedure 193.3(d). Accordingly, we conclude the Hospital did not waive the medical peer review committee privilege as to Ciarochi's credentialing file by failing to comply with rule 193.3(d).

Finally, Gambreezi contends the Hospital waived the medical peer review committee privilege by producing, after this proceeding was filed, four pages from Bray's credentialing file that the Hospital had previously claimed were privileged. However, the trial court determined the four pages from Bray's credentialing file were not privileged and ordered the Hospital to produce those pages. The Hospital complied with the trial court's order. Gambreezi cites no authority to support the proposition the Hospital was required to challenge the trial court's ruling as to all the documents the Hospital initially claimed were encompassed within the medical peer review privilege or that the production of documents that were determined by the trial court not to be privileged waived the Hospital's claim other documents are privileged.

We conclude the documents labeled RRH-In Camera-001–005 and 007–048 are protected from production by the medical peer review committee privilege. We, therefore, need not address whether any of those documents are also encompassed by the medical committee privilege. TEX. R. APP. P. 47.1; *see also* TEX. HEALTH & SAFETY CODE ANN. §§ 161.032 (“The records and proceedings of a medical committee are confidential and are not subject to court subpoena.”); 161.031(a) (“medical committee” includes “any committee” of hospital); *In re Mem'l Hermann Hosp. Sys.*, 465 S.W.3d at 716–18 (discussing medical committee privilege).

Conclusion

Because we conclude the trial court abused its discretion by ordering the production of the documents labeled RRH-In Camera-001–005 and 007–048, we conditionally grant the Hospital's petition for writ of mandamus and order the Honorable Ted Akin to vacate that

portion of the December 16, 2015 order that requires the production of the documents labeled RRH-In Camera-001–005 and 007–048. A writ will issue only if Judge Akin fails to comply.

/Robert M. Fillmore/

ROBERT M. FILLMORE
JUSTICE

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