



# COMMONWEALTH of VIRGINIA

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June 20, 2007

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The Honorable Anthony N. Sylvester  
Commonwealth's Attorney for the City of Hopewell  
100 East Broadway, Room 252  
Hopewell, Virginia 23860

Dear Mr. Sylvester:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

## Issues Presented

You ask whether the confidentiality and immunity<sup>1</sup> provisions contained in § 32.1-283.2(D) include immunity from administrative proceedings, such as a physician licensing proceeding, for a physician serving on a local or regional child fatality review team. Specifically, you ask whether § 32.1-283.2(D) is applicable to an administrative subpoena.

## Response

It is my opinion that when a physician has acquired information solely in his capacity as a member of a local or regional child fatality review team, the nondisclosure provisions of § 32.1-283.2(D) would apply, and the physician is not subject to administrative subpoena.

## Applicable Law and Discussion

Section 32.1-283.2(A) provides that "local or regional child fatality teams may be established for the purpose of conducting contemporaneous reviews of local child deaths in order to develop interventions and strategies for prevention specific to the locality or region." Information and records obtained or created by a local or regional child fatality team ("Team") regarding the review of a fatality are confidential and are excluded from The Virginia Freedom of Information Act<sup>2</sup> pursuant to § 2.2-3705.5(9).<sup>3</sup>

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<sup>1</sup>I note that § 32.1-283.2(E) specifically provides civil immunity from liability to members of a review team "for any act or omission made in connection with their participation in a child fatality review team review, unless such act or omission was the result of gross negligence or willful misconduct." Therefore, it is my opinion that § 32.1-283.2(E) would provide immunity from a physician licensing action except in the case of "gross negligence or willful misconduct."

<sup>2</sup>VA. CODE ANN. tit. 2.2, ch. 37, §§ 2.2-3700 to 2.2-3714 (2005 & Supp. 2006).

<sup>3</sup>See VA. CODE ANN. § 32.1-283.2(D) (2005); see also § 2.2-3705.5(9) (2005) (excluding "[a]ll information and records acquired during a review of any child death ... by a local or regional child fatality review team established pursuant to § 32.1-283.2").

Section 32.1-283.2(D) provides, in pertinent part, that:

All information and records obtained or created regarding the review of a fatality shall be confidential and shall be excluded from the Virginia Freedom of Information Act (§ 2.2-3700 et seq.) pursuant to subdivision 9 of § 2.2-3705.5. All such information and records shall be used by the team only in the exercise of its proper purpose and function and shall not be disclosed. *Such information or records shall not be subject to subpoena, subpoena duces tecum, or discovery or be admissible in any criminal or civil proceeding... No person who participated in the reviews nor any member of the team shall be required to make any statement as to what transpired during the review or what information was collected during the review.* [Emphasis added.]

The Director of the Department of Health Professions has broad authority to conduct investigations on behalf of a health regulatory board such as the Board of Medicine.<sup>4</sup> Specifically, § 54.1-2506(A) grants to the Director and health regulatory boards “the power to subpoena witnesses and issue subpoenas requiring the production of patient records, business records, papers, and physical or other evidence in the course of any investigation.” Pursuant to § 54.1-2400.2(A)(1), any investigative information so obtained strictly is confidential except as used in a disciplinary proceeding before a board, in any subsequent trial, or any appeal of an action or order. In accordance with § 54.1-2400.2(A)(4), a court may order disclosure “for good cause arising from extraordinary circumstances being shown.” Finally, “[i]n no event shall [such] confidential information ... be available for discovery or court subpoena or introduced into evidence in any civil action.”<sup>5</sup>

Disciplinary licensure proceedings before the Board of Medicine, like attorney disciplinary proceedings before the Virginia State Bar, are civil in nature.<sup>6</sup> Section 32.1-283.2(D) expressly provides, in pertinent part, that

All ... information and records shall be used by the team only in the exercise of its proper purpose and function and shall not be disclosed. Such information or records *shall not be subject to subpoena, subpoena duces tecum, or discovery or be admissible in any criminal or civil proceeding.* If available from other sources, however, such information and records shall not be immune from subpoena, subpoena duces tecum, discovery or introduction into evidence when obtained through such other sources solely because the information and records were presented to the team during a fatality review. [Emphasis added.]

Further, § 32.1-283.2(D) provides that no “member of the team shall be required to make any statement as to what transpired during the review or what information was collected during the review.”

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<sup>4</sup>See VA. CODE ANN. § 54.1-2506 (2005).

<sup>5</sup>Section 54.1-2400.2(B) (Supp. 2006).

<sup>6</sup>See 1979-1980 Op. Va. Att’y Gen. 168, 170 (noting that actions where licensee may lose right to practice are civil in nature, as in proceedings against attorneys; burden of proof is clear and convincing evidence), *see also, e.g.*, Tucker v. Va. State Bar, 233 Va. 526, 532, 357 S.E.2d 525, 528 (1987) (noting that proceedings to discipline attorneys are civil in nature).

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Words and phrases in a statute must be considered in the context used to arrive at a construction consistent with the purpose of the statute.<sup>7</sup> “[W]hen one statute speaks to a subject generally and another deals with an element of that subject specifically, the statutes will be harmonized, if possible, and if they conflict, the more specific statute prevails.”<sup>8</sup> When faced with a choice between a specific and general statute, the former is controlling.<sup>9</sup> Thus, as long as information is acquired as part of a fatality review and not from other sources, a Team member cannot be required to discuss, voluntarily or by administrative subpoena, information garnered as a result of participation in a fatality review. This would include a licensing proceeding for a physician conducted by the Board of Medicine.

### Conclusion

Accordingly, it is my opinion that when a physician has acquired information solely in his capacity as a member of a local or regional child fatality review team, the nondisclosure provisions of § 32.1-283.2(D) would apply, and the physician is not subject to administrative subpoena.

Thank you for letting me be of service to you.

Sincerely,



Robert F. McDonnell

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<sup>7</sup> See 1993 Op. Va. Att’y Gen. 192, 195; see also *Turner v. Commonwealth*, 226 Va. 456, 459, 309 S.E.2d 337, 339 (1983) (noting that meaning of word finds expression from purport of entire phrase of which it is part); 2A NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 47.16, at 265 (6th ed. 2000) (“If the legislative intent or meaning of a statute is not clear, the meaning of doubtful words may be determined by reference to their relationship with other associated words and phrases.”).

<sup>8</sup> *GasMart Corp. v. Bd. of Supvrs.*, 269 Va. 334, 350, 611 S.E.2d 340, 348 (2005) (quoting *Commonwealth v. Brown*, 259 Va. 697, 706, 529 S.E.2d 96, 101 (2000)).

<sup>9</sup> Op. Va. Att’y Gen.: 2005 at 112, 113; 2001 at 59, 60.