

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

COURT OF APPEAL – SECOND DIST.

FILED

Aug 30, 2022

DANIEL P. POTTER, Clerk

mfigueroa Deputy Clerk

FACEY MEDICAL GROUP,

B320470

Petitioner,

(Super. Ct. No. 19STCV40434)

v.

(Stephen P. Pfahler, Judge)

SUPERIOR COURT OF THE
STATE OF CALIFORNIA FOR THE
COUNTY OF LOS ANGELES,

Respondent;

**ORDER and ALTERNATIVE
WRIT OF MANDATE**

JOHN DOE et al.,

Real Parties in Interest.

TO THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR
THE COUNTY OF LOS ANGELES:

We have read and considered the petition for writ of mandate and request for emergency stay filed on May 20, 2022, the preliminary opposition filed on June 17, 2022, an application to file an amicus letter filed on June 21, 2022 on behalf of the California Hospital Association, and the reply filed on June 24, 2022.

Good cause appearing, you are commanded, immediately upon receipt of this writ, either to:

(a)(1) vacate your three orders of April 22, 2022, adopting the three April 14, 2022 reports and recommendations of the discovery referee; and instead (a)(2) conduct proceedings newly considering whether to compel further responses to the Request for Admissions (Set 3), the Form Interrogatories (Set 1), and the Request for Production (Set 5) in light of Evidence Code section 1157,¹ because—

- Section 1157 generally shields from civil discovery the records and proceedings of peer review committees that evaluate physician care. (§ 1157, subds. (a), (b).) Courts broadly construe the term “records” to limit discovery. (*Alexander v. Superior Court* (1993) 5 Cal.4th 1218, 1224 (*Alexander*) [disapproved on other grounds in *Hassan v. Mercy American River Hospital* (2003) 31 Cal.4th 709, 724, fn. 4].) Allowing such discovery would “[stifle] candor and [inhibit] objectivity” in the review process, which could endanger quality of care. (*Id.* at p. 1227.)
- Petitioner bears the burden of showing that section 1157 applies to the information sought. (See *Santa Rosa Memorial Hospital v. Superior Court* (1985) 174 Cal.App.3d 711, 724, 726–727.)
- The parties refer to section 1157 as a privilege, and indeed much of the governing case law intermittently uses the word “privilege” to describe section 1157. It is not truly a “privilege,” however, it is a provision that shields the peer review process from civil

¹ All further statutory references are to the California Evidence Code unless otherwise specified.

discovery. Section 1157 is not one of the privileges enumerated in Division 8 of the Evidence Code. Rather, it is one of the extrinsic policies affecting evidence enumerated in Division 9. (See *University of Southern California v. Superior Court* (1996) 45 Cal.App.4th 1283, 1292 (USC).)

- Consistent with section 1157 being a shield from discovery as opposed to a true privilege, the provision does not prevent a party from discovering the same information from sources other than the peer review committee or its participants. (*Alexander, supra*, 5 Cal.4th at p. 1223.)
- If a plaintiff has obtained such information from other sources, section 1157 does not bar the introduction of the information as evidence. (*Fox v. Kramer* (2000) 22 Cal.4th 531, 539.)
- Because section 1157 is not a privilege under the Evidence Code, “[s]ection 912’s privilege waiver provisions . . . do not apply to section 1157’s discovery exemption.” (USC, *supra*, 45 Cal.App.4th at p. 1292.) It is not clear whether any waiver doctrine applies to the section 1157 civil discovery shield. “Assuming that a waiver doctrine of some kind does apply, that doctrine would have to account in some manner for all those who are protected by the discovery exemption of section 1157.” (*Ibid.* [the party seeking the discovery would have had to show waiver by all individuals involved, including “many committee members, physician reviewers, resident surgical trainees who were reviewed, etc.”].)

- The fact of an evaluation is not privileged. A plaintiff may discover whether a hospital has evaluated the competency of a doctor on its staff. “This result stimulates the evaluation process without permitting penetration of the content of committee discussions. It is our view that such information does not constitute either ‘proceedings’ or ‘records’ [fn. omitted] under the policy the Legislature has evidenced in enacting section 1157.” (*Brown v. Superior Court* (1985) 168 Cal.App.3d 489, 501 (*Brown*)).
- Section 1157 protects documents submitted to committees in conjunction with an evaluation. (*Alexander, supra*, 5 Cal.4th at pp. 1224–1226 [disagreeing with *Hinson v. Clairemont Community Hospital* (1990) 218 Cal.App.3d 1110]; see also *Snell v. Superior Court* (1984) 158 Cal.App.3d 44, 47–49.) “[N]othing in section 1157(a) limits the privilege to records that are generated by a medical staff committee, and nothing in the statute supports the suggestion that materials submitted to a committee for review are not protected ‘records’ of the committee. ‘We give effect to statutes according to the usual, ordinary import of the language employed in framing them.’ [Citation omitted.] . . . [W]e perceive no reason to suspect the Legislature intended to exclude staff applications from the definition of committee records, or to draw the ‘generated versus submitted’ distinction advanced by petitioners.” (*Alexander, supra*, at p. 1225, italics omitted.) A physician’s application for staff privileges is protected. (*Id.* at p. 1227.)

- Section 1157 shields from discovery the records and proceedings of peer review committees, not of hospital administrations. (See *Matchett v. Superior Court* (1974) 40 Cal.App.3d 623, 628.) But the mere fact that a document is in an administrative file rather than a committee file does not end the inquiry. To the extent the hospital administrative records contain references to the peer review proceedings, those portions of the records are not discoverable. (See *Brown, supra*, 168 Cal.App.3d at p. 499.) Similarly, a hospital may not shield a document from discovery by placing it in a review committee's files. The question is whether the document or information was obtained or generated as part of a peer review evaluation or otherwise reflects the proceedings of a peer review committee.
- If a court considers compelling production of a document from an administrative file that section 1157 may in whole or in part shield from discovery, the court must inspect it in camera before compelling the discovery. (See *Saddleback Comm. Hosp. v. Sup. Ct.* (1984) 158 Cal.App.3d 206, 209.)
- “Section 1157’s promotion of peer review candor has a cost: a plaintiff is denied access to potentially relevant evidence. [Citation omitted.] Nevertheless, it is the judgment of the Legislature that societal interests are best served by exempting such information from discovery. [Citation omitted.] It is not the judiciary’s function to reorder competing societal interests which have already been ordered by the Legislature.” (*USC, supra*, 45 Cal.App.4th at pp. 1288–1289.)

OR

(b) in the alternative, SHOW CAUSE before this court, in its courtroom at 300 South Spring Street, Los Angeles, California, when the matter is ordered on the court's calendar, why you have not done so and why a peremptory writ of mandate requiring you to do so should not issue.

Upon choosing alternative (a), the superior court is directed to issue an order informing this court that it has or will forthwith comply with alternative (a), and transmit such order by email or facsimile to this court on or before September 20, 2022.

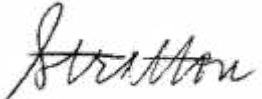
In the event you fail to comply with alternative (a), a formal return to the writ is unnecessary. But real party in interest may, if necessary, file a supplemental response to the petition on or before November 1, 2022. Any reply shall be served on or before December 1, 2022.

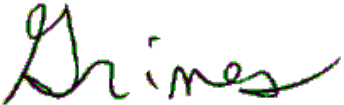
BY ORDER OF THE COURT.


ATTEST my hand and the seal of this court this ____ day of
August 2022.

DANIEL P. POTTER, Clerk

By _____
Deputy Clerk


STRATTON, P.J.


GRIMES, J.


HARUTUNIAN, J.*

* Judge of the San Diego Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.