

# Recent Iowa Supreme Court Opinions Address Open Records Request for a Public Hospital's Internal Audits and Address Hospital Board Liability for Negligent Credentialing

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The Iowa Supreme Court issued two recent opinions that advance our understanding of important concepts, including a public hospital's obligation to release internal audit reports pursuant to open records requests, and the standard of care applicable to a hospital board of directors in fulfilling its credentialing function.

### **Must a public hospital disclose to the public an internal audit previously shared with a licensing board?**

In *Hall v. Broadlawns Medical Center*, decided on March 9, 2012, the supreme court encountered several issues arising in the aftermath of the arrest of a pharmacist employed by the hospital on suspicion of operating a motor vehicle while intoxicated. In the course of investigating that allegation, the pharmacist told law enforcement authorities that she had diverted prescription medications from the hospital. Broadlawns discharged the pharmacist, and the Iowa Board of Pharmacy suspended her license indefinitely while simultaneously commencing an investigation into her conduct and regarding the hospital's pharmacy operations.

As part of the Board's investigation, it contacted Mark Hall, an employee of a company that had contracted with Broadlawns to provide its pharmacy services. Hall was the pharmacist in charge at Broadlawns, and was asked to provide the Board certain records so the Board could perform an audit of the pharmacy's operations. Hall provided the records to the Board, but also performed his own audit because he wanted immediate answers and did not want to wait for the Board's audit before taking any necessary action at the pharmacy. Once completed, Hall provided a copy of his audit simultaneously to the hospital and to the Board. Hall stated that he provided the internal audit to the Board because he thought it was important for the Board to have complete information.

The Board later filed charges against both Hall and Broadlawns, referencing Hall's audit as confirming shortages of controlled substances at the pharmacy. The Board's statement of charges was a public record, and prompted the *Des Moines Register* to make an open records request to Broadlawns (a county hospital, subject to Iowa's open records laws) for production of Hall's audit. Broadlawns and Hall disputed disclosure of the audit, and litigation ensued.

Several issues were presented on appeal, including the primary question of "whether records in the possession of third parties [in this case, Hall] that contain information being considered by a licensing board as part of its investigation are shielded from public disclosure" under Iowa Code section 272C.6(4). That section provides, in operative part:

In order to assure a free flow of information for accomplishing the purposes of this section, and notwithstanding section 622.10, all complaint files, investigation files, other investigation reports, and other investigative information in the possession of a licensing board or peer review committee acting under the authority of a licensing board or its employees or agents which relates to licensee discipline are privileged and confidential, and are not subject to discovery, subpoena, or other means of legal compulsion for their release to a person other than the licensee and the boards, their employees and agents involved in licensee discipline, and are not admissible in evidence in a judicial or administrative proceeding other than the proceeding involving licensee discipline.

In analyzing this Code section, the supreme court first observed that the statute was subject to multiple interpretations providing wildly-divergent scopes of protection for information generated by a third-party such as Hall and provided to a licensing body such as the Board. While the court noted some prior precedents informing its analysis, it also acknowledged the case presented issues of first impression in Iowa. After a brief survey of Iowa law and analogous federal cases, the court was left conflicted:

On the one hand, the mere fact that a copy of the document is possessed by a third party should not be determinative of the privilege issue if the privilege is to have any substance. On the other hand, the providing of information to a licensing body or peer review committee should not transform otherwise discoverable information into privileged material.

To resolve this quandary, the court adopted an analysis premised on three categories of potentially-privileged documents: (1) "documents ordinarily generated by the organization [i.e., the Board] that reflect internal deliberations and functions of the reviewing body," (2) "preexisting documents that are submitted to the reviewing body," and (3) documents "created for the purpose of submission to the reviewing body." The court observed that documents in the first category are clearly privileged and implied the same for documents in the third category. The court concluded the claim of privilege is weak for those in the second category.

The evidence in the present case revealed that Hall's creation of the audit fell into the second category based on Hall's testimony that his purpose in creating the audit was to provide a speedier analysis of the issues than the Board could provide. In other words, "[h]is purpose *in providing* the document to the board may have been to provide it with complete information, but his purpose *in creating* the document in the first place was not related to the board's investigation." As a result, the court concluded that Hall's internal audit was not privileged from public disclosure under an open records request to Broadlawns.

Moreover, the supreme court went on to reject other theories articulated by Hall to prevent disclosure, including the argument that the internal audit fell under exceptions to the open records laws permitting a public entity to withhold documents prepared in relation to an issue to be addressed in a closed session. First, the court concluded the audit was not prepared for purposes of discussion with legal counsel in a closed session. The court also rejected Hall's contention that the audit was not subject to disclosure as an assessment of Hall's own professional competence.

Ultimately, the supreme court concluded that Hall and Broadlawns were required to both turn over the internal audit and pay the *Des Moines Register's* attorneys

fees arising out of the open records dispute.

### **What standard of care applies when a hospital fulfills its credentialing function?**

In *Hall v. Jennie Edmundson Memorial Hospital*, decided Friday, April 13, the Iowa Supreme Court once again skirted the issue of whether a cause of action exists for “negligent credentialing” of a physician by a hospital. In a counter-intuitive twist, however, the court also addressed the standard of care to be applied if such a cause of action exists.

The key facts of *Hall* were straightforward: Hall and her husband sued her physician, the hospital, and Nebraska Methodist Health System, Inc. after Hall underwent an unsuccessful pancreaticoduodenectomy, also known as a Whipple procedure. Hall eventually settled with her surgeon, but the parties went to trial on her claim that JEMH and NMHS had negligently credentialed or privileged the surgeon for performance of the Whipple procedure. (The court acknowledged a distinction between “credentialing” and “privileging,” but used, and analyzed, the terms interchangeably in its opinion.)

The first issue encountered by the supreme court was whether it would recognize a cause of action for negligent credentialing. The trial court had predicted such a cause of action would be recognized based on prior supreme court precedent (the same issue has been raised before in Iowa, but never resolved) and opinions from other jurisdictions. JEMH and NMHS did not appeal this issue, which led the supreme court to assume that the cause of action was viable. However, the supreme court stated that it would not decide definitively the question of whether a negligent credentialing claim was actionable under Iowa law.

Nonetheless, based on the assumption the negligent credentialing cause of action was viable, the supreme court went on to address what standard of care would apply to the defendants’ credentialing conduct. The parties disputed whether the decision to credential the surgeon was subject to a heightened “professional” standard of care or a “non-professional” standard. Noting the “ultimate decision whether to grant privileges at JEMH was made by the board of directors, consisting of eleven lay members,” the court determined that the non-professional standard applied. Accordingly, the court held that the board needed only to exercise “reasonable care under the circumstances,” a concept that did not require the parties in this case or future cases to present expert testimony on the standard.

Nonetheless, the parties in this case disputed whether the trial court ultimately applied the correct standard. The supreme court rejected these arguments, noting the trial court did not rely on extraneous expert testimony on the standard of care in finding “evidence of hospitals’ customary practice [for credentialing] ‘compelling’ but ‘not necessarily conclusive.’” The supreme court also affirmed the trial court’s determination that the standard of care was not breached by JEMH or NMHS in this case based on the extensive review of the surgeon’s qualifications by multiple layers of personnel at JEMH.

Interestingly, one of NMHS’ defenses was that it existed solely to provide JEMH “with certain business services, including information technology and marketing assistance.” The Halls countered that NMHS “controlled” the JEMH credentialing process “based on evidence of the relationship between JEMH and NMHS which authorized NMHS to appoint the CEO of JEMH and some of the directors serving on the board of JEMH.” In the end, the supreme court’s affirmation that neither JEMH or NMHS breached the standard of care made it unnecessary to resolve the scope of NMHS’ liability, leaving open another important question for resolution on

another day.

## **Conclusion**

The Iowa Supreme Court's opinion in these two recent cases provide helpful guidance for the health care field. For public hospitals in Iowa, the court has provided important guidance related to open records requests for internal documents provided to a licensing body. For all hospitals in Iowa, the supreme court has provided additional insight into the standard of care for a negligent credentialing claim against a hospital governing body – if the court ever recognizes such tort in Iowa.

If you have any questions about the Iowa Supreme Court's recent opinions and their applicability, please feel free to contact us directly.

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