

**CITY OF MADISON
CITY ATTORNEY'S OFFICE
Room 401, C.C.B.
266-4511**

April 3, 2003

REVISED OPINION NO. 02-005

TO: Fire Chief Debra H. Amesqua
FROM: James L. Martin, City Attorney
RE: **Confidentiality of Records and Police Investigations**

You have asked for legal advice from the City Attorney regarding Police Department access to Fire Department records made by Fire Department EMTs called to a scene to render emergency medical care. Your question necessarily involves State statutory confidentiality requirements relating to patient health care records.

BRIEF ANSWER

The Police Department is entitled to access of "ambulance run" information generally available to the public; to patient health care records, upon request, and with the informed consent of the patient or individual authorized to act on the patient's behalf; and to patient health care records without informed consent for the specific reasons itemized in the statute: (1) investigations/prosecutions of suspected child or unborn child abuse or neglect and (2) investigations of deaths of vulnerable individuals in certain institutions. In all other cases Police Department access to confidential patient health care records must be pursuant to a court order.

OPINION

Pursuant to § 146.50, Wis. Stats., Fire Department records made by EMTs or first responders in administering emergency care or handling and transporting sick, disabled or injured individuals must be maintained as confidential patient health care records. That statute reads as follows:

Section 146.50

(12) CONFIDENTIALITY OF RECORDS. (a) *All records made by an ambulance service provider, an emergency medical technician or a first responder in administering emergency care procedures to and handling and transporting sick, disabled or injured individuals shall be maintained as confidential patient health care records subject to ss. 146.81 to 146.84 and, if applicable, s. 252.15 (5) (a) (intro.), (6), (8) and (9).*¹ For the purposes of this paragraph, an ambulance service provider, an emergency medical technician or a first responder shall be considered to be a health care provider under s. 146.81 (1). Nothing in this paragraph permits disclosure to an ambulance service provider, an emergency medical technician or a first responder under s. 252.15 (5) (a), except under s. 252.15 (5) (a) 11. (Emphasis added).

An exception is made in the statute for basic ambulance run information requested under the open records statute:

(b) Notwithstanding par. (a), an ambulance service provider, who is an authority, as defined in s. 19.32 (1), *may make available, to any requester, information contained on a record of an ambulance run which identifies the ambulance service provider and emergency medical technicians involved; date of the call; dispatch and response times of the ambulance; reason for the dispatch; location to which the ambulance was dispatched; destination, if any, to which the patient was transported by ambulance; and name, age and gender of the patient.* No information disclosed under this paragraph may contain details of the medical history, condition or emergency treatment of any patient.² (Emphasis added).

The confidentiality requirement while extensive is not absolute. Such records may be released with the informed consent of the patient under § 146.82(1), Stats.

Section 146.82 Confidentiality of patient health care records.

(1) CONFIDENTIALITY. All patient health care records shall remain confidential. *Patient health care records may be released only to the persons designated in this section or to other persons with the informed consent of the patient or of a person authorized by the patient.* This subsection does not prohibit reports made in compliance with s. 146.995, 253.12 (2) or 979.01 or testimony authorized under s. 905.04(4)(h).³ (Emphasis added).

In addition, under certain circumstances listed in the statute, access to the records may be given without informed consent of the patient under § 146.82(2), Stats. The listed circumstances include the following:

¹ § 252.15(5), Stats., deals with confidentiality and HIV tests.

² The Attorney General has concluded that this language was intended to make the information listed subject to the open records law. As such, a custodian is responsible to conduct the balancing test on a case by case basis. 78 OAG 71 (1989).

³ § 146.995, Stats., (reporting wounds and burns); §979.01, Stats., (reporting deaths); §905.04(4)(h) (exceptions to physicians-patient privilege for reports of wounds or burns).

(2) ACCESS WITHOUT INFORMED CONSENT. (a) Notwithstanding sub. (1), patient health care records *shall be released upon request without informed consent in the following circumstances:*

* * * *

4. Under a lawful order of a court of record.

5. In response to a written request by *any federal or state governmental agency to perform a legally authorized function*, including but not limited to management audits, financial audits, program monitoring and evaluation, facility licensure or certification or individual licensure or certification. The private pay patient, except if a resident of a nursing home, may deny access granted under this subdivision by annually submitting to a health care provider, other than a nursing home, a signed, written request on a form provided by the department. The provider, if a hospital, shall submit a copy of the signed form to the patient's physician.

* * * *

11. To a county department, as defined under s. 48.02 (2g), a sheriff *or police department or a district attorney for purposes of investigation of threatened or suspected child abuse or neglect or suspected unborn child abuse or for purposes of prosecution of alleged child abuse or neglect*, if the person conducting the investigation or prosecution identifies the subject of the record by name. The health care provider may release information by initiating contact with a county department, sheriff or police department or district attorney without receiving a request for release of the information. A person to whom a report or record is disclosed under this subdivision may not further disclose it, except to the persons, for the purposes and under the conditions specified in s. 48.981 (7).

* * * *

15. To the department under s. 48. 60(5)(c), 50.02(5) or 51.03 (2) or sheriff, *police department or district attorney for purposes of investigation of a death reported under s. 48.60(5)(a), 50.035 (5)(b), 50.04(2t)(b) or 51.64(2).*⁴

* * * *

18. *Following the death of a patient, to a coroner, deputy coroner, medical examiner or medical examiner's assistant, for the purpose of completing a medical certificate under s. 69.18(2) or investigating a death under s. 979.01 or 979.10.* The health care provider may release information by initiating contact with the office of the coroner or medical examiner without receiving a request for release of the information and shall release information upon receipt of an oral or written

⁴ §48.60(5)(a) relates to death of a child residing in child welfare agency buildings; §50.035(5); 50.04(2c). 51.64(2) relates to deaths respectively as CBRFs, nursing homes and mental health and treatment facilities.

request for the information from the coroner, deputy coroner, medical examiner or medical examiner's assistant. The recipient of any information under this subdivision shall keep the information confidential except as necessary to comply with s. 69.18, 979.01 or 979.10.⁵ (Emphasis added).

It should be noted that whereas the Fire Department has the obligation to maintain the confidentiality of patient health care records, except as provided above, it also has the affirmative obligation to provide such information upon request to a coroner investigating a death. § 146.82(2)(a)18. In addition the Fire Department has the obligation to report a person's death to the Sheriff, Police Chief, or medical examiner or coroner pursuant to § 979.01, Stats., under the following circumstances:

Section 979.01 Reporting deaths required; penalty; taking specimens by coroner or medical examiner. (1) All physicians, authorities of hospitals, sanatoriums, public and private institutions, convalescent homes, authorities of any institution of a like nature, and other persons having knowledge of the death of any person *who has died under any of the following circumstances, shall immediately report the death to the sheriff, police chief, or medical examiner or coroner of the county where the death took place.*

(1g) A sheriff or police chief shall, immediately upon notification of a death under sub. (1), notify the coroner or the medical examiner and the coroner or medical examiner of the county where death took place, if the crime, injury or event occurred in another county, shall immediately report all of the following to the coroner or medical examiner of that county:

(a) *All deaths in which there are unexplained, unusual or suspicious circumstances.*

* * * *

(f) *All deaths following accidents, whether the injury is or is not the primary cause of death.*

(g) When there was no physician, or accredited practitioner of a bona fide religious denomination relying upon prayer or spiritual means for healing in attendance within 30 days preceding death.

* * * *

(1m) The coroner or medical examiner receiving notification under sub. (1) shall immediately notify the district attorney.⁶ (Emphasis added).

⁵ § 69.18, Stats., (death records and medical certification of death). §979.01, Stats. (see above footnote 2) §979.10 (cremation and cremation permits).

⁶ A coroner or District Attorney has the authority to enforce the right to receive patient health care documents via subpoena issued by the court upon request. § 979.10, Stats. Subpoena for documents. Upon the request of the coroner, medical examiner or district attorney, a court shall issue a subpoena requiring the production of documents necessary for the determination of a decedent's cause of death. The documents may include the decedent's patient health care records and treatment records, as defined in ss. 51.30 and 146.81 (4). The documents shall be returnable to the officer named in the subpoena.

The foregoing statutory provisions reflect a balance of conflicting public policies: privacy interests in medical records; public interest in public records; and public interest in ensuring government agencies have the information they need to perform their official duties.

Initially, one might consider the exception in Subdivision 5 for “any federal or state governmental agency to perform a legally authorized function” to be broad enough to encompass a police department conducting an investigation as part of its official duties. An examination of the subdivision as a whole as well as consideration of other standard exceptions where police department investigations are specifically mentioned leads to the conclusion that the exception in subdivision 5 is more narrowly restricted to agencies that perform licensing, auditing and program monitoring/evaluation functions. In fact, by the express language in the statute (§ 146.82(2)(a) 11 and 15) the right of the police department to gain access to patient health care records *without informed consent* is limited to investigations/prosecutions of suspected child (or unborn child) abuse or neglect; and investigation of deaths of vulnerable individuals who reside in certain institutions. The broader right of access to patient health care records without informed consent where a death has occurred is limited to the coroner or medical examiner.

The police department is not without recourse under the statute to obtain medical records required to conduct investigations into deaths which occurred in unexplained or unusual or suspicious circumstances. However, the Police Department must first obtain a lawful order of a court of record. § 146.82(2)4, Stats.

I understand Police Department and Fire Department personnel will be meeting to develop a protocol relating to access to records. This information may be of assistance to the two departments. If you have further questions, please contact Assistant City Attorney Carolyn Hogg of my staff .

James L. Martin
City Attorney

JLM:skm

cc: Chief Richard Williams
Assistant Chief Noble Wray
Assistant Chief Arthur Dinkins
Carolyn S. Hogg

Page 6
April 3, 2003

bcc: City of Madison Home Page – IS Simile and IS Sweeney (via e-mail attachment) with
copy to AT Group
Central Opinion Book
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File