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ATTORNEY GENERAL OPINION NO. 88- 88

Stanley C. Grant, Ph.D.
Secretary
Kansas Department of Health and Environment
Forbes Field
Topeka, Kansas 66620-0001

Re: Laws, Journals and Public Information--Records Open to Public; Certain Records Not Required to be Open; Laboratory Records

Synopsis: Several exceptions to the open records act permit the secretary of Kansas Department of Health and Environment, in his discretion, to refuse disclosure of records maintained by that agency when those records are generated from laboratory tests concerning sexually transmitted diseases. Disclosure of those records may be obtained by consent of the individual whose name appears on the record. The secretary may not disclose records pertaining to prenatal syphilis tests without consent of the woman. Cited herein: K.S.A. 45-216, 45-217, 45-218; K.S.A. 1987 Supp. 45-221(a)(1)-(3), (30), (d); K.S.A. 60-427, 60-437, 65-118, 65-119, 65-127, 65-153f, 65-153g, 75-5608; K.S.A. 1987 Supp. 77-201 Thirteenth; K.A.R. 28-1-2; 5 U.S.C. §§552, 552a (1984).

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Dear Secretary Grant:

As secretary of the Kansas Department of Health and Environment (KDHE), you have requested our opinion

concerning certain records maintained by KDHE. Specifically, your inquiry whether laboratory records maintained by the agency must be released to the Department of Social and Rehabilitation Services (SRS) upon request.

You advise that, pursuant to K.S.A. 65-153f and K.S.A. 75-5608, KDHE performs laboratory tests concerning sexually transmitted diseases. The tests are performed at the request of certain physicians at no cost. SRS has requested access to records pertaining to these tests in their investigation of fraudulent claims for reimbursement by the physicians. KDHE maintains that the records are confidential pursuant to K.S.A. 65-118.

Initially, KDHE is a public agency within the meaning of K.S.A. 45-217(e), and laboratory records are public records within the meaning under K.S.A. 45-217(f). Your inquiry is therefore subject to analysis of the Kansas open records act (KORA), K.S.A. 45-215 et seq. Both the spirit and letter of the act require that records maintained by a public agency be accessible to any person except as otherwise provided by the act. K.S.A. 45-216(a); K.S.A. 45-218(a). We believe that SRS is a person within the meaning of KORA. K.S.A. 1987 Supp. 77-201 Thirteenth. Unless another law requires disclosure, public agencies are not required to disclose records listed in K.S.A. 1987 Supp. 45-221(a). Four such exceptions appear relevant to your inquiry.

The first relevant exception to the requirement of disclosure appears in K.S.A. 1987 Supp. 45-221(a)(1). That paragraph excludes records the disclosure of which is prohibited by federal or state law. While we do not intend an exhaustive discussion of the requirements of federal law relative to disclosure, we do note that KDHE is not subject to the mandates of the Privacy Act, 5 U.S.C. §552a (1984), which may prohibit disclosure of the records in question without consent of the individual. See Forsham v. Harris, 445 U.S. 169, 63 L.Ed.2d 293 (1980); United States v. Orleans, 425 U.S. 807, 48 L.Ed.2d 390 (1976); UNT v. Aerospace Corp., 765 F.2d 1440 (9th Cir. 1985); St. Michael's Convalescent Hospital v. California, 643 F.2d 1369 (9th Cir. 1981).

Regarding state law, laboratory records pertaining to the prenatal syphilis tests are confidential within the limitations of K.S.A. 65-153f and K.S.A. 65-153g. However, these sections apply only to records regarding tests conducted under that section. You have indicated that the laboratory records in question relate to this and other diseases.

Separate authority is required to conclude that records of laboratory tests for diseases other than prenatal syphilis must be kept confidential. You have cited K.S.A. 65-118 as such authority. That section mandates that certain persons report to the appropriate county or joint board of health, or local health officer, information indicating that a person is suspected of suffering from or has died from a contagious or infectious disease. K.S.A. 65-118(a). Infectious or contagious diseases are designated at K.A.R. 28-1-2. Information thus communicated must be forwarded to KDHE. K.S.A. 65-119(a). Both sections make provisions for confidentiality of the information reported. K.S.A. 65-118(c); K.S.A. 65-119(b). Violation of those sections is an unclassified misdemeanor. K.S.A. 65-127. We do not believe that these sections prevent disclosure of laboratory reports maintained by KDHE for tests performed in the situation you have described. The statutes relate to the reporting of information for the general health and welfare of the public. The requirements of confidentiality strike a balance between the duty of the practitioner to the patient and to the public. The laboratory tests as you have described, however, are not involved with the reporting requirements. Rather, the tests are conducted as a proprietary function of the department, and may or may not produce information that a person is suffering from or has died from an infectious contagious disease. In summary, K.S.A. 1987 Supp. 45-221(a)(1) only authorizes an agency to refuse disclosure of prenatal syphilis tests.

The second relevant exception to the mandatory disclosure requirement appears in K.S.A. 1987 Supp. 45-221(a)(2). That paragraph excludes records which are privileged under the rules of evidence. One such privilege is the physician-patient privilege as provided in K.S.A. 60-427. The physician-patient privilege is an exclusionary rule of evidence to prevent disclosure of confidential communications, and may be invoked in civil actions and misdemeanor criminal cases, subject to statutory exceptions. Attorney General Opinion No. 87-139. The purpose of the privilege is "to encourage persons needing medical treatment to seek it." State v. George, 223 Kan. 507, 510 (1978). The language of the evidentiary rule indicates that the privilege also prevents disclosure of information by agents of the physician. See, e.g., K.S.A. 60-427(a)(4), (g). The privilege is terminated if the holder of the privilege is waived. K.S.A. 60-437.

Whether or not this privilege is abrogated by federal or state law is undecided in this state. In Matter of Camperlingo v. Blum, 56 N.Y.2d 251 (1982), the court held that application of a balancing test indicated an intent by the state and federal legislatures to abrogate the privilege. That determination was made in light of a state regulation made pursuant to federal law which required, by agreement, maintenance of records by service providers and access to those records by appropriate state agencies. We have located no similar agreement or regulation applicable in this state. It would therefor appear that, absent an agreement or legislative mandate, the privilege would protect patient records unless the patient consented to release of such records.

The third relevant exception to the KORA mandating disclosure of public records appears at K.S.A. 1987 Supp. 45-221(a)(3), which pertains to medical records of identifiable patients. This exception is clearly intended to protect the identity of individuals who may wish to keep their personal medical affairs private. As the exceptions in K.S.A. 1987 Supp. 45-221(a) are discretionary, it would appear that the secretary of KDHE may, in his discretion, refuse to disclose the materials contained in the records. In exercising discretion, the secretary may consider a waiver or release by the individual whose name appears on the record.

The fourth relevant exception to the mandatory disclosure requirement appears at K.S.A. 1987 Supp. 45-221(a)(30), which pertains to records "containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy." The records in question may easily fall into this category. Similar language of the Freedom of Information Act, 5 U.S.C. §552(b)(6) (1984) was construed in Rural Housing Alliance v. United States Department of Agriculture, 498 F.2d 73 (D.C. Cir. 1974), in which the court held that an individual's right of privacy should be balanced against the public's right to government information. Regarding the laboratory test records maintained by KDHE, it would appear that such a balance would tip strongly in favor of the individual. Disclosure of the records would place in the public light the fact that the named individual receives public assistance and was tested for a variety of sexually transmitted diseases. While the individual's name may be deleted pursuant to K.S.A. 1987 Supp. 45-221(d), such would render the record useless for the purpose requested by SRS. As with previous exceptions,

it would appear that no unwarranted invasion of privacy would result if the individual consented to disclosure of the record.

In conclusion, it is our opinion that several exceptions to the open records act allow the secretary of KDHE, in his discretion, to refuse disclosure of records maintained by that agency when those records are generated from laboratory tests concerning sexually transmitted diseases. Disclosure of those records may be obtained by consent of the individual whose name appears on the record. The secretary may not disclose records pertaining to prenatal syphilis tests without written consent of the woman.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Mark W. Stafford
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