5113/5778

The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

January 29, 1996

The Honorable Jim Burnett
Coroner, Spartanburg County
366 North Church Street
Spartanburg, South Carolina 29303

Re: Informal Opinion

Dear Coroner Burnett:

You set forth the following facts and seek advice thereupon:

> [m]any times, citizens stop at the scene of shootings or traffic accidents and try to give care to the injured or dying. More and more of these people have contacted us concerned that they may have been exposed to either the Aids Virus or Hepatitis B. Some of these caregivers have informed me that they have open cuts or abrasions on their hands that increases their chances of contracting a disease from the injured or dying person. These caregivers sometimes have asked us to test the blood of the deceased to see if they are carrying the HIV virus or possibly infected with Hepatitis B.
>
> I realize that the deceased has certain protection under the law as this can be construed as a medical record. However, I believe we should make every attempt to alleviate the fears of the person who came upon a traffic accident and tried to help.
>
> In your opinion, is it legal for me to have this blood tested and give the results to the caregiver? In the past, I have

> been able to get around the possible conflict with confidentiality of medical records by getting the next-of-kin to give permission. In the absence of permission from the next-of-kin, will it be permissible to test this blood and give the results to the caregiver and not be subject to any violation of law?

Law / Analysis

At the outset, it will be helpful to review the various statutes which are relevant and relate to the duties and responsibilities of coroners, found in Title 17 of the Code. S.C. Code Ann. Sec. 17-7-10 provides in pertinent part:

> [t]he coroner of the county in which a body is found dead or the solicitor of the judicial circuit in which the county lies shall order an autopsy or post-mortem examination to be conducted to ascertain the cause of death.

Section 17-7-20 further states:

> [w]henever a body is found dead and an investigation or inquest is deemed advisable the coroner or the magistrate acting as coroner, as the case may be, shall go to the body and examine the witnesses most likely to be able to explain the cause of death, take their testimony in writing and decide for himself whether there ought to be a trial or whether blame probably attached to any living person for the death, and if so and if he shall receive the written request, if any, required by § 17-7-50, he shall proceed to summon a jury and hold a formal inquest as required by law. But if there be, in his judgment, no apparent or probable blame against living persons as to the death he shall issue a burial permit and all further inquiry or formal inquest shall be dispensed with.

Pursuant to Section 17-7-30, the coroner's preliminary examination "shall be filed in the clerk's office of the county, the finding to be that deceased came to death (a) from natural cause, (b) at his own hand, (c) from an act of God or (d) from mischance, without blame on the part of another person." Section 17-7-70 authorizes the coroner to conduct an inquest of casual or violent death when the dead body is lying within his county and may issue warrants, summon witnesses, and examine persons concerning the death. The

coroner is further authorized to issue a subpoena duces tecum to compel individuals to produce copies of documents or other materials relevant to a death investigation.

Section 17-7-80 requires the coroner to

> ... examine the body within eight hours of death of any driver and any pedestrian, sixteen years old or older, who dies within four hours of a motor vehicle accident or any swimmer or boat occupant who dies within four hours of a boating accident, and take or cause to have taken by a qualified person such blood or other fluids of the victim as are necessary to a determination of the presence and percentages of alcohol or drugs. Such blood or other fluids shall be forwarded to the South Carolina Law Enforcement Division within five days of the accident in accordance with procedures established by the Law Enforcement Division.

These various statutes clearly afford the coroner broad discretion to examine the body, including testing the blood to determine the cause of death. With the various statutory duties of the coroner in mind, in an opinion of this Office, dated October 1, 1962, former Attorney General McLeod thus stated:

> [t]he question ... with respect to the right of a Coroner to take samples of blood from dead people was previously considered by me in an opinion dated September 17, 1957 ... . The pertinent part of that opinion reads:
>
> > 'Where an inquest is held by you to determine the cause of death of the deceased person, it is my opinion that you, as Coroner, would be authorized to order an autopsy and that this autopsy may include the taking of the sample from the deceased person. You would be authorized to have a blood sample taken, even if this were the only post-mortem action performed by you or at your direction. Your authority for this would be your authority as Coroner and would not necessitate the issuance of a Court Order.'

> From the above it appears that we are in agreement that the Coroner's inherent right to order an autopsy authorizes him to obtain blood samples to aid in his investigation of the cause of death.

And, in Op. Atty. Gen., Op. No. 3724 (February 21, 1974), we concluded that "the drawing of a blood sample from a dead body constitutes a 'post mortem examination', although it is not a complete one, and that coroners are empowered to order the drawing of such blood samples when, in their judgment, such action will assist them in ascertaining the cause of death."

Furthermore, in Op. No. 88-43 (May 26, 1988), we advised you that the Book of Inquisition maintained by your office containing autopsy results, results of toxicological studies and the cause of death could be disclosed under the Freedom of Information Act. There, we reasoned:

> [a]s referenced above, this Office has concluded that while the details of an autopsy report may not be disclosable but see, Soc. of Prof. Journalists v. Sexton, 283 S.C. 563, 324 S.E.2d 313 (1984), the results of an autopsy report may be disclosed. Therefore, it appears that you may continue to disclose the cause of death of a victim whose death you investigated where an autopsy has been conducted. As to your further question concerning the status of blood alcohol levels, generally, the results of blood alcohol tests are public information and thus may be disclosed. See, Op. Atty. Gen. of Texas dated May 27, 1981; Op. Atty. Gen. of Wisconsin dated January 25, 1978; Stattner v. City of Caldwell 727 P.2d 1142 (Idaho, 1986); Staples v. Glienke, 416 N.W.2d 920 (Wis. 1987).

With respect to dangerous communicable diseases, Section 44-29-135 provides that

> [a]ll information and records held by the Department of Health and Environmental Control and its agents relating to a known or suspected case of a sexually transmitted disease are strictly confidential except as provided in this section. The information must not be released or made public upon subpoena or otherwise, except under the following circumstances ... . (emphasis added).

This statute specifies several instances where the records may be released, including release to "medical or epidemiological information to medical personnel to the extent necessary to protect the health or life of any person ... ." Section 44-29-136 requires a court order for release of test results to a solicitor or state criminal law enforcement agency where there "is a compelling need for the test results." The court is required to weigh the need for release against "the privacy interest of the test subject ... " and the potential harm to the public interest "if disclosure deters future Human Immunodeficiency Virus-related testing and counselling or blood, organ and semen donation."

On its face, Section 44-29-135 applies only to "information and records held by the Department of Health and Environmental Control and its agents ... ." In Doe v. American Nat. Red Cross, 788 F.Supp. 884 (D.S.C. 1992), the Court interpreted this provision as follows:

> Section 44-29-135 clearly limits the release of all information and records held by DHEC and its agents relating to a known or suspected case of a sexually transmitted disease to five specific circumstances, none of which allows for the information to be released for the purposes of litigation. These limitations apply even when the information is requested under subpoena. Therefore, it is abundantly clear that by enacting Section 44-29-135, the South Carolina General Assembly intended for "[a]ll information and records held by [DHEC] and its agents relating to a known or suspected case of a sexually transmitted disease" to be privileged matter. Plaintiff concedes this fact, but argues that this privilege exists only in favor of DHEC and its agents, and not to other persons or entities that receive authorized information from DHEC. The Court cannot agree with plaintiff's position.

788 F.Supp. at 888. Thus, unless the records are held by DHEC or its agents or held by other persons or entities received from DHEC, Section 44-29-135 would not appear to apply to a coroner who performs or has performed a blood test on a dead body to determine if the individual had AIDS or Hepatitis B.

It would appear to me, based upon the foregoing, that a good argument can be made that the results of any such test authorized by the coroner would be available to a person who might have been exposed to a communicable disease the individual might have been carrying. Generally speaking, the privacy rights of an individual do not survive

his death. As the Court stated in Society of Professional Journalists v. Sexton, 283 S.C. 563, 566, 324 S.E.2d 313 (1984), "privacy rights are considered personal rights which do not survive." See also, 62A Am.Jur.2d Privacy § 21; Swickard v. Wayne Co., 438 Mich. 536, 475 N.W.2d 304 (1991). In Sexton, the Court went on to conclude that the right of privacy does not prohibit the publication of matter which is "of legitimate public or general interest." Thus, the disclosure of a death certificate did not violate any right of privacy because it was "that of a murder victim in a case of great public interest." 324 S.E.2d at 315.

In the Swickard case, the Supreme Court of Michigan addressed the question of whether a coroner could disclose the results of a toxicology test performed on a deceased who had committed suicide or whether such would violate a right of privacy. The Court cited 3 Restatement of Torts 2d, § 652D comment 9, pp. 390-391 which stated that the disclosure of embarrassing private facts about a deceased must not be a matter of legitimate public concern for there to be any actionable claim for invasion of privacy or disclosure of private facts. The Restatement, further stated that

> "Authorized publicity includes publications concerning homicide and other crimes, arrests, police raids, suicides, marriages and divorces, accidents, fires, catastrophes of nature, a death from the use of narcotics, a rare disease ...". (emphasis added).

475 N.W.2d at 310.

Also referenced in Swickard was Cordell v. Detective Publications, 419 F.2d 989 (6th Cir. 1969) where the Court had disallowed the plaintiff's action for invasion of privacy even though the defendant had written an article sensationalizing the murder of plaintiff's daughter. The Court in Cordell emphasized the rule that an action for invasion of privacy was personal in nature, and could only be asserted by those who are the subjects of publication. Said the Court in Cordell,

> [c]onsequently, the right lapses with the death of the person who enjoyed it, and one cannot recover for this kind of invasion of the privacy of a relative, no matter how close the relationship.

419 F.2d at 990-91, cited at 475 N.W.2d at 311. Thus, the Court in Swickard concluded that disclosure of the toxicology report by the coroner did not constitute an unreasonable invasion of privacy.

Moreover, in Op. Atty. Gen., Op. No. 91-45 (July 11, 1991), we concluded that records concerning a dentist suspected of having AIDS could be released by DHEC to the Air Force so that families who had been exposed to treatment by the dentist could be notified. There, we noted that Section 44-29-135 permitted such notification in those particular circumstances. We concluded as follows:

> [t]he issue here seems to be primarily one of public health and safety rather than privacy. We are aware of the professional medical societies' or health agencies' views on the likelihood of AIDS spreading from health care worker to patient; we are also aware of the need to identify and treat potential patients and to prevent the further spread of HIV and AIDS. The plain language of § 44-29-135 clearly contemplates that disclosure of information could be made if necessary to control or treat such a disease as AIDS, to protect the health or life of any person. In our opinion, the protection of public health and safety would override any concern for the privacy of a deceased person in this instance. Thus, we believe that such disclosure could be made pursuant to the express language of § 44-29-135 (c) and (d), to the United States Air Force as a federal agency, as a means of further identifying and treating HIV and Aids patients and preventing the further spread of this public health menace.

As stated above, by its literal terms, § 44-29-135, interpreted in the 1991 Opinion, would not be applicable to the situation where a coroner orders a toxicological test to be performed on a deceased victim. To my knowledge, no statute expressly prohibits disclosure of test results to a person exposed to the victim in such situation. While Section 44-29-135 is literally not applicable, however, the balancing test required by such statute and recognized in the 1991 Opinion provides substantial guidance in your situation. Subsection (d) authorizes release of information "to medical personnel to protect the health or life of any person" and Subsection (c) permits disclosure "to enforce the provisions of this chapter and related regulations concerning the control and treatment of a sexually transmitted disease." Thus, in my opinion the rationale of the 1991 Opinion would control here. Accordingly, you would probably have the authority to notify a person exposed to diseases such as HIV or Hepatitis B because he stopped to render assistance to a victim

of the results of any tests performed to determine whether the deceased was a carrier of such disease.[1]

I stress, however, that caution is in order. While I am not aware of any statute prohibiting you from such notification, you should make every effort to protect the interests of the deceased and his or her immediate family. Thus, as you have in the past, it would be a good idea to first attempt to obtain the permission of the next-of-kin, for example. Moreover, you will note that Section 44-29-90 expressly authorizes state, district, county and municipal health officers to notify "known sexual contacts or intravenous drug use contacts, or both ... but the identity of the person infected must not be revealed." Thus, if you can avoid revealing the victim's identity in connection with the disclosure of test results, you should do so. You will note as well that Section 44-29-136 requires a court order to disclose test results to a solicitor or state criminal law enforcement agency. If you are able to seek a court order for release of the information, such would also be helpful.

In conclusion, it is my opinion that no statute absolutely prohibits your disclosing test results of a deceased individual to a person exposed at the scene to the deceased who is suspected of having a dangerous communicable disease. Consistent with Op. No. 91-45, the danger to the person living overrides the privacy interests of the deceased. However, because no South Carolina court has recognized the coroner's authority in this area, this issue is not free from doubt. Therefore, you should proceed with caution, making every effort to protect the interests of the deceased victim as set forth above.

This letter is an informal opinion only. It has been written by a designated Assistant Deputy Attorney General and represents the position of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

---

[1] Other statutes are consistent with this conclusion and demonstrate the Legislature's intent to protect public health by impeding the spread of contagious diseases. See, § 17-7-10 [arrangement of autopsy outside South Carolina where person in custody dies and may have contagious disease]; § 44-29-80 [any laboratory with positive finding of sexually transmitted disease]; § 44-29-90 [health officers to examine persons suspected of sexually transmitted disease]; § 44-29-100 [examination and treatment of sexually transmitted disease].

With kind regards, I am

Very truly yours,

Robert D. Cook
Assistant Deputy Attorney General

RDC/ph