The State of South Carolina

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The Honorable Marshall B. Williams
Member, South Carolina Senate
101 Gressette Building
Columbia, South Carolina 29202

Dear Senator Williams:

You have asked for our comments concerning proposed amendments to § 43-38-20 of the Code. As originally enacted, this section authorizes the Governor's Ombudsman "to investigate any problem or complaint on behalf of any interested party or any client, patient or resident of any facility as defined in this chapter." The section further states that "[i]n carrying out any such investigation, he may request and receive written statements, documents, exhibits and other items pertinent to the investigation."

The proposed amendments differ in the House and Senate versions of House bill, H.3236. The House version further defines the items subject to disclosure to the ombudsman as including "medical records of a general hospital in which a client, patient or resident has been treated during the period under investigation." The House amended version further provides that "[g]eneral hospitals are authorized to release the medical records to the ombudsman upon his written request without the necessity of patient authorization." (emphasis added).

The Senate version, on the other hand, while following the House version to the extent of including medical records of a general hospital where a client, patient or resident has been treated during the period under investigation, further provides that "[g]eneral hospitals are authorized to release the medical records to the ombudsman upon his written request with the patient's authorization." (emphasis added). However, where a patient's consent is "unavailable", due to his insanity, mental

defect, mental incapacitation or physical helplessness, "[t]he Ombudsman may petition any State Circuit Court judge to grant access to these items...."

These two versions, which differ primarily with regard to the necessity of patient consent, are presently in conference committee. Your principal concern is whether, absent a patient's consent, particularly where he is "unavailable", the release of the medical records to the ombudsman absolves the hospital from liability and whether such release constitutes an "invasion of privacy of the individual under state and/or federal law?"

The federal constitution, of course, protects the right of privacy. Whalen v. Roe, 429 U.S. 589 (1977); Carey v. Pop. Services, 431 U.S. 678 (1977). Medical records are recognized as being protected pursuant to this privacy right. United v. Westinghouse Elec. Corp., 638 F.2d 570 (3d Cir. 1980)

However, the federal constitutional right to privacy is not absolute. 1/ U. S. v. Colletta, 602 F.Supp. 1322 (E. D. Pa. 1985). Instead, courts "engage in the delicate task of weighing competing interests." U. S. v. Westinghouse Elec. Corp., 638 F.2d at 578. See also, Hawaii Psychiatric Soc. Dist. Branch v. Ariyoshi, 481 F.Supp. 1029 (D. Hawaii 1979); Div. of Med. Qual. v. Gherardini, 156 Cal. Reptr. 55 (1979). The courts generally adhere to the following balancing test as set forth in the Westinghouse case:

> The factors which should be considered in deciding whether an intrusion into an individual's privacy is justified are the type of record requested, the information it does or might contain, the potential for harm in any subsequent nonconsensual disclosure to the relationship in which the record was generated, the adequacy of safeguards to prevent unauthorized disclosure, the degree of need for access, and whether there is an express statutory mandate, articulated public policy, or other recognizable public interest militating toward access.

638 F.2d at 578.

The importance of the State's interest in this area should cause little concern. There is no doubt that the State's interest in the protection of its citizens who reside in medical

1/ Article I, § 10 of our State Constitution establishes a state constitutional right of privacy.

care facilities is substantial. It has been recognized that the State "has a most legitimate interest in the quality of health and medical care received by its citizens." Div. of Med. Qual. v. Gherardini, 156 Cal. Reptr. at p. 61. The General Assembly has recognized the importance of this purpose by authorizing the Governor's Ombudsman to "investigate any problem or complaint on behalf of any interested party or any client, patient or resident of any "facility" as defined in § 43-38-10. 2/

Continuing application of the Westinghouse test, with respect to the need for such material, the statute on its face creates a requirement for relevancy in that documents requested should be "pertinent to the investigation." The General Assembly has determined that such would include the medical records of patients in the facility. Clearly, where the Ombudsman is investigating "problems or complaints" in the type of health care facility defined in the statute, such records would likely be relevant and important to the investigation. While it could not be said, except on a case by case basis, that each and every record in a particular file would be necessary to facilitate an investigation, certainly, from the face of the statute, there is a clear nexus between the records enumerated and the type of investigation by to ombudsman which the General Assembly envisioned. In short, the statute, on its face, would appear to carry out the legislative purpose of insuring proper patient care. Compare, Hawaii Psych. Soc., supra.

Moreover, most Courts conclude that the remainder of the Westinghouse test is sufficiently met to warrant disclosure. In analogous contexts, courts have generally upheld as facially valid statutes which authorize the disclosure of medical records for similar purposes. In Schacter v. Whalen, supra, a New York statute authorized the New York Medical Board to subpoena records when conducting investigations of complaints against

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2/ Section 43-38-10 defines "facility" as "public health centers and tuberculosis, mental, chronic disease and all other types of public or private hospitals and related facilities such as outpatient facilities, rehabilitation facilities, nursing homes, intermediate care facilities, residential care facilities, facilities for persons with developmental disabilities and community mental health centers, including facilities for alcoholics and narcotics addicts but shall not include general hospitals which treat acute injuries or illnesses." I do not know whether the General Assembly intends to continue to exclude general hospitals from the definition of "facility", yet require such hospitals to produce records of treatment. The Legislature may wish to determine whether there is any inconsistency present in such wording.

physicians. Pursuant thereto, the Board subpoenaed the medical records of all cancer patients treated with Laetrile. Patients sought to enjoin disclosure as violating their constitutional right to privacy. Relying upon Whalen v. Roe, the Court upheld the application of the statute because of the overriding State interest in insuring adequate health care.

Other courts have adopted a similar rationale. See, United States v. Allis-Chalmers, supra [court upheld subpoena of employee's medical records in connection with a health hazard evaluation]; G. M. C. v. Director of Nat. Inst., 636 F.2d 163 (6th Cir. 1980) [enforcement of subpoena of employees' medical records in investigation of occupational skin disease]; U. S. v. Lasco Industries, supra [subpoena of medical records in connection with investigation of health effects of potentially toxic substance]; E. I. du Pont de Nemours and Co. v. Finklea, 442 F.Supp. 821 (S. D. W. Va. 1977) [permitted federal administrative agency to get medical records of 3,000 employees for investigation of plant for toxic substances]; La. Chem. Assoc. v. Bingham, 550 F.Supp. 1136 (W. D. La. 1982) [permitted OSHA to obtain corporate medical records]; Chidester v. Needles, 353 N.W.2d 849 (Iowa 1984) [diagnostic records of 13 patients]; Camperlengo v. Blum, 451 N.Y.S.2d 697, 436 N.E.2d 1299 (1982) [D. S. S. subpoena of full medical records of 35 psychiatric patients]; Grand Jury Proceedings, 452 N.Y.S.2d 361, 437 N.E.2d 1118 (1982); In Re The June 1979 Allegheny Co. Investigating Grand Jury, 415 A.2d 73 (Pa. 1980). In only a few instances, to our knowledge, have courts determined that the privacy interests override the public need for disclosure. See, Hawaii Psychiatric Soc., supra [disclosure of medical records not necessary to carry out state's goal of preventing medicaid fraud].

Thus, generally speaking, courts have consistently concluded that the government's interest in maintaining the health and safety of its citizens is paramount to the privacy interest in the nondisclosure of medical records, even where such records contain intimately personal information. See, In Re June 1979 Allegheny Cty. Gr. Jury, supra; United States v. Allis-Chalmers Corp., supra; G. M. C. v. Director, supra; Schacter v. Whalen, supra. Moreover, several courts have upheld such disclosure even where no patient consent was necessary for disclosure. Schacter v. Whalen, supra; E. I. du Pont de Nemours & Co. v. Finklea, supra. As the Supreme Court stated in Whalen v. Roe,

> disclosures of private medical information to doctors, to hospital personnel, to insurance companies and to public health

> agencies are often an essential part of modern medical practice....

429 U.S. at 600-601. Accordingly, we cannot say that the House version of H.3226, which does not require patient consent or court approval, is facially invalid.

Caution should be urged in this regard, however. The Court in Westinghouse recognized the importance of the patient (employee) making "an individual judgment as to whether s/he regards the information so sensitive that it outweighs the employee's interest in assisting ... in a health hazard investigation...." The Court refused to assume that an employee's claim of privacy as to particular material in a file "will always be outweighed" by the need for disclosure. 638 F.2d at 581. While the Court concluded that requiring individualized consent, imposed "too great an impediment" to an investigating agency, the Court still required that prior notice be given to the employees "whose medical records it seeks to examine and to permit the employees to raise a personal claim of privacy." 638 F.2d at 570. A similar procedure was required in United States v. Lasco Industries, supra. And in Div. of Med. Quality v. Gherardini, supra, the Court required either a waiver by the patient of his right to privacy or a showing of "good cause", thus conforming "to the standards to which law enforcement officials, respondents in administrative investigations and civil litigants are held." Id. Thus, there are cases which conclude that some form of due process must be provided to the patient prior to disclosure of the patient's records even to an investigating governmental agency.

Moreover, virtually every case we have examined requires a determination of the "adequacy of safeguards to prevent unauthorized disclosure." Westinghouse, 638 F.2d at 578. Courts such as Westinghouse have considered whether the storage of information to be disclosed is physically secure, or whether information must legally remain secret such as where subpoenaed by a grand jury. See, In Re Zuniga, 714 F.2d 632 (6th Cir. 1982); In Re June 1979 Allegheny Co. Investigating Grand Jury, supra. In Schacter v. Whalen, the court noted it had been assured by counsel that there existed substantial procedures to prevent disclosure of patient's names. See also, E. I. du Pont de Nemours v. Finklea, supra. While we presume that the Ombudsman would maintain patient confidentiality, we note that the

proposed amendments contain no specific legal requirement that he do so. 3/

CONCLUSION

In summary, it cannot be said that the proposed House version of the bill is unconstitutional under the analysis of a number of the cases cited above, or that the House version would not protect a hospital in releasing records to the Ombudsman, pursuant to its requirements. There exists ample authority, under present cases that the right of privacy may be overridden by the State's interest in protecting the health and welfare of its citizens. However, certain concerns remain. We note to the Committee that several cases in upholding disclosure do require more specific and restrictive protections than those contained in the House version of the bill. These include providing the patient an opportunity to object to the disclosure of his medical records. Moreover, virtually all of the cases specifically require some form of assurance of confidentiality on the part of the investigating authority.

The Senate version accommodates these concerns more fully because it provides that a patient must consent, or if he is unable to consent, requires court approval. While it cannot be said that our courts would impose as a matter of constituional law the extensive procedures contained in the Senate version, the federal Constitution would certainly not preclude the

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3/ The Court in de Nemours noted that the federal Freedom of Information Act contained an exception to this disclosure of medical records "which would constitute a clearly unwarranted invasion of personal privacy." The Court specifically held that "such disclosure would constitute such invasion of personal privacy" and that the investigating agency "would be prohibited by law from releasing the protected information gathered from the medical and personnel files, or disclosing same to unauthorized persons." We are uncertain whether this is a correct statement of the law. This Office has concluded that the disclosure of medical records do not necessarily constitute an unreasonable invasion of personal privacy. See, Op. Atty. Gen. Op. No. 84-53 (May 10, 1984). In any event, this Office is of the opinion that our FOIA does not mandate nondisclosure. Op. Atty. Gen., May 13, 1986.

enactment of the Senate version. 4/ Moreover, whether or not the precise language of the Senate version is adopted, the Committee may still wish to avoid constitutional arguments by including at least some form of patient consent or objection mechanism in the bill. The Committee may also wish to include some requirement that the records be kept confidential by the investigating authority.

Very truly yours,

Robert D. Cook
Executive Assistant for Opinions

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4/ We note also that both versions of the bill are broadly worded. Neither version defines "interested party" or what type of "problem or complaint" may be contemplated. Presumably, these matters are left to the discretion of the Ombudsman.