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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

August 25, 1997

Mr. Timothy D. Harbeson
Division Director
Continuum of Care for
Emotionally Disturbed Children
Office of the Governor
220 Stoneridge Drive, Suite 300
Columbia, South Carolina 29210

Dear Mr. Harbeson:

Thank you for your inquiry to the Attorney General's Office concerning the retention of emotionally disturbed children's medical records. Public officials are "the legal custodians of all papers, books and records pertaining to [their] office" and have a duty to preserve those materials. 76 C.J.S. Records, Section 32, p. 105. "[T]he custodian of the public record cannot destroy it, deface it, or give it up without authority from the same source which required it to be made". 66 Am. Jur. 2d Records and Recording Laws, Section 10, p. 347. In South Carolina, the Legislature has designated the "chief administrative officer of any agency or subdivision" as the "legal custodian" of that organization's legal records. S.C. Code Ann. Section 30-1-20 (1991). The custodian may not destroy, erase or dispose of the public record except as provided for by a records retention schedule which has been "documented and reported in accordance with procedures developed by the [South Carolina Department of Archives and History]". S.C. Code Ann. Section 30-1-90 (1991). Thus, it is the public policy of this State to preserve, rather than destroy public records.

The South Carolina Department of Archives and History (Archives) is authorized by statute to assist an agency or subdivision in the:

[p]reparing [of] an inclusive inventory of records in their custody and establishing records schedules mandating a time period for the retention of each series of records. These schedules must be approved by the

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governing body of each subdivision or the executive officer of each agency or body having custody of the records. S.C. Code Ann. Section 30-1-90 (1991).

This office has held in a previous opinion that the Legislature "appears to delegate to the Archives the authority, within its discretion, to determine how long records shall be preserved". Op. Atty. Gen. dated June 6, 1984. Certainly, "[t]here is no statutory authority which provides a specific length of time for juvenile records to be retained. In the absence of any such authority, the question as to what constitutes a reasonable period of time ... becomes a policy decision for the individual agency." Op. Atty. Gen. dated March 27, 1978. This office has strongly recommended that "inasmuch as the destruction of records is an irreversible process, we are hesitant to construe Section 30-1-90 so broadly as to make it applicable to records of" juvenile offenders in a Pretrial Intervention Program. Op. Atty. Gen. dated June 10, 1986.

The recent experience of this Office in the ongoing Tobacco Litigation suggests that the maintenance of detailed medical records is vital to the State's pecuniary interests in a lawsuit which seeks to recover monetary compensation for public health care costs created by private industry. By extension, it is not inconceivable that the State may need to medical documentation similar to that which is now possessed by the Continuum of Care to establish the rights and obligations of parties to a future lawsuit. Certainly, other states have recognized the need to preserve similar public records. The Arizona Supreme Court in Beasley v. Glenn, 520 P.2d 310 (1974) held "the public policy of this State as established by the Legislature is to preserve as a memorial matters customarily retained in public offices for future enlightenment of those necessarily concerned therewith". The Supreme Court of California sitting en banc admonished the Los Angeles City Attorney's Office and Police Department in People v. Zamora, 167 Cal.Rptr. 573 (1980) for destroying records of unsustained citizen complaints against the Police Department. The Court recognized that "such destruction deprived defendant of the opportunity to locate witnesses who could testify" to past allegations even those allegations were never sustained. The thrust of the Court's opinion is clear, public records contain vital information to future citizens even if those records had no contemporaneous result.

In summary, I would reemphasize this Office's earlier opinion that the destruction of public records is an irreversible process which deprives future generations of valuable information. The import of that information may not always be apparent to the current generation. For that reason, a significant degree of restraint is warranted whenever the destruction of records is being contemplated. Accordingly, it is my best advice that the records

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be retained permanently. Of course, it is a matter of discretion as to the particular form in which preservation is maintained and I defer to the Continuum of Care for Emotionally Disturbed Children as the custodian and the Department of Archives and History in this regard.

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.

With kind regards, I remain

Very truly yours,

A handwritten signature in black ink, appearing to be "R. D. Cook", written over the typed name.

Robert D. Cook
Assistant Deputy Attorney General

RDC/rbp