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ATTORNEY GENERAL

February 24, 2016

The Honorable Rusty Clevenger
Coroner, Spartanburg County
366 N. Church St., Suite 700
Spartanburg, SC 29303

Dear Mr. Clevenger:

We are in receipt of your opinion request asking whether "toxicology reports are considered to be 'medical records' under Section 30-4-20(c) of the South Carolina Code and therefore exempt from disclosure under the South Carolina Freedom of Information Act." In particular, you cite our Supreme Court's recent decision in Perry v. Bullock, 409 S.C. 137, 761 S.E.2d 251 (2014) where the Court concluded autopsy reports "fit neatly within the general understanding of medical records" and, in light of this ruling, ask the following questions:

(1) In the case where a toxicology report is issued with nothing more than scientific findings relative to Blood Alcohol Content, but which is reviewed by a pathologist and medical examiner with opinions issued as to same, would that toxicology report be considered a medical record under the findings of Bullock given there are not medical conditions noted or an autopsy performed? Or would it be nothing more than the death certificate analysis in that it is not a medical record in the normal sense but merely statements of conclusion as the Court opined in Society of Professional Journalists v. Sexton?

(2) Converse to the situation in No. 1 above, where a toxicology report is issued with nothing more than scientific findings, but which is included in the review done by the medical examiner for the autopsy, would that toxicology report then be considered a medical record under the finding of Bullock given there are no medical conditions noted but it is considered in the autopsy?

(3) In the case where a toxicology report is issued which does include more than scientific findings alone and which might include medical conditions, as well, would that toxicology report then be considered a medical record under the finding of Bullock given there are notations of medical conditions and it is considered in the autopsy? Or would it once again be considered not to be a medical record in the normal sense but merely statements of conclusion as the

Court opined in Sexton given the autopsy itself would include the information garnered from the toxicology report?

(4) In the event it is determined that the toxicology report itself would be considered a medical record and exempt from release, would that then require that all information included in the report, even scientific information, . . . be exempt from disclosure under HIPAA? More simply stated, might a Coroner advise the public of information relative to Blood Alcohol Content without the actual release of the toxicology report which might include medical conditions? If the Blood Alcohol Content is directly related to the cause and/or manner of death and it's a manner (sic) of great public interest (i.e. Burton where public has a legitimate interest in documents relating to how law enforcement officers perform their duties) then does any argument under Bullock that this is a medical record and contents are to be withheld weaken?

(5) In the event it is determined that the release of the toxicology report and/or any of the information in a toxicology report is allowed, is a Coroner protected by the FOIA provision protecting a public body from liability for releasing exempt info, or is that voided if a Coroner releases a medical record/information included in a medical record covered by HIPAA? Pre-Bullock and the finding that an autopsy report is a medical record, I would not have thought that the Coroner produced "medical records" thus making them a "medical provider" subject to HIPAA. Might a Federal Court, in considering a HIPAA claim, opine that since autopsy results in South Carolina have been deemed "medical records" under this state's law, then a Coroner in South Carolina who orders an autopsy and/or a toxicology report which includes medical information and/or is utilized in an autopsy (in essence creates the medical record) is a medical services provider?

Our responses follow.

I. Law/Analysis

South Carolina's Freedom of Information Act ("FOIA") provides individuals the "right to inspect or copy any public record of a public body, except as otherwise provided by § 30-4-40." S.C. Code Ann. § 30-4-30 (2007). As detailed in Section 30-4-15 of the Code, the purpose of FOIA is to ensure that "public business be performed in an open and public manner so that citizens shall be advised of the performance of public officials and of the decisions that are reached in public activity and in the formulation of public policy." S.C. Code Ann. § 30-4-15 (2007). Explained in the words of our Supreme Court, FOIA's "essential purpose . . . is to protect the public from secret government activity." Lambries v. Saluda County Council, 409 S.C. 1, 8-9, 760 S.E.2d 785, 789 (2014) (citing Wiedemann v. Town of Hilton Head Island, 330

S.C. 532, 500 S.E.2d 783 (1998)). It is with this purpose in mind that our Court has classified FOIA's provisions as "remedial" and therefore construes such provisions in favor of disclosure. E.g., Quality Towing, Inc. v. City of Myrtle Beach, 345 S.C. 156, 161, 547 S.E.2d 862, 864-65 (2001) ("FOIA is remedial in nature and should be liberally construed to carry out the purpose mandated by the legislature.").

Under FOIA, "public bodies" must, upon request, disclose "any public record" unless an exception applies. S.C. Code Ann. § 30-4-30(a). Traditionally, "analysis of the FOIA's application turns on whether the information requested (1) is held by an entity that classifies as a 'public body;' (2) falls under the definition of a 'public record;' and (3) is not exempt from disclosure." Op. S.C. Att'y Gen., 2014 WL 7210767 (December 4, 2014). However, as discussed more fully below, because your request is merely focused on whether a toxicology report can be considered a "public record" under the second prong of the FOIA analysis, this opinion will not address the factual question of whether a FOIA exemption may apply under the provisions of Section 30-4-40 of the Code. See Op. S.C. Att'y Gen., 2014 WL 7210767 (December 4, 2014) (citing City of Columbia v. ACLU of South Carolina, Inc., 323 S.C. 384, 387, 475 S.E.2d 843, 846 (1994) (acknowledging the determination of whether documents or portions of documents are exempt from FOIA are a factual determination "made on a case-by-case basis.")). Understanding this, we will now address your questions.

1. **When an Autopsy is not Performed, is a Toxicology Report Issued with Nothing More than Blood Alcohol Content, but which is Reviewed by a Pathologist and Medical Examiner, a Medical Record under Bullock when the Report does not note Medical Conditions?**

As noted above, your request, correctly assuming the Office of Coroner is a "public body" under FOIA,[1] focuses on whether a toxicology report is a "public record" subject to the statute's disclosure provisions. In particular, you discuss Section 30-4-20(c)'s definition of the phrase "public record," mention the Supreme Court's recent ruling in Bullock— that autopsy reports are a "medical record" and do not qualify as "public records"— and ask if the same rationale applies to a toxicology report. We believe it does. As discussed below, because a toxicology report, similar to an autopsy, is a diagnostic test yielding medical information, we believe, although not free from doubt, that a court would find such a report is a medical record and therefore not a "public record" under Section 30-4-20(c) of the Code.

FOIA defines the term "public record" as "all books, papers, maps, photographs, cards, tapes, recordings, or other documentary materials regardless of physical form or characteristics prepared, owned, used, in the possession of, or retained by a public body." S.C. Code Ann. § 30-4-20(c). However, Section 30-4-20(c) adds that "[r]ecords such as . . . medical records, hospital

[1]See Op. S.C. Att'y Gen., 1983 WL 142752 (November 2, 1983) (concluding the Office of Coroner is a public body under FOIA).

medical staff reports . . . and other records which by law are required to be closed to the public are not considered to be made open to the public under the provisions of this act[.]" Thus, we must determine whether, in the circumstances you have described above, a toxicology report amounts to a "public record" for purposes of Section 30-4-20(c).

As detailed in your request, our Supreme Court, in Bullock, found an autopsy report is a "medical record" and therefore closed to the public pursuant to the terms of Section 30-4-20(c). 409 S.C. at 142, 761 S.E.2d at 253. In so concluding, the Court, recognizing the absence of a statutory definition for the term "medical record," relied on the "normal and customary" definition of the phrase and determined autopsy reports do not meet the definition of a "public record" for purposes of FOIA. Id. In particular, the Bullock majority, quoting *Merriam-Webster*, defined the phrase "medical record" as "a record of a patient's medical information (as medical history, care or treatments received, test results, diagnoses, and medications taken)" and therefore reasoned "medical records are those records containing medical information." Id. Continuing, the Court, supporting its conclusion, added that while "the objective of an autopsy is to determine the cause of death," because an autopsy is "not confined to how the decedent died," but is instead "a thorough and invasive" procedure revealing "extensive medical information" an autopsy report falls within the definition of a "medical record." Id. Thus, analyzing the holding from Bullock, we believe that in order to qualify as a "medical record" exempted from the definition of a "public record" the requested information "must identify a particular patient's medical information." Op. S.C. Att'y Gen., 2014 WL 7210767 (December 4, 2014).

Despite the Court's recent holding in Bullock, our Supreme Court has previously rejected the argument that a death certificate, which by law requires "a medical certification of the cause of death," is a "medical record" under FOIA. Society of Professional Journalists v. Sexton, 283 S.C. 563, 566, 324 S.E.2d 313, 314 (1984). In Sexton, the Court modified a circuit court ruling finding a death certificate filed with the Department of Health and Environment Control[2] ("DHEC") was a "medical record." Id. In modifying the circuit court's ruling, the Court distinguished a death certificate from a medical record by explaining the certificate was merely a conclusion issued "by a person required by law to make such findings after the death of a citizen of the state." Id. Thus, to synthesize Sexton and Bullock, where the law requires a medical professional to merely provide a conclusion regarding cause of death, such information should not be considered a medical record; however, where a record contains a patient's medical information, whether it be medical history, care, treatments received, test results, diagnoses, or medications taken, the information would, under Bullock, be considered a medical record. See

[2] Notably, the declaratory judgment action in Sexton included not only DHEC as a defendant, but also named the Charleston County Medical Examiner (Joel Sexton) as a defendant. As explained by the Supreme Court, the circuit court found the Medical Examiner's records qualified "as medical records under § 30-4-20(c)" a ruling which was not appealed to the Supreme Court. Thus, there is persuasive authority in the form of the circuit court's ruling that the information requested from the Charleston County Medical Examiner, specifically "written reports pertaining to the death of [the victim]" are considered medical records for purposes of FOIA. See Sexton, 283 S.C. at 565, 324 S.E.2d at 314 (explaining the circuit court's ruling that the requested Medical Examiner's records were medical records under Section 30-4-20(c) of the Code was not appealed).

Bullock, 409 S.C. at 143, 761 S.E.2d at 254 (distinguishing a death certificate from an autopsy report on the basis that a death certificate is a mere conclusion concerning an individual's cause of death whereas an autopsy report includes information concerning a decedent's "general medical condition at the time of death" and is therefore a medical record).

Here, applying the holdings from Sexton and Bullock, we believe that while admittedly a close question, because a toxicology report would, in this situation, appear to be a diagnostic test used to determine the medical condition of an individual at or near the time of their death, such a report meets the "plain and ordinary" meaning of the phrase "medical record" under the rubric of Bullock. As a result, it would appear such a record is not a "public record" under Section 30-4-20(c) and therefore, is not subject to disclosure under FOIA.

Pursuant to Black's Law Dictionary, "toxicology" is defined as "[t]he branch of medicine that concerns poisons, their effects, their recognition, their antidotes, *and generally the diagnosis and therapeutics of poisoning* . . . ." Black's Law Dictionary (10th ed. 2014) (emphasis added); see also, Merriam-Webster Online, "toxicology" http://www.merriam-webster.com/dictionary/toxicology, ("[A] science that deals with poisons and their effect and with the problems involved (as clinical, industrial, or legal)." Additionally, a "report" is defined by Black's as "[a] formal oral or written presentation of facts or a recommendation for action," Black's Law Dictionary (10th ed. 2014), while Merriam-Webster describes it as "a written or spoken description of a situation, event" or "an official document that gives information about a particular subject." Merriam-Webster Online, "report" http://www.merriam-webster.com/dictionary/report. Thus, taking these two words together, we believe a toxicology report can be accurately described as a presentation or description of facts concerning the diagnosis of poisons and their effect on an individual.

Applying this understanding to your question, we believe a toxicology report testing blood alcohol content meets Bullock's understanding of the phrase "medical record." Specifically, the definition of "medical record" used in Bullock included tests and diagnoses as examples of the "medical information" found in a "medical record." See Bullock, 409 S.C. at 142, 761 S.E.2d at 253 (defining the phrase "medical record" as "a record of a patient's medical information (as medical history, care or treatments received, test results, diagnoses, and medications taken)"). Further, it appears that in the situation mentioned in your question, a pathologist or medical examiner's obvious purpose in ordering a test to determine the presence of alcohol in a decedent's body would be to diagnose a medical condition at the time leading up to their death—i.e. to determine whether the decedent was intoxicated. Thus, we believe a toxicology report, like an autopsy report, is a document necessarily containing medical information and, as a result, meets the Bullock Court's definition of "medical record."

Moreover, while one may argue a toxicology report is more akin to the death certificate in Sexton, we respectfully disagree. Specifically, while a medical examiner or pathologist may be legally required to make conclusions concerning a decedent's cause of death for purposes of a

death certificate, the law does not require medical examiners or pathologists to render a conclusion as to the presence of alcohol in a decedent. For example, even in the case where a decedent's death is a direct result of ingesting too much alcohol (acute intoxication), the death certificate's conclusion under Sexton would simply relay this fact and would not require disclosure of the means of ascertaining the facts supporting the conclusion (i.e. by toxicology report testing blood alcohol content). Indeed, this is the basis for the Bullock Court's death certificate/autopsy report distinction. See Bullock, 409 S.C. at 143, 761 S.E.2d at 254 (distinguishing a death certificate from an autopsy report on the basis that a death certificate is a mere conclusion concerning an individual's cause of death whereas an autopsy report includes information concerning a decedent's "general medical condition at the time of death" and is therefore a medical record).

Furthermore, and as noted in footnote two, the holding from Sexton did not purport to address the circuit court's ruling that the information requested from the Charleston County Medical Examiner, information described as "written records pertaining to the death of [the victim]," were medical records and therefore not public under FOIA. See Sexton, 283 S.C. at 565, 324 S.E.2d at 314 (explaining the circuit court's ruling that the requested Medical Examiner's records were medical records under Section 30-4-20(c) of the Code was not appealed). Indeed, the circuit court's unappealed ruling on this point would later turn out to be consistent with the Court's ruling in Bullock. Thus, while the Sexton Court's opinion is admittedly silent as to whether a toxicology report was included within the information requested in that case, the circuit court's ruling at least shows the court was cognizant that records in the custody of a medical examiner could be considered "medical records" under FOIA. Accordingly, the conclusion from Sexton would be inapposite in this case and therefore we believe a court would find a toxicology report issued with nothing more than blood alcohol content is a medical record under Bullock and, as a result, does not meet Section 30-4-20(c)'s definition of a "public record."

2. **Where a Toxicology Report is Issued with Nothing More than Scientific Findings, but which is Included in the Review done by the Medical Examiner for the Autopsy, would that Toxicology Report then be Considered a Medical Record under Bullock given that there are no Medical Conditions noted but it is Considered in the Autopsy**

Your second question is slightly different from your first in that you appear to be asking whether a toxicology report reviewed by a medical examiner for purposes of an autopsy meets the Bullock Court's definition of a medical record. For the reasons discussed in question one above, namely that a toxicology report contains "medical information" by virtue of the fact it is a diagnostic test used to determine the condition of the decedent at the time leading up to his or her death, we believe, although not free from doubt, that under such circumstances a court would find such a report is a "medical record" under Bullock.

As we explained in our analysis of your first question, a toxicology report is a "medical record" under the Bullock Court's definition of the phrase. Indeed, as detailed in question one, the purpose of the report is to inform the reader "of facts concerning the diagnosis of poisons and their effect on an individual." See supra, at p. 5. ("[W]e believe a toxicology report can be accurately described as a presentation or description of facts concerning the diagnosis of poisons and their effect on an individual."). In this vein, a toxicology report issued with nothing more than scientific findings meets the Bullock Court's definition of the phrase "medical record" because it contains "medical information" from a test used to diagnose the existence of a medical condition in the decedent in the time leading up to his or her death.

This conclusion is actually bolstered in the situation you have described. Specifically, because the toxicology report in your factual scenario is included in the review done by the medical examiner in the autopsy, it would appear that the autopsy report, a medical record under Bullock, would be relying on data contained within the toxicology report to support the findings made in the autopsy thereby strengthening the argument that a toxicology report is a diagnostic test. With this in mind, the Sexton argument advanced in question one is weakened by the fact the toxicology report is exclusively utilized to determine the presence of alcohol or drugs, and is not being used as a conclusion concerning the cause of death. Stated differently, where the data contained within the toxicology report is simply relied upon to support the findings contained within an autopsy, it cannot at the same time be a conclusion concerning a decedent's cause of death and is therefore materially different from a death certificate. Accordingly, where a toxicology report is issued with nothing more than scientific findings and is included in the review done by the medical examiner for the autopsy, we believe such a report constitutes a "medical record" under Section 30-4-20(c) and is therefore not a "public record."

3. Would a Toxicology Report including more than Scientific Findings Alone, and which might include Information Concerning Medical Conditions, be Considered a Medical Record under Bullock

Your third question asks whether a toxicology report including more than scientific findings alone, and which might include information concerning medical conditions, is a "medical record" under Bullock. While not free from doubt, and based in part on the analysis from question one, it is the opinion of this Office that a court would likely find such a report meets the Bullock Court's definition of the phrase "medical record." Accordingly, we believe that in the circumstances mentioned in your letter, a toxicology report is not a "public record" under Section 30-4-20(c) and therefore is not subject to disclosure under FOIA.

As discussed in our responses to your first and second questions, we believe a toxicology report is a "medical record" in that it contains medical information in the form of diagnostic test results concerning the medical condition of the decedent in the time leading up to his or her death. As a result, it follows that, in the situation you have presented, a toxicology report would be a "medical record" under Bullock.

This conclusion would only be strengthened in the factual situation you have provided here. Specifically, while we cannot comment on facts, because your question references a toxicology report containing more than mere scientific data, including information concerning the presence of medical conditions, such a report would seem more likely to qualify as a "medical record" under Bullock. This is because such a report could be considered to contain "medical information" in that it not only includes findings concerning a diagnostic test result, but may also contain information concerning medical conditions that are collateral to the presence of alcohol or illegal drugs. For instance, if a toxicology report, in addition to containing information concerning an individual's blood alcohol content, also included information reflecting the presence of therapeutic drugs used to treat a medical condition (e.g. therapeutic levels of an anti-depressant in an individual diagnosed with Clinical Depression), then it would seem such a report contains multiple examples of the medical information discussed in Bullock—diagnostic test results as well as care or treatments received and/or medications taken. See Bullock, 409 S.C. at 142, 761 S.E.2d at 253 (defining the phrase "medical record" as "a record of a patient's medical information (as medical history, care or treatments received, test results, diagnoses, and medications taken)"). Indeed, the presence of collateral medical conditions in a report was an obvious concern to the Bullock Court when it found an autopsy report was a "medical record" under Section 30-4-20(c) and therefore was not a "public record" subject to disclosure under FOIA. Notably, the Bullock Court explained that because an autopsy report revealed the presence of diseases and medications as well as any treatments received, "regardless of whether that information pertained to the cause of death" an autopsy report met the definition of a "medical record." Bullock, 409 S.C. at 142, 761 S.E.2d at 253. Thus, it stands to reason a toxicology report containing more than scientific findings alone, and which might contain information concerning medical conditions, may be more likely to be considered a "medical record" under Bullock since, in addition to containing medical information in the form of diagnostic test results, it may also yield information concerning the presence of treatments, medications or diagnoses of condition(s) that are outside of the purpose of such a report.

4. If a Toxicology Report is Considered a Medical Record, would all Information Included in the Report, even Scientific Information, be Exempt from Disclosure under the Health Insurance Portability and Accountability Act ("HIPAA")?

In your fourth question you ask, in the event we decide a toxicology report is a medical record, whether all of the information contained within the report, including scientific information, is "exempt from disclosure under HIPAA." Continuing, you explain "more simply stated, might a Coroner advise the public of information relative to Blood Alcohol Content without the actual release of the toxicology report which might include medical conditions?" While the ultimate answer to your question hinges upon the factual question of whether a

Coroner's Office meets the definition of a "covered entity" under HIPAA,[3] a question which is outside of the scope of an Attorney General's opinion, we believe a court would likely find HIPAA does not apply to the Office of Coroner and is therefore not subject to HIPAA's "Privacy Rule." Assuming this is the case, HIPAA would not prohibit a Coroner from advising the public of "information relative to Blood Alcohol Content" without releasing the report containing such information.

As we have previously mentioned, the determination of whether a Coroner's Office is subject to the requirements of HIPAA—particularly HIPAA's so-called "Privacy Rule" is ultimately a question of fact. Op. S.C. Att'y Gen., 2014 WL 7210767 (December 4, 2014) (concluding that the determination of whether a facility is a "covered entity" for purposes of HIPAA is "question of fact to be considered on a case-by-case basis and is therefore outside of the scope of this opinion."). Under the Privacy Rule, "covered entities" are prohibited from using or disclosing "protected health information" unless an exception applies.[4] 45 C.F.R. § 164.502(a). The term "covered entity" is defined as a "health plan, a health care clearinghouse," or a "health care provider who transmits any health information in electronic form in connection with a transaction covered by this subchapter." 45 C.F.R. § 160.103. In turn, the regulations define a "health plan" as "an individual or group plan that provides, or pays the cost of, medical care" 45 C.F.R. § 160.103; define a "health care clearinghouse" as "a public or private entity, including a billing service, repricing company, community health management information system or community health information system . . ." 45 C.F.R. § 160.103; and define a "health care provider" as a provider of services (as defined in section 1861(u) of the Act, 42 U.S.C. 1395x(u)), a provider of medical or health services (as defined in section 1861(s) of the Act, 42 U.S.C. 1395x(s)), and any other person or organization who furnishes, bills, or is paid for health care in the normal course of business." 45 C.F.R. § 160.103.[5]

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[3] See Op. S.C. Att'y Gen., 2014 WL 7210767 (December 4, 2014) (concluding that the determination of whether a facility is a "covered entity" for purposes of HIPAA is "question of fact to be considered on a case-by-case basis and is therefore outside of the scope of this opinion.").

[4] The "Privacy Rule" also applies to the "business associates" of a covered entity via the "business associate agreement." Bradshaw, Megan & Hoover, Benjamin, Not so Hip?: The Expanded Burdens on and Consequences to Law Firms as Business Associates Under HITECH Modifications to HIPAA, 13 Rich. J.L. & Pub. Int., 313, 332-33 (2010). As explained by one source, a business associate, for purposes of HIPAA, is an entity acting "on behalf of a covered entity when another person uses or discloses (or creates, obtains and uses) protected health information to perform a "function or activity" (such as claims processing, utilization review, practice management) or provides specified services (legal, actuarial, accounting, consulting, management, accreditation, data aggregation, and financial services)." Johnston, Mary Beth HIPAA Administrative Simplification Privacy, Security, and Transaction Standards, 14 No. 2 Health Law. 9 (Jan. 2002). We believe the determination of whether the Office of Coroner is a "business associate" for purposes of HIPAA and therefore subject to the terms of the "Privacy Rule" would necessarily be dependent upon the factual question of whether the Office has entered into a "business associate agreement" as discussed above. Assuming your Office has not entered into such an agreement, it appears your Office could not be subject to liability under HIPAA as a "business associate." See 13 Rich. J.L. & Pub. Int., at 332 ("The Privacy Rule also applies to business associates, but it applies through the obligations set forth in the business associate agreement, as opposed to direct application of the Security Rule.").

[5] The term "provider of services" for purposes of Section 160.103's definition of "health care provider" as defined under Section 1861(u) of the Social Security Act (codified at 42 U.S.C. § 1395x(u)), means "a hospital, critical

Here, understanding HIPAA's definitions concerning a "covered entity," we believe that while such a determination is ultimately a factual question based upon the services rendered by the Office of the Coroner, it appears the Office does not meet the definition of a "covered entity" under HIPAA. Indeed, it seems obvious the Office of Coroner does not meet HIPAA's regulatory definition of "a health plan" or "health care clearinghouse" as, at least to our knowledge, it does not pay the cost of medical care or bill individuals for medical care provided per the terms of Section 160.103. Moreover, while admittedly a closer question, it would seem the Office of Coroner is not a "health care provider" as it is not one of the entities listed in either § 1395x(s) or § 1395x(u), nor do the procedures included in § 1395x(s) include either an autopsy or toxicology report as an example of a "health care service."

In fact, it appears the only argument supporting a claim that the Office of Coroner may be considered a "covered entity" under the definition of a "health care provider" would be that the Office is an organization that "furnishes, bills, or is paid for health care in the normal course of business." As to this argument, which is admittedly a question of fact related to the services rendered by your Office, it is our belief that a court would likely find a Coroner's Office does not furnish health care in the normal course of business, nor does it bill or receive payment for health care. For example, coroners are generally defined as "publicly elected officials charged with the duty of making inquiries into the causes and circumstances of any death occurring suddenly or through violent means." 14 S.C. Jur. Coroners § 2 (citing Black's Law Dictionary, (5th ed.), p. 306). This is consistent with the mandates of Sections 17-7-10 and 17-7-20 of the South Carolina Code, both of which generally reflect that coroners are charged with investigating deaths, ordering autopsies and, if necessary, conducting inquests. See S.C. Code Ann. § 17-7-10 (2014); S.C. Code Ann. § 17-720 (2014). Likewise, it is consistent with the common law origin of the Office of Coroner which, under English Common Law, was "to make inquiries into sudden or violent deaths." 14 S.C. Jur. Coroners, § 9 (citing 4 Edw. I Stat. 2 (1276) (Statute De Officio Coronatoribus). Thus, it appears the primary purpose of the Office of Coroner is, and in fact has been, to investigate deaths and determine their causes, rather than to furnish health care, or bill or receive payment for health care.

Furthermore, while it is true the Office of Coroner includes the duty of ordering autopsies, which according to Bullock is a medical procedure, it is difficult to call this medical procedure "health care" for purposes of HIPAA, especially when § 1395x(s), which is cross-referenced in Section 160.103, fails to include such a procedure in its exhaustive list of "health care services." Indeed, it is hard to imagine a medical procedure that, by definition, can only be

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access hospital, skilled nursing facility, comprehensive outpatient rehabilitation facility, home health agency, hospice program, or, for purposes of section 1395f(g) and section 1395n(e) of this title, a fund." Meanwhile, the term "provider of medical or health services" as used in Section 160.103's definition, a term which cross-references 42 U.S.C. § 1395x(s), is not expressly defined in Section 1395x(s), but instead includes an exhaustive list of individuals providing health services. Notably, none of these definitions expressly state a medical examiner or coroner's office provides such services.

performed on a dead body, was intended as the type of health care service which would result in a Coroner's Office becoming a "covered entity" under HIPAA. This is especially true where HIPAA, although providing exhaustive examples of covered entities in its cross-referenced provisions of § 1395x(s) and 1395x(u), also fails to include either the Office of Coroner or the Office of Medical Examiner, as either a "health care provider" or "a provider of medical or health services[.]" In fact, a review of 45 C.F.R. § 164.512(g), a provision which expressly names coroners and medical examiners as individuals that are exempt from HIPAA's general requirement that covered entities either receive authorization or consent from a patient in order to disclose protected health information to third parties, confirms that both coroners and medical examiners were never intended to be "covered entities" under HIPAA. See 45 C.F.R. § 164.512(g)(1) (2013) ("A covered entity may disclose protected health information to a coroner or medical examiner for the purpose of identifying a deceased person, determining a cause of death, or other duties as authorized by law. A covered entity that also performs the duties of a coroner or medical examiner may use protected health information for the purposes described in this paragraph."). Specifically, if Health and Human Services ("HHS") the agency who adopted the regulations at issue, intended coroners and medical examiners to be "covered entities" under HIPAA, then there would be no need to promulgate a regulation contemplating that they are third parties that are not subject to HIPAA's disclosure requirements. Accordingly, and while admittedly a question of fact based upon the services rendered by your office, we believe a court would likely find the Office of Coroner is not a "covered entity" for purposes of HIPAA. Thus, assuming this conclusion is correct, HIPAA's "Privacy Rule" would not apply meaning your Office would not be prohibited from advising the public of information contained within a toxicology report without actually disclosing the report itself.

5. In the event it is Determined the Release of a Toxicology Report is Permitted, is a Coroner protected by the FOIA Provision Protecting a Public Body from Liability for Releasing Exempt Information, or is that Voided if a Coroner Releases a Medical Record/Information Included in a Medical Record Covered by HIPAA? Could a Coroner, post-Bullock, be considered a Medical Services Provider?

In your fifth question you ask, (A) "in the event it is determined that the release of the toxicology report and/or any of the information in a toxicology report is allowed, is a Coroner protected by the FOIA provision protecting a public body from liability for releasing exempt info, or is that voided if a Coroner releases a medical record/information included in a medical record covered by HIPAA?" Continuing, you ask (B) whether, in the wake of Bullock, "a Federal Court, in considering a HIPAA claim, [might] opine that since autopsy results in South Carolina have been deemed 'medical records' under state law" could the Coroner, as the individual who orders autopsies and/or toxicology reports be "a medical services provider?" Because your question essentially asks two different though related questions, we will answer them separately.

A. Protection from Liability for Releasing Closed Records

In essence, it appears the first part of your question is asking whether the Coroner is protected from liability pursuant to Section 30-4-40(a) if he releases a toxicology report that, as a result of our conclusion above, is believed to be a closed record rather than an exempt record. Because Bullock interpreted Section 17-5-120 of the Code[6] as addressing the Coroner's retention of medical records "*concerning the death of a person*" and further added the statute's reference to FOIA indicated FOIA was, "a law of exclusion" we believe the Coroner cannot avail himself to FOIA's protections which, by statue, relate only to exempt public records. 409 S.C. at 142, 761 S.E.2d at 253-54 (emphasis added). In particular, while our prior opinions as well as Section 30-4-40 explain that public bodies may disclose public records fitting within the category of an exemption, because FOIA's applicability is limited to "public records" and, pursuant to our conclusion above, a toxicology report is a "medical record" and therefore closed for purposes of FOIA, it appears FOIA, because it applies only to "public records" was not intended to protect a public body should it release a closed record. In other words, because we believe a toxicology report is a closed record as opposed to a public record subject to Section 30-4-40's disclosure exemptions, FOIA's protections permitting the disclosure of an exempt record do not apply to the disclosure of a closed record.

As detailed above, "analysis of the FOIA's application turns on whether the information requested (1) is held by an entity that classifies as a 'public body;' (2) falls under the definition of a 'public record;' and (3) is not exempt from disclosure." Op. S.C. Att'y Gen., 2014 WL 7210767 (December 4, 2014). This is important because, in the words of our Supreme Court, "records which are required by law to be closed to the public *are not subject to the FOIA*." Beattie v. Aiken County Dept. of Social Servs., 319 S.C. 449, 453, 462 S.E.2d 276, 279 (1995) (emphasis added). Thus, both this Office, as well as our Supreme Court, clearly recognize the distinction between closed records and public records which are exempt from disclosure pursuant to the terms of Section 30-4-40.

Under our Supreme Court's holding in Bullock, the majority, citing to Section 17-5-120 of the Code, a provision addressing the "availability of medical records to coroner[s] of another state" found the statute, by adding language stating the release of such records were not prohibited by FOIA, was an indication the Legislature assumed FOIA generally prohibited the release of autopsy reports and was therefore a statute "of exclusion." Bullock, 409 S.C. at 142, 761 S.E.2d at 253-54. In doing so, Bullock rejected the interpretation advocated by Justice

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[6] Section 17-5-120 of the Code, entitled "Availability of medical records to coroner of another state" explains:

> Records, papers, or reports concerning the death of a person on file at any hospital, nursing home, or other medical facility in this State are available to a coroner of another state as they are to a coroner in this State if the deceased person was a resident of or is buried in the county in which the coroner serves in the other state. The release of these records to the coroner of another state *is not prohibited by Chapter 4 of Title 30 or any other provision of law.*

Pleicones in his dissent that FOIA's definition of a public record, could not, by itself, close a record, but the record must instead be closed under an additional provision of law. See 409 S.C. at 144-45, 761 S.E.2d at 255 (Pleicones, A.J. dissenting) (reviewing Section 30-4-20(b), questioning whether "autopsy reports are required by law to be closed to the public[,]" and looking to the terms of Section 17-5-280 addressing the availability of autopsy reports to parties with a material interest in the report). Thus, Bullock stands for the proposition that FOIA, Section 30-4-20(c) in particular, can by itself, close a record to the public and does not require, as advocated by Justice Pleicones in his dissent, that a record be closed to the public by an additional provision of law.

Understanding this, Section 30-4-40(a), which permits public bodies to, if they so choose, disclose information that would otherwise be exempt from disclosure pursuant to any one of the 19 statutory exemptions contained within the statute, does not apply to closed records. In particular, Section 30-4-30(a) explains "[a]ny person has a right to inspect or copy any public record of a public body, except as otherwise provided by § 30-4-40 . . . ." S.C. Code Ann. § 30-4-30(a). In doing so, Section 30-4-30(a) obviously limits one's right to inspect or copy to the "public records" of a "public body" and ties Section 30-4-40's exemptions to this limited context, a fact which is confirmed by our December 4, 2014 opinion concerning the proper analysis of a FOIA question. See Op. S.C. Att'y Gen., 2014 WL 7210767 (December 4, 2014) ("[A]nalysis of the FOIA's application turns on whether the information requested (1) is held by an entity that classifies as a 'public body;' (2) falls under the definition of a 'public record;' and (3) is not exempt from disclosure.").

With this in mind, our conclusion in question one, that a toxicology report, like an autopsy, is a "medical record" pursuant to Bullock, means, under the holding from Beattie, that a toxicology report is a closed record as opposed to a public record and, as a result, is "not subject to the FOIA." Beattie, 319 S.C. at 453, 462 S.E.2d at 279. It therefore follows that FOIA protections for disclosing public records that are subject to Section 30-4-40's exemptions, do not protect a public body disclosing closed records.[7]

B. Is a Coroner Considered a Medical Services Provider under HIPAA

In the final portion of your question, you ask "whether, in the wake of Bullock, "a Federal Court, in considering a HIPAA claim, [might] opine that since autopsy results in South Carolina have been deemed 'medical records' under state law" could the Coroner, as the individual who orders autopsies and/or toxicology reports be "a medical services provider?" As we noted in our response to your fourth question, the ultimate answer to this question hinges

[7] Additionally, in light of our conclusion on this question and in light of our conclusion concerning your fourth question—that a court would most likely find HIPAA does not apply to the Office of Coroner as it does not appear to meet any of the regulatory definitions of a "covered entity" and absent a business associate agreement, could not be considered a business associate—the portion of your question related to FOIA's so-called liability protections and HIPAA are inapplicable.

upon the factual question of whether a Coroner's Office meets the definition of a "covered entity" under HIPAA,[8] a question which, as previously stated, is outside of the scope of an Attorney General's opinion. However, based upon our understanding of the Coroner's role as discussed in our analysis in section I(4) above, we believe a court would likely find HIPAA does not apply to the Office of Coroner as it does not appear to meet any of HIPAA's regulatory definitions of a "covered entity," including that of a "medical services provider."

II. Conclusion

To summarize, it is the opinion of this Office that:

1. Because our Supreme Court has yet to apply its wide-open definition of "medical record" set forth in Bullock with respect to autopsies, we can only speculate as to how the Court would apply its definition to a toxicology report. Our best surmise however, is that the Court would reach the same conclusion as it did in Bullock—that toxicology reports are a "medical record" and thus confidential.

We readily acknowledge that the Supreme Court's Bullock analysis is much different from that of our prior opinions and even from the Court's earlier decision in Bellamy v. Brown, 305 S.C. 291, 408 S.E.2d 219 (1991). Like our prior opinions, Bellamy had concluded that FOIA does not mandate confidentiality in a given circumstance. Instead, the Bellamy Court concluded that FOIA is a remedial statute and that exemptions in FOIA do not mandate non-disclosure. Thus, consistent with Justice Pleicones' dissent in Bullock, we have always looked to whether a specific statute other than FOIA requires confidentiality. See Op. S.C. Att'y Gen., 1984 WL 159892 (July 24, 1984) (statute requires identity of mental patients remain confidential, thereby requiring, "to the extent that confidential information is contained" in a public record, such is exempt from disclosure); Op. S.C. Att'y Gen., 1983 WL 181970 (August 10, 1983) ("The South Carolina Freedom of Information Act allows the Board to refuse to provide documents concerning "matters declared confidential by law."). We are unaware of any statute making toxicology reports confidential.

Nevertheless, regardless of our previous analysis, the Court's decision in Bullock is now the governing law. Thus, we are constrained by this decision. Accordingly, while not free from doubt, we believe the Court is likely to adhere to its Bullock analysis in a case involving toxicology reports, deeming such reports to be "medical records" and therefore confidential.

2. Likewise, this conclusion carries over to the set of circumstances mentioned in your second question. Specifically, the Court's conclusion in Bullock constrains us to conclude that a toxicology report containing "nothing more than scientific findings" necessarily contains "medical information" and, as a result, meets the Court's definition of the phrase "medical

[8] See FN. 3, supra.

record." Again, while it is true FOIA is a remedial statute and should be interpreted in favor of disclosure, Bullock also acknowledged these holdings, but rejected them to find an autopsy report was a "medical record" and therefore closed to the public. The Court also distinguished the holding from Sexton to conclude that the autopsy report in Bullock was different than the death certificate in Sexton, and thus found Sexton inapplicable. In light of this, we believe, although not without doubt, that Bullock forces us to conclude a court would find a toxicology report containing "nothing more than scientific findings" is "medical record" for purposes of FOIA and is therefore closed to the public.

3. The same is true with respect to your third question. In particular, because a toxicology report containing scientific findings in addition to information concerning medical conditions is consistent with the Bullock Court's definition of the phrase "medical record," we believe, under these circumstances, that Bullock requires us to conclude a toxicology report is "medical record" that is closed to the public. As mentioned previously, Bullock, by rejecting prior holdings favoring disclosure, and interpreting the phrase "medical record" as "a record of a patient's medical information (as medical history, care or treatments received, test results, diagnoses, and medications taken)," reflects that a court, in applying Bullock, would likely determine a toxicology report in these circumstances would be closed to the public.

4. As it relates to your fourth question concerning whether a Coroner violates HIPAA when discussing the results of a toxicology report without disclosing such a report, we believe the ultimate answer to your question hinges upon the factual issue of whether a Coroner's Office meets the definition of a "covered entity" under HIPAA,[9] a question which is outside of the scope of an Attorney General's opinion. With that said, based upon our understanding of the Coroner's functions here in South Carolina, we believe a court would likely find HIPAA does not apply to the Office of Coroner meaning it is not subject to HIPAA's "Privacy Rule." As a result, HIPAA would not prohibit a Coroner from advising the public of "information relative to Blood Alcohol Content" without releasing the report containing such information.

5. Finally, and again, while not free from doubt, it is the opinion of this Office that the court would likely follow Bullock, concluding that a toxicology report is a closed record as opposed to a public record subject to Section 30-4-40's disclosure exemptions. Again, this analysis is inconsistent with our prior opinions, but Bullock is now the governing law. Thus, FOIA's protections permitting the disclosure of an exempt record do not apply to the disclosure of a closed record. With that being said, and as mentioned by the Court in Bullock, we are aware "there may be policy concerns militating against this result[.]" 409 S.C. at 144, 761 S.E.2d 254. Nevertheless, we recognize as did the Court in Bullock, that policy questions such as these are "a matter for the Legislature[,]" and, assuming they need to be remedied, must be addressed via the legislative process. Id. Accordingly, and as is the case with questions one through three, we

[9] See Op. S.C. Att'y Gen., 2014 WL 7210767 (December 4, 2014) (concluding that the determination of whether a facility is a "covered entity" for purposes of HIPAA is "question of fact to be considered on a case-by-case basis and is therefore outside of the scope of this opinion.").

believe we are constrained by the Court's ruling in Bullock and therefore conclude FOIA's protections concerning the disclosure of exempt records do not apply to a record which, according to Bullock, is closed by the terms of the FOIA statute.

Sincerely,

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REVIEWED AND APPROVED BY:

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Solicitor General