

nonpublic school children. Obviously, an amendment of the bylaw, if this is deemed appropriate (see discussion, *supra*), which is designed to have the deduction formula more equally reflect the true additional costs would not in any way be inconsistent with the applicable statutory provisions.

A complete repeal of the bylaw which produces a result whereby the State does underwrite to some extent the cost of transporting nonpublic school children would not violate any of the constitutional provisions discussed herein. As already noted, there is one additional constitutional question presented by the limitation of school transportation assistance to parochial school children which we are not resolving at this time, but will deal with in a subsequent opinion. See footnote 1, *supra*.

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¹ We have just been asked for our opinion on a separate constitutional question which we do not treat herein. A public local law applicable in Frederick County and bearing a striking resemblance to Chapter 977 of the Laws of 1945 provides for the transportation on public school buses of children "who attend parochial schools in the county, which schools do not receive State aid." The question has been raised as to the meaning and scope of the term "parochial schools" and, if that phrase is deemed to be limited to schools operated by religious organizations, we have been asked whether the extension of such a service only to parochial school children and not to other private school children would violate the equal protection clause or any other provision of the United States Constitution. Obviously, our ultimate answer to that question will impact the fate of the bylaw and the public local law discussed herein.

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VITAL RECORDS

VITAL RECORDS-DISCLOSURE OF NAMES AND ADDRESSES FOR RESEARCH AND OTHER PURPOSES—CONFIDENTIALITY OF MEDICAL RECORDS AND INFORMATION CONTAINED ON COMPUTER TAPES—DISCLOSURE OF AUTOPSY REPORTS.

June 1, 1978.

Frances Jean Warthen, Ph.D.

Director,

Maryland Center for Health Statistics,

Department of Health and Mental Hygiene.

You have asked us whether your agency may disclose identifying information in the form of names, addresses, age, sex and race upon request from birth and death certificates (1) for the use of a group of researchers requesting names and addresses of parents of children who died from sudden infant death syndrome to solicit the parents to participate in a project studying the cause and other aspects of sudden infant death syndrome and (2) for a research project to select human controls matched on age, race and sex to study the death experience of a group of drug addicts who were under treatment between 1951-1972.

The disclosure of information contained in vital records is limited by the provisions of Article 43, Section 27, *Annotated Code of Maryland* (1971 Repl. Vol.), which states:

To protect the integrity of vital records, to insure their proper use, and to insure the efficient and proper administration of the vital records system, it is unlawful for any person to permit inspection of, or to disclose information contained in vital records, or to copy or issue a copy of all or part of any such records except as authorized in § 25 or by regulation.

Unless Section 25 or a valid regulation authorizes disclosure, neither the vital record, nor the information on the vital record, can be disseminated to the public.

The criteria necessary to obtain a copy of, or information directly from, a vital record are set forth in Section 25(a)-(1). In addition, regulations have been promulgated by the Secretary of Health and Mental Hygiene further refining the criteria

tions under which one may obtain copies of, or information from, vital records. See, *COMAR* 10.03.01.07.

It is apparent from reading Section 25(a) and (b) in conjunction with *COMAR* 10.03.01.07, that the only persons entitled to obtain copies of vital records under these provisions are members of the family, the legal guardian or some other authorized representative who can demonstrate both a "direct and tangible interest" in the content of the record and that the information is necessary for the determination or protection of personal or property rights. There is no doubt that the researchers who are the subject of this opinion cannot meet these requirements.

However, Section 25(c), (d) and (e) permit disclosure under certain circumstances when no direct or tangible interest can be shown. Those provisions state:

(c) No birth certificate information shall be given where it is to be used for purposes of commercial solicitation or private gain.

(d) The National Vital Statistics Division of the Public Health Service may be furnished such copies or data as it may require for national statistics; on the condition such data shall not be used for other than statistical purposes by the National Vital Statistics Division unless so authorized by the State Board of Health and Mental Hygiene or its authorized representative.

(e) Federal, State, local, and other public or private agencies may, upon request, be furnished copies or data for statistical purposes upon such terms or conditions as may be prescribed by the State Board of Health and Mental Hygiene or its authorized representative.

Subsection (c) above only applies to birth certificates and the information contained thereon. The prohibition against disclosure extends to situations where the information is to be used for commercial solicitation or private gain. We do not believe the Legislature intended this subsection to apply to research projects where there is no direct remuneration or exchange of anything other than information from the solicited subjects.

However, *COMAR* 10.03.01.07C states:

For vital records purposes, information may not be given to individuals or commercial firms where the information is to be used for the purpose of solicitation or private gain.

The prohibited purposes in the regulation extend beyond those specified by the Legislature in Section 25(c). The regulation prohibits disclosure of *any* vital record, not just birth certificates, where the information is to be used for the purpose of *any* solicitation, not just "commercial" solicitation. While this regulation could be construed to prohibit disclosure in the circumstances which you have presented to us, it is our opinion that the provisions of *COMAR* 10.03.01.07C go beyond the delegation of authority granted to the Secretary by the Legislature. The Legislature specified in Section 25(c) the circumstances under which disclosure would be prohibited. We find no other statutory delegation that allows the Secretary to restrict disclosure beyond "commercial" solicitation or to apply the restriction to "all" vital records.

In 58 Opinions of the Attorney General 826, 829 (1973), where we determined that the director of vital records may not amend the given name on birth certificates without a court order, we stated in connection with the same regulation chapter:

The Legislature provided the guidelines within which the Health Department must operate in this regard when it passed . . . the statute. Any rules and regulations which are intended to implement that statute must be confined by it and may not provide to the agency greater powers than those expressly or impliedly granted in the statute itself. The regulations may not be in violation of, or contrary to, an express statutory provision.

Subsection 25(c) does not, however, *permit* disclosure; it only specifies situations where disclosure will not be allowed. Pursuant to Section 27, a specific provision of Section 25, or the regulations, must authorize release of the information before it may be available to a requesting party. Neither subsection 25(a), (b) or (c) authorizes disclosure in the situations described in your letter.

Subsection 25(d) is not applicable to permit disclosure to the researchers since neither project is a part of, or on behalf of, the National Vital Statistics Division of the Public Health Service.

Subsection 25(e) would appear to permit disclosure of the information if it were to be used only for "statistical purposes." The Secretary of Health and Mental Hygiene may prescribe the terms and conditions that these agencies must follow prior to being furnished copies or data. No substantive terms and conditions have been adopted by the Secretary pursuant to the statute. *COMAR* 10.03.01.09E, which peculiarly is contained in the regulation entitled "Verification of Divorce Records," merely restates the provisions of the statute and offers no guidance as to the terms and conditions necessary to release the information. Neither is there a regulation further refining the meaning of "for statistical purposes."

In your letter, you have already determined that the use by both projects is for other than statistical purposes. In subsequent correspondence you have related that in the first study, concerning Sudden Infant Death Syndrome (SIDS), the information is wanted to enable the researchers to locate parents for interviews and to provide counseling and assistance to those parents. A detailed analysis of the project and its purposes was discussed previously in an informal letter from Jack T. Roach, Assistant Attorney General, to Senator Melvin A. Steinberg dated March 24, 1977, wherein we discussed the desire of a private organization (The International Guild for Infant Survival, Inc.) to obtain the names and addresses of parents whose children died from Sudden Infant Death Syndrome from the Central Maryland SIDS Center (CMSC), the project requesting information from your records."

We agree with your conclusion that the purpose of the request for information from CMSC is not for statistical purposes. While one of the goals of CMSC is a report, the information supplied would be used to locate people for personal interviews and not solely and directly for statistical purposes.

However, we do not agree with your conclusion that the purpose of the request for information in the second study concerning the death experiences of drug addicts is not for

statistical purposes. In communications subsequent to your letter you stated that the research investigator wants birth certificate information in the form of names, dates of birth, sex and race to select a control group to compare with the death experience of the study group. This information would then be taken to the Social Security Administration by the researcher to find out the death experience of the control group. The people in the control group would never be contacted and would not know that they are a part of the control group.

We have been informed by correspondence from the researchers conducting the study on the drug addicts death experience that they do not need to know the names of the individuals in the control group or have them identified in any manner other than with respect to whether they are living or dead. They have suggested a process that would insure that no names or other identities of the persons in the control group would come into their hands. Birth certificates would be selected in random fashion by the Division of Vital Records of the Department based on matching age, race and sex with the addict group. A list of the names on these certificates would be sent by the Vital Records Division to the U. S. Social Security Administration where that agency would ascertain whether the persons in the control group were living or dead, and if dead, the date of death. The Social Security Administration would release to the researchers simply a frequency count of death by age, sex, race, with no names being involved. The Social Security Administration has agreed to cooperate fully with the study.

It is our opinion that the purpose of the request for information in the death experience study is "statistical" as contemplated by the Legislature. "Statistical" is defined in Webster's *New World Dictionary* 1891 (2nd Coll. Ed., 1976), as "of, having to do with, consisting of, or based on statistics." "Statistics" is defined as "facts or data of a numerical kind, assembled, classified, and tabulated so as to present significant information about a given subject" (emphasis added). The statute read in conjunction with these definitions, indicates that a statistical purpose involves an aggregation of numerical data on groups or categories of subjects not for the purpose of ascertaining the personal identity of individuals to whom the information in question relates. The fact that

names will be used in an interim step to obtain the ultimate data does not invalidate the proposed procedure in the special circumstances described. The names selected for the control group will be communicated to the Social Security Administration, a federal governmental agency that already has in its storehouses of information the data being sent to it. While Social Security may have the information, apparently they do not have the ability to select a control group suitable to the study, which is the reason for the two-step procedure to obtain the death statistics. Every precaution must be taken to insure that the identities of the persons in the control group are not revealed to anyone other than the Division of Vital Records or the Social Security Administration. There are situations where the use of names in the process to obtain statistical data will be prohibited, especially if the circumstances do not lend themselves to maintaining the confidentiality of the identities within prescribed limits. However, under the procedures described by the researchers conducting the death experience study, it is our opinion that the release of the information would not be prohibited under the present vital records law since it would be used for statistical purposes and the confidentiality of the names would be maintained.

You have stated in communications subsequent to your letter that the information requested is also contained in departmental records other than on the birth and death certificates themselves. These other records consist of extracts of information taken directly from the vital records and placed onto computer tapes for easy retrieval for the purpose of preparing reports of vital statistics as mandated by Article 43, Section 14(b)(1) and for research or studies conducted by the Department from time to time. One of the Departmental studies that was conducted by using aggregate information from these records was the Galaxy Chemical Company investigation and report.

The question then becomes whether the Department must disclose this information since it will not be obtained directly from the vital records. An argument could be made that these records are, in effect, vital records, since they were extracted directly from certificates, and should be afforded the same protection as a vital record. However, we do not have to reach that issue since Article 43, Section 1-I deals more

specifically with the problem. It states:

(a) All records, reports, statements, notes, and other information which have been assembled or procured by the State Board of Health and Mental Hygiene for purposes of research and study and which name or otherwise identify any person or persons are confidential records within the custody and control of the Board and its authorized agents and employees, and may be used only for the purposes of research and study for which assembled or procured.

(b) It is unlawful for any person to give away or otherwise to disclose to a person or persons not engaged in such research and study for the Board, any of such records, reports, statements, notes, or other information which name or otherwise identify any person or persons. Any person who violates any provision of this subtitle is guilty of a misdemeanor and upon conviction shall be fined not more than fifty dollars (\$50).

(c) Access to and use of any such records, reports, statements, notes or other information also are protected and regulated by the provisions of § 5-302 and § 10-205(a) of the Courts Article of the Code. (1974, ch. 865, § 8).

(d) Nothing in this section applies to or restricts the use or publicizing of statistics, data, other material which summarize or refer to any such records, reports, statements, notes, or other information in the aggregate and without referring to or disclosing the identity of any individual person or persons. (1963, ch. 826.)

Subsection (a) sets forth the type of information that is deemed to be confidential. The use of the term "and other information" makes it difficult to conceive a type of data that would not be confidential. However, there are two important qualifications before the information can be held to acquire a confidential status. It must be assembled or procured for the purposes of research and study, and it must be information that would identify a person. From the information supplied by you, it is our opinion that the birth and death certificate

data contained on the computer tapes is confidential, under Article 43, Section 1-1, to the extent that it identifies any person or persons. As soon as the identity of persons is removed from the request for information, the blanket of confidentiality is tossed aside. Section 1-1(d) specifically permits disclosure when no reference is made to the identity of any person.

The Maryland Public Information Act,¹ Article 76A of the Annotated Code of Maryland (1975 Repl. Vol.), cannot be used as a vehicle for disclosure of birth or death certificates where disclosure is not permitted under the particular statutory provisions applicable to them. Section 2(a) of Article 76A, provides that all "public records" shall be open for inspection. However, Section 1(a) excepts from the term "public record" any paper, correspondence, form, book, photograph, photostat, film, microfilm, sound recording, map drawing, or other document, regardless of physical form or characteristics that is confidential by law. Birth and death certificates are documents confidential by law, except to the extent disclosure is permitted under the applicable statutory provisions discussed above.

The information on the computer tape is somewhat different in characteristic than the certificates themselves. That information must be produced from the tape into a form that can be understood, similar to what is required of a sound recording. Storing and using information on computer tapes is a relatively new technology which may not have been originally contemplated when Article 76A was drafted. However, the law often compensates for these unforeseen occurrences by including phrases that provide for the unforeseen or unanticipated situation. We are of the opinion that the provision in Section 1(a) that places other documents, "regardless of physical form or characteristics," in the realm of public records was intended to apply to items such as computer tapes. There is no rational basis to distinguish a computer tape from a sound recording, film, paper or other type of document containing information. While there is no Maryland case law on the issue, this interpretation is consistent with the trend in federal courts to construe narrowly exemptions to the federal public disclosure law. See, *Robles v. Environmental Protection Agency*, 484 F.2d 843 (4th Cir. 1973); *Environmental Protection Agency v. Mink*, 410 U.S. 73 (1973).

Although computer tapes thus may be public records, in the context of the present situation, the confidentiality provisions of Art. 43, Section 1-1 protect the identity information as previously discussed.

A closer examination of Article 76A reveals another provision that has application to the situations described in your letter. Section 3(c)(i) provides:

(c) The custodian shall deny the right of inspection of the following records, unless otherwise provided by law:

(i) Medical, psychological and sociological data on individual persons, exclusive of coroners' autopsy reports;

Since we have already determined that the disclosure provisions of the Maryland Public Information Act do not apply to the information requested on the vital records or computer tapes, it is not necessary to decide whether the information, in each circumstance, comes within the Section 3(c)(i) exception from disclosure as "medical, psychological and sociological data on individual persons." We note however, with respect to the SIDS inquiry, that there is no doubt that a release of the names of parents of children victimized by SIDS would be a release of "medical data on individual persons." This interpretation is consistent with federal court interpretations of the similar provision in the federal public disclosure statute exempting "personnel and medical files and similar files" from disclosure. See, *Wine Hobby U.S.A., Inc. v. U.S. Bureau of Alcohol, Tobacco and Firearms*, 502 F.2d 133 (3rd Cir. 1974); *Ditlow v. Schulz*, 379 F. Supp. 326 (D.D.C. 1974).

It is the last phrase of Section 3(c)(i) that may be used to provide the SIDS project with some of the information it has requested. That provision excludes coroners' autopsy reports from the Section 3 exception to public disclosure. The State Medical Examiner's office replaced the local coroners in the performance of autopsies and the determination of causes of death. Article 22, Annotated Code of Maryland. The duties of the medical examiners are set forth in Article 22, Section 6, to investigate any death that resulted from violence, suicide, casualty, or any death that occurred suddenly when the victim was in apparent health or unattended by a physician or in any suspicious or unusual manner. The Medical Ex-
aminer

routinely conducts autopsies in SIDS cases because the death was sudden when the victim was in apparent health. The reports issued on these autopsies are disclosable as public records pursuant to Section 3(c)(1). Therefore, the autopsy reports are available to the researchers as members of the public.

CONCLUSION

In conclusion, it is our opinion that birth and death certificates, or the identifying information contained thereon, is not available for inspection or copying by the SIDS researchers pursuant to Article 43, Section 25, Annotated Code of Maryland (1971 Repl. Vol.)

The drug addict death experience researchers may obtain the aggregate vital record information they request as long as the identities of the persons for whom the information is requested is not made known to them and kept solely within the knowledge of the Division of Vital Records and the Social Security Administration.

The identifying information is also protected on computer tapes as being confidential pursuant to Article 43, Section 1-1, Annotated Code of Maryland (1971 Repl. Vol.)

The Maryland Public Information Act may not be used in the context of your letter to disclose the identifying information since it is confidential by law, but autopsy reports may be obtained from the custodian of such reports under this statute.

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¹ A vital record is defined in Art. 43, § 14(a)(1) as, "records of birth, death, fetal death, marriage, divorce, adoption and adjudication of paternity required by law to be registered with the State Board of Health and Mental Hygiene."

² The rights, powers, duties, obligations and functions of the State Board of Health and Mental Hygiene were transferred to the Secretary of Health and Mental Hygiene by Chapter 77, § 8, Laws of Maryland 1969.

³ That letter discusses certain contractual and other limitations of federal

origin on the ability of CMSC to provide identifying data to the International Guild. Those limitations are not treated here, and in any event would appear not to apply in the circumstances presented here.

⁴ For a complete discussion of Maryland authorities, including Opinions of the Attorney General, concerning the interpretation of various provisions of Article 76A, especially in the context of disclosure of names and addresses, See 61 Opinions of the Attorney General 698 (1976).