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THE ATTORNEY GENERAL

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Dr. Bertram W. Pepper
Commissioner of Mental Hygiene
Department of Health and Mental Hygiene
O'Conor Office Building, 4th Floor
201 W. Preston Street
Baltimore, Maryland 21201

Dear Dr. Pepper:

In your recent letter you have asked several questions with respect to the confidentiality of mental hospital records. Specifically, you have asked:

(1) Is it public information that a specific individual is currently a patient in one of our hospitals? Does this apply to both voluntary and involuntary patients?

(2) If it is public information, must the hospital respond to such a query, or is the response of the hospital permissive?

(3) Do we need the permission of the patient to release information to another State Hospital Center? To a County or Municipal Health Department? To a community mental health center which is under private auspices such as North Central or Provident, but which is partially funded with State Department of Health and Mental Hygiene funds which is part of our service delivery system?

Maryland's Public Information Act is in Article 76A, Maryland Annotated Code (1974 Cumulative Supplement). That statute provides for the right of inspection and copying of records with certain exceptions. At the outset, the definition of "public records" in Section 1(a) includes "any paper, correspondence, form, book, photograph, photostat, film, microfilm, sound recording, map drawing or other document, regardless of physical form or characteristics and including all copies thereof, that have been made by the State and any counties, municipalities and political subdivisions thereof, or received by them in connection with the transaction of public business, except those privileged or confidential by law. (Emphasis supplied)

Section 3(a) provides:

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> "(a) The custodian of any public records shall allow any person the right of inspection of such records or any portion thereof except on one or more of the following grounds or as provided in subsection (b) or (c) of this section:
>
> (i) Such inspection would be contrary to any State statute;
>
> (ii) Such inspection would be contrary to any federal statute or regulation issued thereafter having the force and effect of law."

Section 3(c) provides that a custodian shall deny the right of inspection of certain records, unless otherwise provided by law, including:

> "(i) Medical, psychological, and sociological data on individual persons, exclusive of coroners' autopsy reports;..."
>
> (vii) Hospital records relating to medical administration, medical staff, personnel, medical care and other medical information, whether on individual persons or groups, or whether of a general or specific classification;..."

There are several Maryland statutes which limit the disclosure of information from mental hospital records.

Article 59, Section 19 (1974 Cumulative Supplement) provides as follows:

> "Each facility which has, as patients, any persons admitted under the provisions of this subtitle, shall make and retain in a separate and secure area of the facility, complete records of each such patient. Such records shall contain copies of all data required by this article, and such additional information as may be required by the Department. Such records shall be open for inspection by persons designated by the Commissioner and in accordance with the provisions of Section 9-109 of the Courts Article of the Code, but shall be closed to all other persons".

Section 9-109 of the Courts Article, which applies to Courts, administrative and

legislative proceedings, establishes a privilege in connection with mental patients. Section 9-109(b) provides:

> "Unless otherwise provided, in all judicial, legislative or administrative proceedings, a patient or his authorized representative has a privilege to refuse to disclose and to prevent a witness from disclosing, communications relating to diagnosis or treatment of the patient's mental or emotional disorder."

Certain exceptions are provided for, including among others, custody matters, placement of the patient in a facility, proceedings where a patient claims insanity, and malpractice claims against a psychiatrist.

There are other Maryland statutes permitting limited access to records for research purposes which need not concern us here. See e.g., Article 43, Section 1-I, Article 43, Section 134, and Section 5-302 of the Courts Article.

The above statutesmake it clear that there is very little, if anything, in the mental hospital patient records which is "Public Information" within the meaning of the public information statute. It is obvious that "medical, psychological and sociological data on individual persons" is not public (Article 79A, Section 3(c)(i)), that "hospital records relating to medical administration, medical staff personnel, medical care and other medical information" are not public information (Article 76A, Section 3(c)(vii) and that under other Maryland law, which controls, mental hospital records must be closed to all persons except those designated by Order of the Commissioner and those who would have access to it under the Courts Article (Article 59, Section 19 and Courts Article 9-109).

With this statutory background in mind, we can address your specific questions.

First, you have asked whether it is public information that a specific individual is a patient in one of the mental hospitals.

It should be pointed out that while you have phrased your question in terms of queries, the Public Information Act is addressed to the inspection and copying of records. There is no statutory obligation on your part to give information over the telephone.

The basic hospital record containing patient information is the individual patient record. This record is clearly protected from inspection by Article 59, Section 19. A patient's name is part of his hospital record. See Department of Health and Mental Hygiene Regulations 10.02.04, .330 which provides for such records to include include identification (name, address, age, sex, marital status), date of admission, date of discharge, and other information. While "informational" data relating to the identification of the patient is generally considered to be in a separate, non-confidential category, this is not the case with respect to mental hospitals, where the mere fact that he has been a patient in the hospital could

be a source of embarrassment to the patient. See Health Law Center - University of Pittsburgh - Hospital Law Manual, Section 3-1, p. 23.

> "As has been pointed out, the data in the medical record is of two types: informational and clerical. The data can be classified broadly in terms of confidentiality and non-confidentiality. Confidential data is that which is obtained professionally and is found in the clinical part of the record. Non-confidential data relates to the identification of the patient and the facts of hospitalization and is found in the informational part of the record. Non-confidential data may be released at the discretion of the hospital authorities without written consent of the patient in the usual case. However, even this type of information should be released with care. Thus, in the usual case, the patient's name, the dates of admission and discharge, and the name of his physician may be given upon request or voluntarily without untoward consequences. However, disclosure that an unmarried woman was admitted to a maternity hospital or that a person was admitted to a mental hospital for observation might be improper. Therefore, a conservative policy in releasing such information is indicated."(Emphasis supplied)

The stigma attached to confinement in a mental institution distinguishes this question from the questions dealt with in earlier Attorney General's opinions in which we said that the release of names was required under Article 76A. Thus, in 59 Opinions of the Attorney General (May 21, 1974), in which we said that county boards of education are required to supply the names and addresses of students within their schools, we pointed out that we had found no statutory provision which would exempt the lists in question from the operation of the Public Information Act. We noted the existence of State Board of Education by-laws which state the individual pupil records are confidential in nature and are to be made available only to the pupils' parents or legal guardians in conference with the appropriate school personnel and said that "assuming arguendo that the by-laws of the State Board are equivalent to State statutes because they have been given the force of law, we still do not believe that a listing of the names and addresses of pupils, without more, would constitute individual pupil records within the meaning of the by-laws". In 60 Opinions of the Attorney General (January 7, 1975), we concluded that the giving of names and addresses of students would not be in violation of Public Law 93-380, Section 438(b)(1) of which requires educational institutions which receive federal funding to forbid the release of "...personally indentifiable records or files (or personal information contained therein) of students without the written consent of their parents to any individual, agency, or organi-

zation, other than to the (officials and others described in the subsection)..." In 59 Opinions of the Attorney General (April 9, 1974), we said that under the pertinent statutes, the Bank Commissioner had the duty to disclose the name and place of residence (not the exact address) of bank shareholders. In none of these situations was there a factor similar to the stigma attached to confinement in a mental institution.

As we noted in 59 Opinions of the Attorney General (May 21, 1974), in situations where there has been a question as to the propriety or necessity for disclosing a perons's name, the Courts have balanced individual rights, including the right of privacy, against the duty of the custodian to make public records available for inspection.

In Getman v. N.L.R.B., 450 F. 2d 670 (D.C. Cir., 1971), application for stay denied, 404 U.S. 1204 (1971), a case decided under the Federal Freedom of Information Act, some legal researchers had requested the N.L.R.B. to release the names and addresses of employees which employers had been required to furnish the N.L.R.B. The applicable provision of the statute, 5USCA, Section 552(b)(6), includes an invasion of privacy test. It provides that the section does not apply to personnel and medical files and similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. The Court balanced the extent to which there was an invasion of privacy against the value of the project and the responsible character of the researches and concluded that there would not be an unwarranted invasion of privacy, pointing out that the only invasion here was in losing anonymity and in being asked over the phone if the person would be willing to be interviewed. It is significant that the Court pointed out, on p.675, that "/t/he giving of names and addresses is a very much lower degree of disclosure; in themselves a bare name and address gives no information about an individual which is embarrassing." In the Getman case, there was obviously no special factor which would make for an invasion of privacy in releasing of a name. The outcome would probably have been different if the content had been such as to identify the person involved with something that was personal or embarrassing. Thus, in Marcus v. Superior Court of Los Angeles County, 95 Cal. Reptr. 2d 545 (Cal. Ct. of Ap. 1971), the Court held that it was improper to force a doctor to disclose in response to a discovery request in a malpractice suit the names of patients who had been given certain tests. The Court pointed out that while disclosure of a patient's name does not always violate a privilege, it would in that case because revealing the names would reveal information that a person received a specified test. The remarks of the Court in that case would apply with even more force to our present problem, where the medical information revealed has a stigma attached to it. The Court said, at p.547:

> As the Senate Committee Comment on Section 991 noted, "Persons do not ordinarily consult physicians out of idle curiosity". A person who received the specified test from Dr. Marcus will have communicated to the physician facts about herself indicating the need for testing. If Dr. Marcus is required to list persons receiving such tests

> as required by the Court's order, he necessarily reveals this confidential information".

In light of the above, it is our opinion that the fact that a specific individual is a patient in a mental hospital is confidential information under Article 59, Section 19, and is therefore not public information, and this is true whether the patient has been voluntarily or involuntarily confined, since whatever stigma is attached to confinement in a mental institution is present in either case. Since Article 59, Section 19 controls, we need not decide whether this information would come within either of the other exceptions to the Public Information Act.

The fact that patient information of the kind requested may not actually be derived from the patient's record but from a list which is kept separately does not change our opinion, in light of the strong legislative policy indicated by Article 59, Section 19. A conclusion that information from the patient's record may be released so long as it ncluded in a different administrative record separate and apart from the patient's individual record would defeat the purpose of the statute which is to protect confidentiality of patient information and which provides that such records shall be open for inspection by persons designated by the Commissioner and in accordance with Article 9-109 of the Courts Article of the Code, but shall be closed to all other persons. (Emphasis supplied)

While our interpretation might impose hardships and practical difficulties in individual cases, it is not as restrictive as it appears, since under the controlling statute, Article 59, Section 19, the legislature has given the Commissioner the right to designate those persons who may receive the information which is sought. We suggest that policies be established by the Commissioner of Mental Health which would define the persons to whom information as to a patient's presence in the hospital may be released.

In addition, while Article 59, Section 19 does not so state, it is our opinion that such information may be released upon the consent of the patient, or, where necessary, that of his parent or guardian, since, as Section 9-109 of the Courts Article makes clear, the privilege of confidentiality belongs to the patient or his authorized representative and it is the patient whose privacy is being protected by the refusal to disclose the information.

You have also asked whether permission of the patient is needed to release information to another State Hospital Center, a County or Municipal Health Department, or to a Community Mental Health Center which is under private auspices, such as North Central or Provident, but which is partially funded with State Department of Health and Mental Hygiene funds and which is part of your service delivery system.

It is clear to us that under Article 59, Section 19, information from the patient's records may not be disclosed to the institutions you have named unless the disclosure comes within one of the exceptions in Article 59, Section 19. This would mean that in the absence of designation by the Commissioner and except in the situations related to legislative, administrative and Court hearings listed in Section 9-109, the information cannot be given. In fact, a strict reading of

Article 59, Section 19 would not even allow release of the record with the patient's consent. However, since Section 9-109 makes such information the privilege of the patient, a proper reading of Article 59, Section 19, in our opinion, would permit release of such information with the patient's consent. As the Court of Appeals has most recently pointed out in State of Maryland v. Barnes, 273 Md. 195 (decided November 26, 1974), statutes relating to the same general subject matter and directed at attaining the same basic results "should be construed together so that they will harmonize with each other and be consistent with their general object and scope".

Since, as with your first two questions, inspection of the relevant records would be contrary to Article 59, Section 19, application of the Public Information Act is precluded by Section 3(a)(11), which excepts inspection which would be contrary to any state statute, and we need not reach the questions of whether the other exceptions in the Public Information Act are also applicable.

We are aware that a ruling that information may not be disclosed to other institutions without the patient's consent might impose a hardship and may actually be detrimental to the interests of the patient in situations where information is needed for proper treatment or placement and the consent cannot be obtained or there is delay in obtaining it. We point out, however, that it is within your power, as Commissioner, to designate these institutions as proper recipients of the information requested without the consent of the patient in certain circumstances. You might, in the alternative, find that a proper solution would be to obtain the patient's consent to such transfers of information prior to his departure from the institution.

Very truly yours,

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Judith K. Sykes
Special Assistant Attorney General

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