Linda Willard

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NOV 20 1990
DEPT. OF JUSTICE

ROBERT M. SPIRE
Attorney General
A. EUGENE CRUMP
Deputy Attorney General

TO: Dr. Gregg F. Wright

DATE: November 20, 1990

SUBJECT: Confidentiality of Birth and Death Records

WRITTEN BY: Robert M. Spire, Attorney General

I recently have reviewed two previous opinions of my office dealing with the confidentiality of death and birth certificate records maintained by the Department of Health as a part of its vital statistics responsibilities.

These opinions are (1) Opinion No. 86058, dated July 30, 1986, about access to death certificates, and (2) Opinion No. 86060, dated August 6, 1986, about access to birth certificates. I attach copies of these two opinions.

Upon further consideration of the statutes involved in these two opinions, I have concluded that these opinions are incorrect and therefore require modification. My conclusions are set out below.

Opinion No. 86058 involved a request by a newspaper editor for a copy of the death certificate of a certain individual. We concluded that a death certificate was a public record under our public records statutes, Neb.Rev.Stat. §84-712 et seq. (Reissue 1987). However, we also concluded that the Department of Health was empowered to limit disclosure of that record under Neb.Rev.Stat. §71-612 (Reissue 1986), which deals with the circumstances in which the Department of Health is required to provide certified copies of certain vital statistics. Under the latter statute, such certified copies must be provided by the Department for "any proper purpose" as defined by Department regulations. Since news gathering was not a proper purpose under those regulations, we concluded that the Department had no duty to disclose the contents of the death certificate. My review of the statutes in question leads me to modify that conclusion. Stated another way, I believe our prior analysis was wrong. Rather than continue this error, I want to admit our mistake and correct it.

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Neb.Rev.Stat. §84-712 (Reissue 1987) provides that the citizens of this state are empowered to examine all public records, free of charge, during the normal business hours of the governmental agency involved. Neb.Rev.Stat. §84-712.01 (Reissue 1987) defines public records, but excludes records and information from its definition and coverage by the public records statutes where "any other statute expressly provides" that such information shall not be made public. Neb.Rev.Stat. §84-712.05 (Reissue 1987) specifically provides that certain records may be withheld from the public, and includes in its list of such records:

> (2) Medical records, <u>other than records of births and deaths</u>, in any form concerning any person. . .

(Emphasis added). Consequently, under the public records statutes, birth and death records are public records which specifically may not be withheld from the public unless there is some other statutory provision which prevents their disclosure.

In Opinion No. 86058, we concluded that §71-612 is such a statute which expressly provides that particular information should not be made public. Section 71-612 states, in pertinent part:

> The Director of Health, as the State Registrar, through the Department of Health shall preserve permanently and index all certificates received. The department shall supply to any applicant for any proper purpose, as defined by regulations of the department, a certified copy of the record of any birth, death, marriage, or divorce registered.

Upon a closer reading of §71-612, I have now concluded that there is no language in that statute which expressly provides that birth and death records shall not be made public. That statute simply governs the issuance of certified copies of such records, and allows the Department of Health, by regulation, to determine under what circumstances it will issue certified copies of information contained in its vital statistics. Therefore, §71-612 does not allow the Department of Health to maintain the confidentiality of birth and death records contrary to the explicit provisions of §84-712.05.

Opinion No. 86060 involved a press request for a copy of a birth certificate. Under the reasoning set out in Opinion No. 86058, we earlier concluded that the Department could keep birth certificates confidential. For the reasons stated above, I have now concluded that Opinion No. 86060 must be modified as well.

As a result, I now direct that Opinions No. 86058 and No. 86060 are modified in the following respects:

1. Under the present statutory framework, and in particular under §84-712.05, birth and death records must be available to the public in the same fashion as other public records. That is, members of the public, including the press, can review such records, free of charge, during the normal business hours of the Department of Health, subject to reasonable restrictions for the orderly conduct of state business and the security of the records.

2. Under §71-612, the Department of Health may continue to determine, by regulation, what constitutes a proper purpose for the issuance of a certified copy of a birth certificate or a death certificate. If news gathering is not deemed such a proper purpose, no such certified copies need be provided to the press.

Robert M. Spire

Robert M. Spire
Attorney General of Nebraska

5-86-13

DEPARTMENT OF JUSTICE
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STATE OF NEBRASKA
OFFICIAL
JUL 30 1986
DEPT. OF JUSTICE

ROBERT M. SPIRE
Attorney General
A. EUGENE CRUMP
Deputy Attorney General

DATE: July 29, 1986

SUBJECT: Impact of Neb.Rev.Stat. §§84-712, 84-712.01 and 84-712.05(2) on Neb.Rev.Stat. §71-612 and 174 NAC 3

REQUESTED BY: Gregg F. Wright, M.D., M.Ed.
Director of Health, Department of Health

WRITTEN BY: Robert M. Spire, Attorney General
Marilyn B. Hutchinson, Assistant Attorney General

You have a request from the editor of a newspaper for a copy of the death certificate of a certain person. The editor wants the copy of the death certificate "for newsgathering purposes" to verify information they have collected from other sources so they can inform the public about a matter which they believe involves major public health issues.

So far the Department has refused to give him a copy of the requested death certificate. It has relied on an Attorney General Opinion, dated March 13, 1952, and on Neb.Rev.Stat. §71-612. That section authorizes the Department to give such copies only to persons who have a "proper purpose" as defined in rules and regulations of the Department of Health and to certain persons doing medical research pursuant to Neb.Rev.Stat. §§71-3401 and 71-3402 for the purpose of reducing morbidity or mortality. In the latter case the Department is not to reveal the identity of any person whose condition or treatment is being studied. Neb.Rev.Stat. §71-3402 (Reissue 1981).

The Department has had a rule on file defining "proper purpose" since August 27, 1975. On August 22, 1983, it was recodified as 174 NAC 3 and is in full force and effect. The editor of the newspaper in this case has admitted that "those regulations do not specifically define 'proper purpose' as including a request by the press."

Neb.Rev.Stat. §§84-712, 84-712.01 and 84-712.05 do not override Neb.Rev.Stat. §71-612.

The editor in this case argues that a death certificate is a "public record" as defined in Neb.Rev.Stat. §84-712.01 which the

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Department has no discretion to withhold under Neb.Rev.Stat. §84-712.05(2). He states that Neb.Rev.Stat. §71-612 "seemingly conflicts with Section 84-712.05," but argues that "[i]f there is a conflict between these statutes, general rules of statutory construction require that Section 84-712.05 takes precedence over Section 71-612 because statutes enacted later in time take precedence over existing statutes to the extent of any conflicts."

Neb.Rev.Stat. §71-612 has been amended twice since the Department of Health filed its rule defining proper purpose with no change in its authority to do so. See, Laws 1985, LB 42, §7, and Laws 1986, LB 333, §9. Both of those amendments have been since §§84-712, 84-712.01 and 84-712.05 were amended.

Under Neb.Rev.Stat. §84-712.01 (Reissue 1981) all state records are public records except those expressly excluded by a statute.

Under Neb.Rev.Stat. §84-712 (Reissue 1981) a person may have access to all public records except as expressly provided by statutes.

Under Neb.Rev.Stat. §84-712.05 (Supp. 1984) some records may be withheld unless they have already been disclosed in certain instances, including disclosure by a public entity pursuant to its duties. Death certificates are expressly excluded from those documents which may be withheld.

When these statutes are read with Neb.Rev.Stat. §§71-612 and 71-3402, as they must be, we conclude that a death certificate is a public record under Neb.Rev.Stat. §84-712.01 for which there is a provision in the statutes expressly limiting access to such record. That statute is Neb.Rev.Stat. §71-612.

We have concluded that if a person comes within one of the classes granted access to a death certificate under Neb.Rev.Stat. §71-612, the Department has no discretion under Neb.Rev.Stat. §84-712.05 to withhold it from such person. On the other hand, as a state agency the Department of Health has only those powers it is granted by law. So far that law has empowered it to disclose death certificates only in those circumstances specified in Neb.Rev.Stat. §71-612. This request admittedly does not come within any proper purpose as defined in regulations issued by the Department of Health and is not by specified researchers trying to reduce morbidity or mortality. Thus, we have concluded the Department has no authority to disclose the record as requested.

The statutes in Nebraska are different than those in cases cited by the editor.

While the editor in this case admits there is no Nebraska case holding that newsgathering is a "proper purpose" for getting access to a death certificate, he relies on cases from New York, South Carolina and Connecticut in which a newspaper was given access to a death certificate.

In Rome Sentinel Co. v. Boustedt, 43 Misc. 2d 598, 252 N.Y. S.2d 10 (1964), New York had a statute which authorized disclosure of a death certificate for a "proper purpose." That term was not defined in the statute or any regulation. The court found that some newsgathering, such as that regarding matters having news value or of public interest of a legitimate kind, was for a proper purpose; other newsgathering, such as prying into matters which an individual might reasonably insist on keeping to himself, was not. Each case had to be decided on its own merits, balancing the interests for disclosure and nondisclosure.

In Society of Professional Journalists v. Sexton, 324 S.E.2d 313 (S.C. 1984), South Carolina had a statute which made a death certificate a public record and contained no statutory exception to disclosure. The custodian of the record claimed various nonstatutory grounds for withholding the death certificate. He claimed it was a medical record, that disclosure would be an unreasonable invasion of privacy, that it was a record of an investigation of a crime, that disclosure would be contrary to public policy and contrary to limits set out in rules and regulations of the custodian. The court found the death certificate was not exempt as a medical record, a right to privacy didn't survive death, there was no ongoing investigation of a crime, restricting access was a legislative function and public policy couldn't override goals of the Freedom of Information Act in that case where the Legislature had not specified any exceptions.

In The Meriden Record Co. v. Browning, 6 Conn.Cir. 633, 294 A.2d 646 (1971), Connecticut had a statute which made all records of state agencies public records except as otherwise provided. Those records excepted included medical records or "similar files the disclosure of which would constitute an invasion of personal privacy." The same statute gave a general right of the public to inspect all public records.

The custodian of the death certificate refused to disclose it on the ground it was not a public record because some people would feel the diagnosis of some diseases, such as syphilis, as the cause of death constituted an invasion of privacy.

The court found the death certificate was a public record because no right of privacy could be claimed on behalf of a decedent. It said it was willing to recognize exceptions to

disclosure of public records which were not statutory, such as situations in which harm to the public interest would justify refusal to permit inspections. However, it did not find that the public body in that case had met its burden of showing that shielding such record from scrutiny was "vital to public security." Id. at 649.

All of these cases involve a different statutory framework than in Nebraska where express statutory limitations on access to public records are recognized in Neb.Rev.Stat. §84-712, where such an express statutory limitation is in Neb.Rev.Stat. §71-612, where that limitation expressly authorizes the Department of Health to define proper purpose in regulations, where the Department has done so in a rule on file since 1975, where the requested newsgathering purpose is not included and where so far as we know no amendment to include it or any other newsgathering purpose within that definition has ever been proposed. Thus we have concluded the present case can be distinguished from all three cases cited in support of disclosure.

The public's right to know is not absolute.

The editor in this case then claims that newsgathering is a right which cannot be excluded from any definition of proper purpose. For this his relies on the same cases set out above.

Those cases do not give newsgatherers unlimited access to death certificates, but recognize there are countervailing interests to be weighed on a case by case basis.

In conclusion, we have concluded that you should entertain any proposed amendments to include newsgathering as a proper purpose under 174 NAC 3. That is the proper procedure for you to explore such countervailing interests within the statutory framework and then to decide whether to amend the rule as proposed.

Sincerely yours,

ROBERT M. SPIRE
Attorney General

Marilyn B. Hutchinson
Assistant Attorney General

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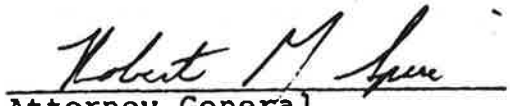

Attorney General

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STATE OF NEBRASKA
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AUG 6 1986
DEPT. OF JUSTICE

ROBERT M. SPIRE
Attorney General
A. EUGENE CRUMP
Deputy Attorney General

DATE: August 4, 1986

SUBJECT: Request by Press for Access to a Birth Certificate

REQUESTED BY: Gregg F. Wright, M.D., M.Ed.
Director of Health, Department of Health

WRITTEN BY: Robert M. Spire, Attorney General
Marilyn B. Hutchinson, Assistant Attorney General

On July 21, 1986, you received a request from a reporter of a newspaper for a copy of the birth certificate of a certain person not related to the reporter in any way. The reporter wants to prove or disprove a rumor that a public figure is the father of such person and, if so, to make that the basis of a newspaper story.

So far you have denied the request on the basis that it is not a proper purpose as required by Neb.Rev.Stat. §71-612 and as defined by the Department of Health in 174 NAC 3. You have been awaiting our response to your request regarding access of the press to a death certificate.

That response went to you as Attorney General Opinion No. 86058 on July 30, 1986. Since both death certificates and birth certificates are covered by the same statutes and regulation, our conclusion is the same. That is that the Department has no authority to disclose the record to the person requesting it where the purpose is not one coming within those for which access is authorized by Neb.Rev.Stat. §71-612 and 174 NAC 3.

You say the reporter has argued that "proper purpose" does not apply to requests from the news media on the basis of the First Amendment to the U.S. Constitution.

The press is a part of the public and may have the same access to a birth certificate which the general public may have. Thus, there is no absolute bar to the press from such public record. If a proper purpose as defined in Neb.Rev.Stat. §71-612 or in 174 NAC 3 is shown by the requesting party, the Department has no discretion to withhold the record from such party because that party is a reporter of a newspaper.

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The First Amendment does not give anyone an absolute right. See, Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) and Central Hudson Gas & Electric Corp. v. Public Service Commission, 447 U.S. 557 (1980). Such right must be balanced with other rights. As we suggested in our prior opinion, above, the rule-making process is an appropriate forum for exploring such countervailing interests.

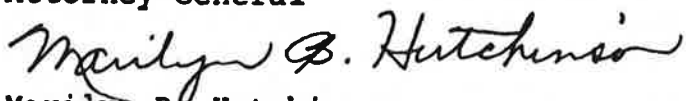
In our opinion about death certificates, above, we discussed cases cited by the newspaper editor. The courts balancing such rights in two of those cases stated that a right to privacy does not survive death so it was not an interest given consideration. However, such a right may be very important to the subject of a birth certificate. On the other hand, the interest of the state in limiting access to death certificates to encourage accurate reporting of the cause of death to facilitate research to reduce morbidity and mortality would not be relevant with respect to a birth certificate.

You have also asked whether you have authority under Neb.Rev.Stat. §84-712.06 (Reissue 1981) to provide to the public a portion of a death certificate or a birth certificate. We have concluded you do as discussed below.

You have authority under Neb.Rev.Stat. §71-612 to disclose vital records to certain persons doing research to decrease morbidity and mortality. As provided in Neb.Rev.Stat. §71-3402 (Reissue 1981), you must not reveal the identity of any person whose condition or treatment is being studied. It follows that you can only provide portions of vital records to such researchers. If there are other proper purposes for which a portion of a vital record of a particular person may be disclosed, such purposes should be set out in amendments to 174 NAC 3. Where the death certificate or birth certificate of a particular person is requested by one not entitled to the complete certificate, it would be impossible to provide any portion of the death certificate or birth certificate without identifying it with that person.

Sincerely yours,

ROBERT M. SPIRE
Attorney General



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