*Modified by Opinion #90039

DEPARTMENT OF JUSTICE
STATE OF NEBRASKA
TELEPHONE 402/471-2682 • STATE CAPITOL • LINCOLN, NEBRASKA 68509

#86058
NO.
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

L. Jay Bartel, John M. Boehm, Dale D. Brodkey, Martel J. Bundy, Janie C. Castaneda, Dale A. Comer, Laura L. Freppel, Lynne R. Fritz, Ruth Anne Evans, Yvonne E. Gates, Jill Gradwohl, Royce N. Harper, William L. Howland, Marilyn B. Hutchinson, Mel Kammerlohr, Sharon M. Lindgren, Charles E. Lowe, Steven J. Moeller, Harold I. Mosher, Bernard L. Packett, LeRoy W. Sievers, James H. Spears, Mark D. Starr, John R. Thompson, Susan M. Ugai, Linda L. Willard

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,

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Marilyn B. Hutchinson
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MBH/bae
APPROVED:

Attorney General