**Opinion No. 59-158**

October 5, 1959

**BY:** HILTON A. DICKSON, JR., Attorney General

**TO:** Stanley J. Leland, M.D. Director, State Department of Public Health Santa Fe, New Mexico

*{*246}* This is in reply to your letters of recent date, the first in regard to records of your office in connection with maternal and infant deaths, the second in regard to records which cover the immunization of school children.

In substance, your questions are:

1. Are the case histories furnished by attending physicians on individual patients from which mortality data is to be taken confidential records?

2. If so, is the data compiled from such case histories where the individual identity is lost also confidential?

3. Is such data subject to subpoena?

4. Are the immunization records of school children available to the public?

Our answer to your first question is yes.

Our answer to your second question is no.

Our answer to your third question is very probably.

Our answer to your fourth question is yes.

Our Supreme Court has rendered no decisions which throw light on the subject of your inquiries.

The pertinent portions of the statutory law of New Mexico which bear upon the subject or subjects at hand are § 20-1-12, N.M.S.A., 1953 Comp.:

". . . (d) A person duly authorized to practice physic or surgery, or a professional or registered nurse, cannot be examined without the consent of his patient as to any communication made by his patient with reference to any real or supposed venereal or loathsome disease or any knowledge concerning such disease obtained by personal examination of such patient; . . ."

Section 71-5-1, N.M.S.A., 1953 Comp.:

"71-5-1. RIGHT TO INSPECT PUBLIC RECORDS -- EXCEPTIONS. -- Every citizen of this state has a right to inspect any public records of this state **except records pertaining to physical or mental examinations** and medical treatment of persons confined to any institutions and except as otherwise provided by law." (Emphasis supplied)

and Section 41-5-16, N.M.S.A., 1953 Comp., under the heading "Grand Jury" which reads:

"41-5-16. FREE ACCESS TO PRISONS AND PUBLIC RECORDS. -- They are also entitled to free access, at all reasonable times, to the public prisons, and to the examination, without charge, of all public records in the county."

Perhaps I have categorically answered your questions with considerably more assurance than is warranted, absent statutes bearing upon the subject (other than those herein-above quoted) and absent any decisions on the subject by our State Supreme Court.

Quoting from 58 Am. Jur., page 232, Sec. 401:

"At common law a physician called as a witness had no right to decline or refuse to *{*247}* disclose any information on the ground that such information had been communicated to him confidentially in the course of his attendance upon or treatment of his patient in a professional capacity. Nor could the patient, in case the physician proved a willing witness, by objection exclude that information, or, as a witness himself, refuse to disclose any communication made to him by the physician. In other words, **no privilege** existed as to communications between physician and patient. This is the rule in the absence of a contrary statute." (Emphasis supplied)

In addition to the above quote from American Juris-prudence, a study of the opinions of the high courts of the several states discloses that no question exists as to the common law on the subject of physician and patient. There **was no privilege** regarding the disclosure of communications from a patient to his physician. It follows, therefore, that all statutes bearing upon the subject are in derogation of the common law and are, therefore, to be strictly construed.

The decisions of the courts of last resort of our sister states are based on statutes which are quite similar but far from identical. Such decisions constitute the body of the law applicable to your questions.

Obviously, if Senate Bill # 138, State of South Dakota, a copy of which you so kindly furnished to this writer, had been embodied in our New Mexico statutory law, there would have been no necessity for your opinion request. It would seem that such a bill should be a proper subject for future legislative consideration.

Section 20-1-12, N.M.S.A., supra, was quoted herein merely because it is one of the only three New Mexico statutes in any way bearing upon the subjects at hand. Obviously, your instant problem does not involve venereal disease.

It would seem that the language of Section 71-5-1, N.M.S.A., 1953 Comp., supra, supports my conclusions as to your first and second questions.

76 C.J.S., page 137, section 35, states:

"Where the language of the statute is plain, and, there is no ambiguity in it, there is no occasion for the interpretation of words or construction of phrases or sentences. . . ."

Incidentally, in one of your letters you made the observation that the data and documents are not public records. In this, I beg to differ with you. In support of my position, I quote briefly from the opinion of this office, dated April 22, 1942, bearing the number 4073. Said opinion quotes from Ruling Case Law, Vol. 23, page 155, Section 2, reading in part as follows:

"It is said that a public record is one required by law to be kept, or necessary to be kept, in the discharge of a duty imposed by law, or directed by law to serve as a memorial and evidence of something written, said or done. In all instances where by law or regulation a document is filed in a public office and required to be kept there, it is of a public nature, but this is not quite inclusive of all that may properly be considered public records. For whenever a written record of the transactions of a public officer in his office is a convenient and appropriate mode of discharging the duties of his office, it is not only his right but his duty to keep that memorial, whether expressly required so to do or not; and when kept it becomes a public document -- a public record belonging to the office and not to the officer; it is the property of the state and not of the citizen, *{*248}* and is in no sense a private memorandum . . . ."

In support of my answer to your third question, we are dealing with the subject of evidence. After proper research, a treatise of interminable length could be written involving so many **ifs** that you would still be in doubt. The attempt to subpoena such records for use in court might come in a criminal as well as a civil case. It might come in connection with a legislative investigation, administrative proceeding or in some other connection.

If in a court of law in particular, the presiding judge will have the say as to whether such records are subject to subpoena. If the Court rules that they are so subject, you or your subordinates would no doubt be held in contempt, fined or jailed or both if you refused to obey the Court's ruling that such records are the subject of subpoena -- this regardless of any opinion given to you by this office.

Section 71-5-1, N.M.S.A., 1953 Comp., supra, is the only section of our statutory law which comes even close to providing an answer to your fourth question which involved the availability for public inspection of immunization records of school children. Try as

one may, this section cannot be construed as giving your department the authority to withhold such records from inspection by the public.

Please bear in mind what was stated and restated in the preceding paragraphs of this opinion, towit, at common law no such privilege existed and at this writing we have no statutes adequately covering the situation.

Carl P. Dunifon

Assistant Attorney General