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OPINION NO. 2001-041

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Dear Executive Director Winsley and Executive Administrator Tiberi:

You have asked for clarification of 1999 Op. Att'y Gen. No. 99-006 as it applies R.C. 149.43, the Ohio public records act, to run sheets of a county emergency medical services (EMS) organization. It will be useful to summarize that opinion and the facts upon which it was based before responding to the specific points you have raised.

Review of 1999 Op. Att'y Gen. No. 99-006

1999 Op. Att'y Gen. No. 99-006 addressed the circumstances under which a run sheet, created and maintained by a county EMS organization, is a public record subject to mandatory disclosure under R.C. 149.43(B).[1] The facts provided by the county prosecuting attorney who requested the opinion included the following:

> [A] run sheet … [is] a document that is completed by the county emergency medical services team whenever it is dispatched on a call. The run sheet contains information such as the patient's name, address, age, location of the incident,

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[1] R.C. 149.43(B)(1) requires that all public records "be promptly prepared and made available for inspection to any person at all reasonable times during regular business hours." Division (A)(1) defines the term "[p]ublic record" as "any record that is kept by any public office," and provides for exceptions to that definition.

> nature and time of the call, and disposition of the patient. The run sheet is prepared for and maintained by the EMS organization for its own purposes, and not for the use of the receiving hospital or the patient's physician.

Id. at 2-36. Finding that run sheets created and maintained by a county EMS organization are records kept by a public office, the opinion proceeded to examine whether they fell within any of the categories of records that are excepted from the definition of "[p]ublic record" in R.C. 149.43(A).

Included as part of this examination was R.C. 149.43(A)(1)(a), which exempts "[m]edical records" from the definition of "[p]ublic record." R.C. 149.43(A)(3) defines a "[m]edical record" as "any document or combination of documents, except births, deaths, and the fact of admission to or discharge from a hospital, that pertains to the medical history, diagnosis, prognosis, or medical condition of a patient and that is generated and maintained in the process of medical treatment." Noting that the Cuyahoga County Court of Appeals has twice held that the information on a run sheet concerning the treatment of a living patient is a medical record exempt from disclosure under R.C. 149.43(B),[2] 1999 Op. Att'y Gen. No. 99-006 concluded at 2-43 to 2-44 that, "when a run sheet created and maintained by a county EMS organization documents treatment of a living patient,[3] *the EMS organization is authorized, pursuant to R.C. 149.43(A)(1)(a), to redact information 'that pertains to the medical history, diagnosis, prognosis, or medical condition' of the recipient of the emergency medical services*." (Emphasis and footnote added.) The opinion went on to caution that, "[t]he medical record exception does not permit, however, the redaction of names, addresses, or other non-medical personal information." *Id*. at 2-44.

The opinion also examined the exception found in what is now R.C. 149.43(A)(1)(v), which exempts from the definition of "[p]ublic record" any record "the release of which is prohibited by state or federal law." Not only are such records exempt from mandatory disclosure under R.C. 149.43(B), but their release is affirmatively prohibited. 1999 Op. Att'y Gen. No. 99-006. The physician-patient testimonial privilege found at R.C. 2317.02(B) was cited as one

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[2] *See State ex rel. Richard v. Cleveland Metro Health Ctr.,* 84 Ohio App. 3d 142, 616 N.E.2d 549 (Cuyahoga County 1992); *State ex rel. Nat'l Broadcasting Co., Inc. v. City of Cleveland*, 82 Ohio App. 3d 202, 611 N.E.2d 838 (Cuyahoga County 1992). *See also* 1996 Op. Att'y Gen. No. 96-005.

[3] As explained in 1999 Op. Att'y Gen. No. 99-006 at 2-44, if a person is deceased when the emergency medical services (EMS) squad arrives, documentation of that fact in the run sheet will not qualify as a medical record "because it is not generated in the process of treatment." *See State ex rel. Nat'l Broadcasting Co., Inc. v. City of Cleveland; State ex rel. Ware v. City of Cleveland*, 55 Ohio App. 3d 75, 562 N.E.2d 946 (Cuyahoga County 1989).

provision that prohibits the release of certain medical information for purposes of R.C. 149.43(A)(1)(v).[4] In analyzing the scope of the privilege, the opinion noted at 2-40:

> Emergency medical services are provided by emergency medical technicians, first responders, or paramedics. *See* R.C. 4765.01(G). The physician-patient testimonial privilege does not extend to information observed and recorded by such ancillary medical personnel unless that information is intended to assist a physician in diagnosis or treatment…. *Thus, the question of whether the physician-patient testimonial privilege applies to any information in a run sheet will depend on the facts of each situation. You have informed us that in your situation the run sheets are not prepared or maintained for the purpose of assisting a physician in treatment. Accordingly, none of the information on the run sheets you have described is subject to the physician-patient testimonial privilege.* (Emphasis added and citations omitted.)

Run Sheets Documenting Treatment of Patients

Your letter seeking clarification of 1999 Op. Att'y Gen. No. 99-006 asks us to apply the public records law to a set of facts different from those originally considered in that opinion. The run sheets at issue in 1999 Op. Att'y Gen. No. 99-006 were prepared for, and maintained by, the EMS organization solely for its own purposes, and not for the use of the receiving hospital or the patient's physician. Each run sheet included the patient's name, address, age, location of the incident, nature and time of the call, and disposition of the patient, but no information about the patient's medical condition or treatment. You now ask whether run sheets that are used to document drugs administered to the patient, as well as the patient's vital signs and medical condition, are public records. By way of description, you state that the receiving hospital and treating physician have "dire need" for such an EMS run sheet, explaining:

> This paperwork contains the drug administration records needed to properly continue the patient's treatment. The EMS records are prepared precisely for this reason and they are incorporated within the patient's chart at the receiving hospital. Without such records, the hospital could easily overdose a patient by duplicating drug administration, or it could under-medicate by failing to administer drugs when assuming the EMS unit did so. Prudent medical care mandates this reason for recordkeeping.

"Medical Records" Exception

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[4] The opinion examined other statutes, administrative rules, and the federal constitutional right of privacy that also prohibit the release of certain information.

As quoted above, 1999 Op. Att'y Gen. No. 99-006 concluded that if a run sheet contains information pertaining to the medical history, diagnosis, medical condition, and treatment of a living patient, such information is not subject to mandatory disclosure and may be redacted. Certainly, the information you have described that pertains to medication and other treatment administered to the patient by the EMS unit, as well as documentation of the vital signs and other indicia of the patient's state of health, relate to the patient's medical condition and treatment and would thus fall within the "medical records" exception so as to be exempt from mandatory disclosure.

Release of Records Prohibited by Law

As previously discussed, the information on a run sheet that pertains to the condition and treatment of a living patient constitutes a "medical record," as defined in R.C. 149.43(A)(3), and is exempt from mandatory disclosure pursuant to R.C. 149.43(A)(1)(a). Moreover, an exception to mandatory disclosure can also exist if the release of information on a run sheet is prohibited by law. Pursuant to R.C. 149.43(A)(1)(v), "[r]ecords the release of which is prohibited by state or federal law," are not "public records" for purposes of R.C. 149.43. If the information is made confidential by state or federal law, then the EMS organization is not only relieved of the requirement in R.C. 149.43(B) to release it, but is affirmatively prohibited from releasing it.

A. Physician-Patient Testimonial Privilege

As noted above, 1999 Op. Att'y Gen. No. 99-006 examined whether information on a run sheet recording the observations of emergency medical technicians (EMT's), first responders, or paramedics may be covered by the physician-patient testimonial privilege of R.C. 2317.02(B),[5] and thus fall within the exemption in R.C. 149.43(A)(1)(v) for records the release of which is prohibited by state or federal law. *See* 1996 Op. Att'y Gen. No. 96-005 (although the prohibition against disclosure in R.C. 2317.02(B)(1) is directed to physicians, it also serves to remove privileged physician-patient communications that are kept by a public office from the definition of "public record"). 1999 Op. Att'y Gen. No. 99-006 found that such information may be

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[5] The physician-patient testimonial privilege is created by R.C. 2317.02(B)(1), which states that a physician shall not testify "concerning a communication made to the physician … by a patient in that relation or the physician's … advice to a patient," except as otherwise provided by statute or unless the patient has waived the privilege. The term "communication" is defined for purposes of R.C. 2317.02(B) in division (B)(5)(a) to mean "acquiring, recording, or transmitting any information, in any manner, concerning any facts, opinions, or statements necessary to enable a physician … to diagnose, treat, prescribe, or act for a patient. A 'communication' may include, but is not limited to, any medical … office, or hospital communication such as a record, chart, letter, memorandum, laboratory test and results, x-ray, photograph, financial statement, diagnosis, or prognosis."

covered by the privilege *where it is intended to assist a physician in diagnosis or treatment of the patient*. Again, the conclusion set forth in 1999 Op. Att'y Gen. No. 99-006 that none of the information on the run sheets in question was exempt under the physician-patient testimonial privilege was based upon the assertion by the county prosecuting attorney that the run sheets were not prepared or maintained for the purpose of assisting a physician in diagnosis or treatment. However, as observed in the opinion, any determination as to whether information in a patient's run sheet falls within the privilege will depend upon the facts of each particular situation.[6]

You have suggested that a physician-patient testimonial privilege is created whenever drugs are administered to a patient by an EMS squad because R.C. 4765.41 requires the medical director or cooperating physician advisory board of each EMS organization to establish written protocols to be followed by EMS personnel "in performing emergency medical services when communications have failed or the required response prevents communication and the life of the patient is in immediate danger." Such written protocol must be submitted by the EMS organization with its application to the State Board of Pharmacy to be licensed as a "terminal distributor of dangerous drugs" under R.C. 4729.54.[7] *See* R.C. 4729.54(D)(1). You assert that whenever dangerous drugs are administered, "a physician-patient relationship … necessarily exists because the drugs are dispensed pursuant to that physician's order, based upon the medical condition of the patient as assessed by the squad personnel, pursuant to the criteria set forth in the protocol."

There will certainly be circumstances in which a patient who is being attended to by an EMS unit will establish a relationship with a physician such that the privilege will apply. For example, as explained in 1999 Op. Att'y Gen. No. 99-006 and 1996 Op. Att'y Gen. No. 96-005, information observed and recorded by EMS personnel may be privileged where recorded to

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[6] We note that EMS personnel may be required to release to law enforcement officers certain information that would otherwise fall within the privilege of R.C. 2317.02(B)(1). R.C. 2317.02(B)(2) requires health care providers, including emergency medical personnel, to provide to law enforcement officers, upon written request, copies of any records that pertain to any tests administered to a person, against whom a criminal investigation or proceeding has been commenced, to determine the presence of alcohol or a drug of abuse in that person's blood, breath, or urine at any time relevant to the criminal offense, "except to the extent specifically prohibited by any law of this state or of the United States." R.C. 2317.02(B)(2) and (5)(b) and (c).

[7] Licensure as a "terminal distributor of dangerous drugs" enables an EMS organization to obtain and possess dangerous drugs for the purpose of administering emergency medical services. *See* R.C. 4729.51; R.C. 4729.54. *See also* R.C. 4729.01(Q) (defining the term "[t]erminal distributor of dangerous drugs").

assist a physician with the diagnosis and treatment of the patient. *See State v. Bourdess,* No. 74842, 1999 Ohio App. LEXIS 4785 (Cuyahoga County Oct. 7, 1999); *State v. Napier*, No. C-970383, 1998 Ohio App. LEXIS 3939 (Hamilton County Aug. 28, 1998); *State v. Cherukuri*, 79 Ohio App. 3d 228, 607 N.E.2d 56 (Lake County 1992); *State v. Gabriel*, 72 Ohio App. 3d 825, 596 N.E.2d 538 (Franklin County 1991); *State v. Kabeller*, No. 90AP-53, 1990 Ohio App. LEXIS 5765 (Franklin County Dec. 20, 1990).[8] Under this standard, documentation of the administration of drugs or other treatment provided by an EMS unit that is relied upon by the treating physician would unquestionably constitute a communication that falls within the scope of the physician-patient testimonial privilege.

Further, EMS personnel may, depending upon their level of certification, perform certain emergency medical services "only pursuant to the written or verbal authorization of a physician or of the cooperating physician advisory board, or pursuant to an authorization transmitted through a direct communication device by a physician or registered nurse designated by a physician." *See* R.C. 4765.35(D) (first responder); R.C. 4765.37(D) (EMT-basic); R.C. 4765.38(C) (EMT-intermediate); R.C. 4765.39(C) (EMT-paramedic). In situations where prior authorization is required, EMS personnel may rely upon the written protocol established pursuant to R.C. 4765.41 only when communications fail or the required response time prohibits communication with a physician and the life of the patient is in immediate danger. *Id*. *See also* R.C. 4765.36 (EMT's may perform services in a hospital "only under the direction and supervision of a physician or registered nurse designated by a physician"). If a physician authorizes an EMT to administer a drug or perform any other service, documentation of the physician's authorization and administration of the treatment or procedure by the EMS unit may fall within the physician-patient testimonial privilege. *Cf. McKinney v. Schlatter*, 118 Ohio App. 3d 328, 692 N.E.2d 1045 (Butler County 1997) (finding there to be a physician-patient relationship for purposes of medical malpractice liability between an on-call consulting physician and emergency room patient whom the physician does not know, has not met or spoken with, and has not previously treated, where the physician participates in the diagnosis of the patient's condition, participates in or prescribes a course of treatment for the patient, and owes a duty to the hospital, staff, or patient for whose benefit he is on call). Lack of direct contact between the physician and patient has been found not to preclude the establishment of a physician-patient relationship. *Id*.

However, there is no authority to support the proposition that a written protocol, developed without regard to the diagnosis or treatment of a particular patient, establishes a

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[8] 1996 Op. Att'y Gen. No. 96-005 at 2-22 and 2-23 n. 2 also cites cases, decided before the definition of "communication," as used in R.C. 2317.02(B), was broadened, that decline to extend the physician-patient testimonial privilege to medical personnel other than those specifically mentioned in R.C. 2317.02(B), now doctors of medicine, doctors of osteopathic medicine, doctors of podiatry, and dentists. *See* R.C. 2317.02(B)(6).

physician-patient testimonial privilege between the physician who prepared the protocol, and any patient who is treated by an EMS squad pursuant to that protocol, where there is no other involvement by the physician in the patient's diagnosis or treatment. The privilege is intended to prevent a physician from disclosing information communicated between him and his patient in order to "encourage free disclosure by the patient to the doctor and, thus, to facilitate proper diagnosis and treatment." *In re Winstead*, 67 Ohio App. 2d 111, 114, 425 N.E.2d 943, 945 (Summit County 1980). *See also In re Miller,* 63 Ohio St. 3d 99, 585 N.E.2d 396 (1992). It has no ready application to a situation where a physician has prepared, without reference to a specific patient, a written protocol for use by emergency squad personnel when communication with a physician is not possible. *See Weis v. Weis*, 147 Ohio St. 416, 428, 72 N.E.2d 245, 252 (1947) ("the privileged-communication statute, being in derogation of the common law, must be strictly construed"). *Accord In re Miller*.

Thus, the mere fact that drugs are administered to a patient by an EMS unit pursuant to a written protocol developed by a physician or physician advisory board does not establish a physician-patient testimonial privilege, whereby documentation on a run sheet of the administration of drugs or other treatment pursuant to the protocol would be confidential. Documentation on a run sheet of the administration of drugs, the observations of EMS personnel, and other diagnostic procedures or treatment would constitute a communication falling within the physician-patient testimonial privilege if such documentation is for the purpose of assisting a physician with the diagnosis or treatment of the patient. Documentation of a physician's authorization of the performance of an emergency medical service by an EMT and administration of the service may also fall within the privilege. However, we must emphasize, as we did in 1999 Op. Att'y Gen. No. 99-006, that application of the privilege will depend upon the facts and circumstances of each situation.

B. Confidentiality of Drug Records

You also have asked whether the confidentiality requirements of R.C. 3719.13 would apply to information on a run sheet. You state that the administration of drugs during a run must be documented pursuant to R.C. 3719.07, and that R.C. 3719.13 expressly makes this documentation confidential. While R.C. 3719.07 does impose a duty to keep certain records, the release of which is governed by R.C. 3719.13, the record-keeping requirements of R.C. 3719.07, and thus the scope of confidentiality under R.C. 3719.13, are more limited than your question suggests.

R.C. 3719.13 reads as follows:

> Prescriptions, orders, and *records, required by Chapter 3719. of the Revised Code*, and stocks of dangerous drugs and controlled substances, shall be open for inspection only to federal, state, county, and municipal officers, and employees of the state board of pharmacy whose duty it is to enforce the laws of

> this state or of the United States relating to controlled substances. Such prescriptions, orders, records, and stocks shall be open for inspection by employees of the state medical board for purposes of enforcing Chapter 4731. of the Revised Code and employees of the board of nursing for purposes of enforcing Chapter 4723. of the Revised Code. No person having knowledge of any such prescription, order, or record shall divulge such knowledge, except in connection with a prosecution or proceeding in court or before a licensing or registration board or officer, to which prosecution or proceeding the person to whom such prescriptions, orders, or records relate is a party. (Emphasis added.)

Documents covered by R.C. 3719.13[9] are thus subject to inspection only by those persons and for those purposes specified therein. In order to be deemed confidential under R.C. 3719.13, a record must be "required by" R.C. Chapter 3719, the uniform controlled substances act.

R.C. 3719.07 requires, *inter alia*, prescribers, manufacturers and wholesalers, category III terminal distributors of dangerous drugs, and other persons who are "authorized to purchase and use controlled substances" to maintain certain records, R.C. 3719.07(B), but only as to *controlled substances*. *See* R.C. 3719.01(C) (defining "[c]ontrolled substance"). For example, a person who is authorized to purchase and use controlled substances, including an EMS organization, is required to keep records containing a description of any controlled substance administered or used, the name and address of the person to whom or for whose use the controlled substance was administered or used, and the date of administering or using. R.C. 3719.07(C)(1)(b).[10] Any such

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[9] The confidentiality requirements of R.C. 3719.13 apply to "prescriptions, orders, and records, required by Chapter 3719. of the Revised Code." As discussed in this opinion, the records required for the receipt and disposition of controlled substances by persons other than pharmacists are specified in R.C. 3719.07. A pharmacist's duties to retain written prescriptions and records of oral prescriptions are governed by R.C. 3719.05. *See also* R.C. 4729.37. An "[o]fficial written order" is defined in R.C. 3719.01(Q), and is used in reference to certain sales of controlled substances. *See, e.g.,* R.C. 3719.04(A)(3) and (B) (addressing the sale of controlled substances upon a special official written order approved by a commissioned medical officer or acting assistant surgeon of the United States public health service, and the record-keeping required for such orders).

[10] 11 Ohio Admin. Code 4729-9-14 (Supp. 2000-2001) further describes the record keeping requirements imposed upon each prescriber or terminal distributor of dangerous drugs with regard to controlled substances. Division (A) reads:

> Each prescriber or terminal distributor of dangerous drugs shall keep a record of all controlled substances received, administered, dispensed, sold, or used.

records created and maintained by an EMS organization would be subject to the confidentiality requirements of R.C. 3719.13. R.C. 3719.07 does not, however, apply to records documenting the administration of drugs or dangerous drugs that are not classified as controlled substances. *See* R.C. 3719.01(G) and R.C. 4729.01(E) (defining "[d]rug"); R.C. 3719.01(D) and R.C. 4729.01(F) (defining "[d]angerous drug").[11] Thus, records relating to the administering of drugs which are not controlled substances would not be covered by the confidentiality requirements of R.C. 3719.13 since they are not required by R.C. 3719.07 or elsewhere in R.C. Chapter 3719.[12]

Furthermore, there is some question whether a "run sheet" is a record that is "required by" R.C. Chapter 3719 so as to fall within the confidentiality provisions of R.C. 3719.13, even if it does include documentation pertaining to controlled substances. Case law suggests that records documenting the condition and treatment of a specific patient will not always constitute a record "required by" R.C. Chapter 3719. For example, in *State v. Schultz*, No. 92-L-063, 1993 Ohio App. LEXIS 797 (Lake County Feb. 12, 1993), the court held that a "patient information

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> (1) Records of receipt shall contain a description of all controlled substances received, the kind and quantity of controlled substances received, the name and address of the persons from whom received, and the date of receipt.
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> (2) Records of administering, dispensing, or using controlled substances shall contain a description of the kind and quantity of the controlled substance administered, dispensed, or used, the date, the name and address of the person to whom or for whose use, or the owner and identification of the animal for which, the controlled substance was administered, dispensed, or used.
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> (3) Records of drugs administered which become a permanent part of the patient's medical record shall be deemed to meet the name and address requirements of paragraph (A)(2) of this rule.

[11] As a general matter, a "drug" is any article used for the prevention, treatment, or cure of disease, and a "dangerous drug" is a drug that may be dispensed only upon prescription. A "controlled substance" is a substance that has been placed on a schedule by the United States Attorney General and State Board of Pharmacy for extensive regulation because it has a potential for abuse, and either has no accepted medical use in treatment or its abuse may lead to dependence. *See* R.C. 3719.44.

[12] 11 Ohio Admin. Code 4729-9-22 (Supp. 2000-2001) sets forth the record keeping requirements imposed upon each prescriber or terminal distributor of dangerous drugs with regard to dangerous drugs. This rule was promulgated to amplify R.C. 4729.37, rather than R.C. 3719.07, and applies to record keeping of "dangerous drugs," rather than "controlled substances." Thus, records required by rule 4729-9-22 are not records required by R.C. Chapter 3719 and are not subject to the confidentiality provisions of R.C. 3719.13.

sheet" is not a prescription, order, report, or record required by R.C. Chapter 3719 because it is not on the list found at R.C. 3719.07.

In *State v. Lowe*, No. 93-CA-54, 93-CA-55, 1995 Ohio App. LEXIS 1062 (Miami County March 24, 1995) the court held that, while a doctor's dispensing record or log for controlled substances is a record or report required by R.C. Chapter 3719, the patients' medical charts at issue did not qualify as prescriptions, reports, or records required by R.C. Chapter 3719 because nothing therein related to the administering of a controlled substance, noting that "there is nothing in Chapter 3719 which requires a practitioner to keep patients' medical charts per se." *State v. Lowe* at *27. The court did, however, examine division (A)(3) of rule 4729-9-14, *see* note 10, *supra*, which states that, "[r]ecords of drugs administered which become a permanent part of the patient's medical record shall be deemed to meet" the requirement in division (A)(2) that the name and address of the person to whom or for whose use the controlled substance was administered or used be kept, and concluded that "in some cases, a portion of a patient's medical chart relating to drugs administered to the patient by the practitioner may constitute reports or records required by R.C. Chapter 3719." *State v. Lowe* at *27.[13]

Under the analysis in *State v. Lowe*, when a controlled substance is administered by an EMS unit, documentation of the patient's name and address on the patient's run sheet would, pursuant to rule 4729-9-14(A)(3), be deemed to be a record required by R.C. 3719.07 and rule 4729-9-14(A)(2), and thus confidential under the terms of R.C. 3719.13, assuming the run sheet becomes a permanent part of the patient's medical record. Otherwise, a run sheet, like a patient's medical chart, is not required *per se* to be kept by R.C. 3719.07 or other provision of

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[13] In *State v. Lowe*, No. 93-CA-54, 93-CA-55, 1995 Ohio App. LEXIS 1062 (Miami County March 24, 1995), the court made certain to distinguish between the "dispensing" of drugs and the "administering" of drugs. *See* R.C. 3719.01(A) (defining "[a]dminister" as "the direct application of a drug, whether by injection, inhalation, ingestion, or any other means to a person or an animal"); R.C. 3719.01(E) (defining "[d]ispense" as "to sell, leave with, give away, dispose of, or deliver"). The court noted that, while rule 4729-9-14(A)(3) implies that a patient's medical chart may be used to keep records of controlled substances that are administered, it also implies, by failing to mention the dispensing of drugs, that a separate record of controlled substances that are dispensed must be kept apart from the patients' medical charts. *Id*. at *28. EMT's are not authorized to *dispense* controlled substances or other dangerous drugs. *See* R.C. 4765.38(B)(4) (an emergency medical technician-intermediate is authorized to administer epinephrine); R.C. 4765.39(B)(5) (an emergency medial technician-paramedic is authorized to "[a]dminister appropriate drugs"). *See also* R.C. 4729.28 and R.C. 4729.29 (no one other than a pharmacist or pharmacy intern may dispense dangerous drugs, unless the person is a licensed health professional authorized to prescribe drugs). Thus, it seems unlikely that a run sheet would include documentation of the dispensing of a controlled substance or other dangerous drug, and it is unnecessary for us to address how such documentation would be treated under R.C. 149.43.

R.C. Chapter 3719, and thus would not fall within the confidentiality requirements of R.C. 3719.13. More specifically, if the documentation on the run sheet pertains to the administration of a drug that is not a controlled substance, then the confidentiality provisions of R.C. 3719.13 would not apply.

We reiterate, however, that information on a run sheet about the administration of any drug to a living patient, regardless of whether it is a controlled substance, is exempt from mandatory disclosure under the "medical records" exception, and further, may be confidential under the physician-patient testimonial privilege if documented to assist a physician in the treatment of the patient or pursuant to a physician's authorization of the performance of emergency medical services by an EMT. *See also* 1999 Op. Att'y Gen. No. 99-006 (syllabus paragraphs 3 and 4) (setting forth other statutory and constitutional provisions that would prohibit the release of certain information on a run sheet).

You have also cited 11 Ohio Admin. Code 4729-5-29, which provides that, with certain exceptions, "[r]ecords relating to the practice of pharmacy or administering of drugs are not a public record," and that "[a] person having custody of, or access to, such records shall not divulge the contents thereof, or provide a copy thereof, to anyone." Rule 4729-5-29(A). The rule is intended to amplify R.C. 3719.07 and R.C. 3719.13, as well as other statutes that are unrelated to the confidentiality of records. As noted in 1999 Op. Att'y Gen. No. 99-006 at 2-39 n. 3, "[a]bsent express statutory authority, a state agency may not promulgate a rule which purports to exempt information from the operation of the public records act, R.C. 149.43." *See State ex rel. Lucas County Board of Comm'rs v. Ohio Environmental Protection Agency*, 88 Ohio St. 3d 166, 724 N.E.2d 411 (2000). Rule 4729-5-29 cannot be read, therefore, as expanding the scope of confidentiality provided by R.C. 3719.13, either as to the types of records that are confidential or as to the persons from whom the records may be withheld, nor may rule 4729-5-29 be read as providing an independent basis for exempting from disclosure information that otherwise must be released. Thus, the confidentiality provided by rule 4729-5-29 is coextensive with that provided by R.C. 3719.13.

Conclusions

Ultimately, each run sheet must be examined to determine whether it falls, in whole or in part, within the "medical records" exception, the physician-patient testimonial privilege, or any other exception for information the release of which is prohibited by law. As is made clear by 1999 Op. Att'y Gen. No. 99-006, run sheets cannot be categorized *per se* as either subject to, or exempt from, disclosure.[14]

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[14] As a final matter, we note that the Ohio Supreme Court recently had occasion in *State ex rel. McCleary v. Roberts*, 88 Ohio St. 3d 365, 725 N.E.2d 1144 (2000), to apply the public records law to information about private citizens that was held by a public office. The syllabus

It is, therefore, my opinion, and you are hereby advised that:

1. Information on a run sheet created and maintained by a county emergency medical services (EMS) organization that documents medication or other treatment administered to a patient by an EMS unit, diagnostic procedures performed by an EMS unit, or the vital signs and other indicia of the patient's condition or diagnosis satisfies the "medical records" exception of R.C. 149.43(A)(1)(a), and thus is not a "public record" that must be released to the public pursuant to R.C. 149.43(B). (1999 Op. Att'y Gen. No. 99-006, approved and followed.)

2. Information on a run sheet created and maintained by a county emergency medical services organization that documents medication or other treatment administered to a patient by an EMS unit, diagnostic procedures performed by an EMS unit, or the vital signs and other indicia of the patient's condition or diagnosis, and is relied upon by a physician for diagnostic or treatment purposes, is a communication covered by the physician-patient testimonial privilege of R.C. 2317.02(B), and thus is confidential information, the release of which is prohibited by law for purposes of R.C. 149.43(A)(1)(v). (1996 Op. Att'y Gen. No. 96-005 and 1999 Op. Att'y Gen. No. 99-006, approved and followed.) If a physician authorizes an emergency medical technician (EMT) to administer a drug or perform other emergency medical services, documentation of the physician's authorization and administration of the treatment or procedure by the EMS unit may also fall within the physician-patient testimonial privilege.

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paragraph of this case reads as follows: "Personal information of private citizens, obtained by a 'public office,' reduced to writing and placed in record form and used by the public office in implementing some lawful regulatory policy, is not a 'public record' as contemplated by R.C. 149.43." At issue in *McCleary* was personal, identifying information of children participating in an identification program of a city recreation and parks department intended to fight increased violence and vandalism at city swimming pools. This data included the names, home addresses, family information, emergency contact information, and medical history information of participating children.

The court concluded that the information was not a "record," *see* R.C. 149.011(G), and even if it were, it fell within the exception for records the release of which is prohibited by state or federal law, and was protected from disclosure by the children's right to privacy found in the Fourteenth Amendment to the U.S. Constitution. Without further elucidation from the court, however, it is unclear whether, or to what extent, information on an EMS run sheet would be exempt from mandatory disclosure or confidential under its holding in *McCleary*.

3. A written protocol, developed pursuant to R.C. 4765.41, without reference to a particular patient, for use by emergency squad personnel in cases where communication with a physician is not possible and the patient's life is in danger, does not establish, for purposes of R.C. 149.43(A)(1)(v), a physician-patient testimonial privilege between the physician who prepared the protocol and a patient who is treated by an EMS unit pursuant to that protocol, where there is no further communication by the EMS unit with the physician about the condition or treatment of the patient.

4. If an EMS unit administers a controlled substance to a patient, the patient's name and address documented on the run sheet will, pursuant to 11 Ohio Admin. Code 4729-9-14(A)(3) (Supp. 2000-2001), be deemed to meet a portion of the record keeping requirements of R.C. 3719.07, and thus will be confidential under the terms of R.C. 3719.13, if the run sheet becomes a permanent part of the patient's medical record. However, information on the run sheet that pertains to the administration of a drug that is not a controlled substance is not required by R.C. 3719.07 or other provision of R.C. Chapter 3719, and thus does not fall within the confidentiality requirements of R.C. 3719.13.

Respectfully,

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SYLLABUS: 2001-041

1. Information on a run sheet created and maintained by a county emergency medical services (EMS) organization that documents medication or other treatment administered to a patient by an EMS unit, diagnostic procedures performed by an EMS unit, or the vital signs and other indicia of the patient's condition or diagnosis satisfies the "medical records" exception of R.C. 149.43(A)(1)(a), and thus is not a "public record" that must be released to the public pursuant to R.C. 149.43(B). (1999 Op. Att'y Gen. No. 99-006, approved and followed.)

2. Information on a run sheet created and maintained by a county emergency medical services organization that documents medication or other treatment administered to a patient by an EMS unit, diagnostic procedures performed by an EMS unit, or the vital signs and other indicia of the patient's condition or diagnosis, and is relied upon by a physician for diagnostic or treatment purposes, is a communication covered by the physician-patient testimonial privilege of R.C. 2317.02(B), and thus is confidential information, the release of which is prohibited by law for purposes of R.C. 149.43(A)(1)(v). (1996 Op. Att'y Gen. No. 96-005 and 1999 Op. Att'y Gen. No. 99-006, approved and followed.) If a physician authorizes an emergency medical technician (EMT) to administer a drug or perform other emergency medical services, documentation of the physician's authorization and administration of the treatment or procedure by the EMS unit may also fall within the physician-patient testimonial privilege.

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