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Legal Opinion 2016-022

TO: John Engen, City Council, Dale Bickell, Ginny Merriam, Steve Johnson, Department of Human Resources, Marty Rehbein, Leigh Griffing

CC: Department City Attorney

FROM: Jim Nugent, City Attorney

DATE November 4, 2016

RE: Medical records and medical information of public officials and employees are private confidential records unless the person the medical records concern requests that the medical records be made public

FACTS:

Unless an individual requests that their personal medical records and medical information be made public, any medical records or medical information pertaining to that person in the possession of a Montana municipality must be kept confidential.

ISSUE(S):

Are a person's medical records or medical information in the possession of a Montana municipality confidential private records and private information?

CONCLUSION(S):

Yes. Article II, section 10 of the Montana Constitution establishes a Montana Constitutional right of privacy. Pursuant to subsection 2-6-1002(1) MCA of Montana's public record and public information laws, "confidentiality" is defined in part as including information that is "constitutionally protected from disclosure because an individual's privacy interest clearly exceeds the merits of public disclosure". Subsection 7-1-4144(2) MCA of Montana municipal government law provides that medical records relating "to matters in which the right to individual privacy exceeds the merits of public disclosure shall not be available to the public unless the person they concern requests they be made public".

LEGAL DISCUSSION:

Article II, sections 9 of the Montana Constitution establishes a Constitutional right to know except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure. Article II, section 9 states:

Section 9. Right to know. No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure. (*emphasis added*)

Article II, section 10 of the Montana Constitution establishes a Montana Constitutional right of privacy. Article II, section 10 states:

Section 10. Right of privacy. The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.

Montana's public record and public information law pursuant to subsection 2-6-1002(1) MCA defines "confidential information" as follows:

2-6-1002. Definitions. As used in this chapter, the following definitions apply:

(1) "Confidential information" means information that is accorded confidential status or is prohibited from disclosure as provided by applicable law. The term includes information that is:

- (a) constitutionally protected from disclosure because an individual privacy interest clearly exceeds the merits of public disclosure;
- (b) related to judicial deliberations in adversarial proceedings;
- (c) necessary to maintain the security and integrity of secure facilities or information systems owned by or serving the state; and
- (d) designated as confidential by statute or through judicial decisions, findings, or orders. (*emphasis added*)

There are federal regulations governing the privacy of medical records as well; but this legal opinion will focus on and be limited to Montana law as more than adequately establishing the privacy of medical records with respect to Montana municipalities. Montana's "INSURANCE INFORMATION AND PRIVACY PROTECTION ACT" is set forth in title 33, chapter 19, MCA. Pursuant to subsection 33-19-104(17), (18) and (19) MCA the terms "medical care institution", "medical professional" and "medical record information" set forth in Montana's "INSURANCE INFORMATION AND PRIVACY ACT" are defined to mean:

(17) "Medical care institution" means a facility or institution that is licensed to provide health care services to natural persons, including but

not limited to health maintenance organizations, home health agencies, hospitals, medical clinics, public health agencies, rehabilitation agencies, and skilled nursing facilities.

(18) "Medical professional" means a person who is licensed or certified to provide health care services to natural persons, including but not limited to a chiropractor, clinical dietitian, clinical psychologist, dentist, nurse, occupational therapist, optometrist, pharmacist, physical therapist, physician, podiatrist, psychiatric social worker, or speech-language pathologist.

(19) "Medical record information" means personal information that:

- (a) relates to an individual's physical or mental condition, medical history, medical claims history, or medical treatment; and
- (b) is obtained from a medical professional or medical care institution, from the individual, or from the individual's spouse, parent, or legal guardian

Montana municipal government law, section 7-1-4144 MCA is entitled "PUBLIC RECORDS". Subsection 7-1-4144(2) MCA provides that medical records relating to matters in which the right to individual privacy exceeds the merits of public disclosure should not be available to the public unless the person they concern requests they be made public. Section 7-1-4144 MCA states:

7-1-4144. Public records.

(1) Except as provided in subsection (2), all records and other written materials in the possession of a municipality shall be available for inspection and reproduction by any person during normal office hours. The governing body may impose reasonable fees for providing copies of public records.

(2) Personal records, medical records, and other records which relate to matters in which the right to individual privacy exceeds the merits of public disclosure shall not be available to the public unless the person they concern requests they be made public.

(3) Except as provided by law and as determined by the chief law enforcement administrator, law enforcement records which relate to matters in which the right to individual privacy or law enforcement security exceeds the merits of public disclosure shall not be available to the public. *(emphasis added)*

CONCLUSION(S):

Yes. Article II, section 10 of the Montana Constitution establishes a Montana Constitutional right of privacy. Pursuant to subsection 2-6-1002(1) MCA of Montana's public record and public information laws, "confidentiality" is defined in part as including information that is "constitutionally protected from disclosure because an individual's privacy interest clearly exceeds the merits of public disclosure". Subsection 7-1-4144(2) MCA of Montana municipal government law provides that medical records relating "to matters in which the right to individual privacy exceeds the merits of public disclosure shall not be available to the public unless the person they concern requests they be made public".

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