Records of Public Health Department—Public Health Records Of, Not Open to Public Inspection.

The records of the Department of Public Health are not open to inspection by the public, unless the purpose thereof is bona fide and not to aid in business and speculative enterprises.

March 30, 1920.

Dr. W. F. Cogswell, Secretary,
Department of Public Health,
Building.

Dear Sir:

I have your letter of the 23rd instant, in which you call my attention to the fact that there are concerns and individuals in the State of Montana who insist on access to the reports filed in your office under the provisions of the law governing the matter of collecting vital statistics by the State Board of Health. You state that these concerns and individuals desire information contained in these reports for the purpose of assisting them in their business enterprises and assert that they have access to these reports as a matter of right for the reason that they are public records.

You further state that there are reasons why your Department desires to deny the public access to these records. First, that it demoralizes the work in your office, and, second, that these records contain information more or les delicate and personal regarding the persons upon whom these reports have been compiled.

I can well understand the force of your contention. No doubt a continuous examination of the records in your office by the public would seriously interfere with the efficient discharge of the duties imposed upon your office. The greatest objection, however, is the confidential and delicate nature of the information contained in these reports. I feel that if the law at all warrants you in so doing, you should positively deny the general public access to such records. An examination of the law upon this subject warrants me in advising that you have a right to deny the public access to these records.

The act under which the statistics are collected, I take it, is Sec tions 1764 to 1781, inclusive, of the Revised Code of 1907. By Section 1764 it is provided that a State Bureau of Vital Statistics under the superintendence of the Secretary of the State Board of Health is created. By Section 1765 the State Registrar is empowered to make, promulgate and enforce necessary rules and regulations with the approval of the State Board of Health. The law creating your Bureau is designed to aid the State Board of Health in the maintenance of sanitary conditions and the control of contagious diseases. It provides, to be sure, that the reports which are collected by your office from local registrars, sextons, funeral directors and midwives must be filed in your office. Our Code, under the title of evidence, by Section 7898, provides as follows:

"Every citizen has a right to inspect and take a copy of any public writings of this state, except as otherwise expressly provided by statute."

While this Section appears to be of an extensive scope, yet under judicial interpretations of similar sections it is not without its proper limits.

It is held in some states by their supreme courts that while the general right of citizens to inspect public documents exists, it was never meant that the right should be exercised for a private, speculative, or financial purpose, or to satisfy mere curiosity or to promote scandal. This is particularly true when it is attempted by persons continuously, day after day, and seriously interferes with the duties of the public officials in charge of such records. In the State of Georgia a statute provided:

"All books kept by any public officlal shall be subject to the inspection of all citizens."

In the State of Kansas a statute provided:

"All books and papers required to be kept by the county officials shall be open to the inspection and examination of any person."

Under these statutes it was held by both the Supreme Court of Georgia and the Supreme Court of Kansas that persons or firms engaged in the land and title business, commonly known as abstract companies, could not inspect and make copies of public land or title records for the purpose of furthering their own private business.

Bank v. Colins, 51 Ga. 391;
Carmack v. Walcot, 37 Kan. 391;
Brewer v. Watson, 71 Ala. 299;
Bean v. People, 1 Colo. 200;
Belt v. Prince George County Abstract Co. (Md.) 10 L. R. A. 212;

The courts, however, are divided upon the proposition as above set forth but all of them hold that the right to inspect public records is not without reasonable limitations. This matter is thoroughly considered and discussed by the Supreme Court of Nevada in the case of State ev rel. v. Grimes, 29 Nev. 50, 84 Pac. 1061, 5 L. R. A. N. S. 545.

Under the common law a person did not have the right to inspect public documents in the custody of public officers, even though such documents or records contained no secret or confidential information. He might inspect such documents, either by himself or agent, where he could show an interest therein. This interest must be confined to such a matter as would enable him to maintain an action in court for which the document might furnish evidence. Other than this a person had no right to inspect public documents. The decision uniformly held that under the common law at no time did a person have a right to inspect such public documents merely to satisfy personal curiosity, promote scandal, or in furtheronce of his private financial business.

1 Greenl. Ev. No. 473;
Webber v. Townley, 43 Mich. 534;
Diamond aMtch Company v. Power, 51 Mich. 145;
nI re Coswell's Request, 18 R. I. 835, 29 Atl. 259, 48 A. S. R. 814, 27 L. R. A. 982.

It has also been held by some courts that there might be instances where public policy would demand that the public be denied access to public records. Such instances might consist of documents containing diplomatic correspondence, letters and dispatches in the detective or police service, or other confidential matters relating to the apprehension and prosecution of criminals.

Matter of Egan, 205 N. Y. 147, 98 N. E. 467, Ann. Cas. 1913 E. 56, 41 L. R. A. N. S. 280.

The most important exception, however, to the general right to inspect public records, and the one upon which we can properly base our ruling, is that records containing reports of physical or mental infirmities, or any other information regarding sickness and infirmed condition of a person is of a confidential nature and is not open to public inspection, even though admissible as evidence in a court of law without an express waiver of the individual regarding whom the information has been collected. This involves the well known exception to the general rule of admissibility of evidence because of the fact that in its nature it is evidence obtained by a physician or other person standing in a confidential relationship.

Section 7892 of our Code of 1907 provides as follows:

"There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore, a person cannot be examined as a witness in the following cases;

4. A licensed physician or surgeon cannot, without the consent of his patient, be examined in a civil action as to any information acquired in attending the patient which was necessary to enable him to prescribe or act for the patient."

In the case of Massachusetts Mutual Life Insurance Company vs. Board of Trustees of Michigan Asylum for Insane, 178 Mich. 193, 144 N. W. 538, Ann. Cas. 1915 D 146, we have a situation of the plaintiff in this case being the defendant in a case where it was sued upon an insurance policy. The insurance company asked leave of the Trustees of the Michigan Asylum for the Insane to examine and make copies of the record of one Vernon J. Willey while he was an inmate at said institution. The Board of Trustees of said Asylum refused the Insurance Company this privilege. In the State of Michigan there was an act reading as follows:

"The officers having custody of any county, city, township, village, school district, or other public records in this state, shall furnish proper and reasonable facilities for the inspection and examination of the records and files in their respective offices, and for making memoranda or transcripts therefrom, etc."

Under that act the Supreme Court of Michigan had, prior to the case above mentioned, held that marriage licenses were public records subject to inspection by the public. Notwithstanding its decision in reference to marriage licenses, the Michigan Court in the case above cited held that a hospital record containing information regarding the physical or mental condition of an inmate obtained by the attending physician was not open to inspection by the public, nor could such a record be used in a court of law for the purpose of evidence in pending litigation. The Michigan court cites numerous authorities which hold that public records containing information obtained by a physician in treating his patents are inadmissble in evidence. The court uses the folowing language:

> "They are excluded, not only for the purpose of protecting parties from the disclosure of information imparted in the confidence that must necessarily exist betwen physician and patient, but on grounds of public policy as well. The disclosure by a physician, whether voluntary or involuntary, of the secrets acquired by him while attending upon a patient in his professional capacity naturally shocks our sense of decency and propriety, and this is one reason why the law forbids it. The form in which the statements are sought to be introduced is of no consequence, whether as a witness on the stand or through the medium of an affidavit or certificate."

Upon the reasons given, as set forth above, the Michigan Supreme Court denied to the Insurance Company the privilege of inspecting the hospital records. I am of the opinion that the reasons which you have for refusing the general public access to the vital statistics filed in your office are equally sufficient to sustain your contention. These records contain information, most of them in the nature of privileged communications. Furthermore, the purpose and spirit of the law under which the information is colected is designed to aid the State Board of Health in its activities. I am satisfied that had the concrete case been placed before the legislature when it passed the act it would have inserted a provision in the laws which would have left no doubt that such records were not to be used by the general public for private purposes.

Respectfully,

S. C. FORD,

Attorney General.