

VOLUME NO. 38

OPINION NO. 82

SUBPOENAS - Investigative subpoenas as court orders to compel release of medical records;

MEDICAL PRACTITIONERS - Release of confidential health care information;

HOSPITALS - Release of confidential health care information.

MONTANA CODE ANNOTATED - Sections 50-16-302, 50-16-311, 50-16-314, 46-4-301 to 306.

HELD: A county attorney may, in the course of a criminal investigation, employ an investigative subpoena to compel a health care provider to release confidential health care information.

19 May 1980

Ronald W. Smith, Esq.
Hill County Attorney
Hill County Courthouse
Havre, Montana 59501

Dear Mr. Smith:

You have requested my opinion on the following question:

May a county attorney employ an investigative subpoena to compel a health care provider to produce the results of an examination of a rape victim conducted on request of police officers?

Your question arose from a state of facts in which a hospital refused to divulge the results of an examination of a rape victim, conducted at the request of police, even though the patient/victim consented to release of the information to the county attorney.

Title 50, chapter 16, part 4, MCA, provides that health care providers, such as hospitals, clinics, and physicians, may release "confidential health care information" only if the patient consents or if certain narrowly defined circumstances are present. § 50-16-311, MCA. The statute defines "confidential health care information" broadly to include any information "obtained by a health care provider relating to health care history, diagnosis, condition, treatment, or evaluation." § 50-16-302(3), MCA. This broad definition would include the results of a physical examination of a rape victim.

The statute creates no right of access to confidential health care information. Even if the patient consents, the statute places the health care provider under no obligation to release the information unless compelled to do so by legal process under the limited circumstances set forth in section 50-16-314, MCA:

(1) Except as provided in subsection (2), confidential health care information is not subject to compulsory legal process in any type of proceeding, including any pretrial or other preliminary proceedings, and a person or his authorized representative may refuse to disclose and may prevent a witness from disclosing confidential health care information in any proceeding.

(2) The exemption or privilege provided in subsection (1) does not apply:

(a) when the individual's physical or mental condition is relevant regarding the execution or witnessing of a will or other document;

(b) when the physical or mental condition of an individual is introduced by a party claiming or defending as a successor or beneficiary of the individual;

(c) when an individual makes communications to a psychiatrist in the course of a court-ordered psychiatric examination after having been informed that the communications are admissible only as to issues involving the individual's mental condition;

(d) when required by Rule 35, M.R.Civ.P., or otherwise ordered by a court.

This provision implicitly renders confidential health care information subject to court process, with or without the patient's consent, in those circumstances set forth in subsection (2). In the case of an examination of a rape victim, subdivisions (a), (b) and (c) are inapplicable, as is Rule 35, Mont. R. Civ. P. The county attorney's only recourse is to seek a court order to compel disclosure.

In my opinion, the statutory authority for such an order may be found in sections 46-4-301 to 306, MCA, which provide for the issuance by a district judge or supreme court justice of investigative subpoenas when the administration of justice so requires. Unlike common subpoenas or subpoenas duces tecum, which may be issued without the express approval of a district judge, an investigative subpoena is a discretionary order issued by "any justice of the supreme court or district court judge...commanding the persons to whom they are directed to appear...and give testimony and produce such books, records, papers, documents, and other objects as may be necessary and proper to the investigation." As such it is an order of the court sufficient to compel production of confidential health care information. Compare In re TRW, Inc., 460 F. Supp. 1007 (E.D. Mich. 1978) (grand jury subpoena held to be a "court order" sufficient to compel production of credit records under 15 U.S.C. section 1681b, the Fair Audit Reporting Act).

THEREFORE, IT IS MY OPINION:

A county attorney may, in the course of a criminal investigation, employ an investigative subpoena to compel a health care provider to release confidential health care information.

Very truly yours,

MIKE GREELY
Attorney General