OPINION NO. 96-005

Syllabus:

When records collected for the trauma system registry or the emergency medical services incidence reporting system pursuant to R.C. 4765.06 constitute a medical record, as defined at R.C. 149.43(A)(3), or are confidential, pursuant to the physician-patient privilege of R.C. 2317.02(B), or some other provision of state or federal law, such records do not become public records and the State Board of Emergency Medical Services is not required to disclose such records to the public under R.C. 149.43(B) or R.C. 4765.06. Additionally, in utilizing such non-public records that have been collected in the trauma system registry or emergency medical services incidence reporting system under R.C. 4765.06, the Board is required to maintain the confidentiality of any patient-identifying information contained therein.

To: Roger E. Glick, Executive Administrator, State Board of Emergency Medical Services, Columbus, Ohio
By: Betty D. Montgomery, Attorney General, January 22, 1996

I am in receipt of your letter asking whether "confidential information in patient medical records" becomes a public record when such information is collected for the trauma system registry and the emergency medical services incidence reporting system by the State Board of Emergency Medical Services pursuant to R.C. 4765.06. It is my understanding that you are concerned about the status of this type of information both in records collected from other sources and in records generated by the Board itself.

R.C. 4765.06 requires the State Board of Emergency Medical Services (Board) to establish and maintain two distinct data bases, the trauma system registry and the emergency medical services incidence reporting system. The purpose of the trauma system registry is to collect information regarding the care of trauma victims, including, but not limited to, reports of trauma-related deaths, identification of trauma patients, monitoring of care data, and determination of the amount of uncompensated trauma care provided by facilities. R.C. 4765.06. All persons designated by the Board and any state agency upon request must submit any information the Board has determined necessary to maintain the registry.

The purpose of the emergency medical services incidence reporting system is to collect information regarding the delivery and frequency of emergency medical services, which by definition are services performed by emergency medical technicians or paramedics. R.C.

4765.06; R.C. 4765.01(F). All emergency medical service organizations are required to provide the Board with any information the Board determines necessary to maintain the reporting system. R.C. 4765.06. An emergency medical service organization is a public or private organization that uses emergency medical technicians or paramedics to provide emergency medical services. R.C. 4765.01(G).

The General Assembly has addressed the issue of public access to information collected for these two data bases by the following provisions of R.C. 4765.06:

> In accordance with standards established in rules adopted under section 4765.11 of the Revised Code, the board shall maintain the confidentiality of any information collected under this section that would identify a specific patient of emergency medical services or trauma care, *except as otherwise provided in section 149.43 of the Revised Code.*[1]
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> This section does not restrict, and shall not be construed to restrict, public access to any information used or considered by the board in preparing any report, *unless the information is not a public record under section 149.43 of the Revised Code*. (Emphasis and footnote added.)

The import of this language is that when information collected by the Board *is* a public record under R.C. 149.43, it must be disclosed to the public as required by R.C. 149.43. Additionally,the duty of the Board to keep patient-identifying information confidential does not apply when R.C. 149.43 provides "otherwise." Thus, in instances where R.C. 149.43 requires disclosure, patient-identifying information is not confidential. In other words, the confidentiality provision of R.C. 4765.06 does not require the Board to shield information that is already subject to public access. The initial step in analyzing the status of information collected under R.C. 4765.06 is therefore whether it must be disclosed under R.C. 149.43.

R.C. 149.43(B) requires disclosure to the public of all information that qualifies as a public record, subject only to the exceptions specified in R.C. 149.43(A)(1). *See generally State ex rel. James v. Ohio State Univ.*, 70 Ohio St. 3d 168, 637 N.E.2d 911 (1994); *Dayton Newspapers v. City of Dayton*, 45 Ohio St. 2d 107, 341 N.E.2d 576 (1976). R.C. 149.43(A)(1) defines "public record" as

> any record that is kept by any public office...except medical records, records pertaining to adoption, probation, and parole proceedings, records pertaining to actions under section 2151.85 of the Revised Code and to appeals of actions arising under that section, records listed in division (A) of section 3107.42 of the Revised Code, trial preparation records, confidential law enforcement investigatory records, records containing information that is confidential under section 4112.05 of the Revised Code, DNA records stored in the DNA database pursuant to section 109.573 of the Revised Code, and records the release of which is prohibited by state or federal law.

Pursuant to the definitions in R.C. 149.011, the Board is a public office and the data collected

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[1] Similar language appears in R.C. 4765.10(C) and R.C. 4765.11(A)(20), which govern the rulemaking authority of the Board.

under R.C. 4765.06 are records; therefore, the issue presented is whether such records fall within one of the recognized exceptions to disclosure. Any records collected by the Board that do not fall within one of the exceptions listed in R.C. 149.43(A) must be disclosed to the public pursuant to R.C. 149.43(B) and R.C. 4765.06. Conversely, the Board is not required to disclose any records that do fall within the enumerated exceptions and, like the original recordholders, the Board must maintain the confidentiality of any patient-identifying information therein.

As you have indicated in your request and as is apparent from the nature of the trauma system registry and emergency medical services incidence reporting system, much of the information collected will be medical in nature. Thus, two of the exceptions to the public record law are particularly pertinent to your inquiry. The first of these is the general exception provided for medical records. The second is the exception for "records the release of which is prohibited by state or federal law," which is pertinent because medical information often is subject to express confidentiality requirements. These are not mutually exclusive categories and it is probable that some records collected by the Board will be subject to both of these exceptions.

The term "medical record" is defined for purposes of public records law 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." R.C. 149.43(A)(3). This definition does not limit medical records to documents produced by physicians, but it does require that the documents be generated in the course of actual treatment. *See generally State ex rel. Multimedia Inc. v. Snowden*, 72 Ohio St. 3d 141, 144-45, 647 N.E.2d 1374, 1379 (1995) (psychological report sought as part of hiring process was not a medical record). Applying this definition, courts have held that hospital emergency room records and emergency medical run sheets that document treatment of a living patient are medical records. *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. NBC v. City of Cleveland*, 82 Ohio App. 3d 202, 214, 611 N.E.2d 838, 845-46 (Cuyahoga County 1992), *appeal dismissed*, 66 Ohio St. 3d 1428, 608 N.E.2d 758 (1993); *see also Sheely v. Norris*, No. 92-P-0028, 1993 Ohio App. LEXIS 5205 (Portage County Oct. 7, 1993). An emergency medical run sheet that indicates an individual was dead when the emergency squad arrived, however, is not generated in the process of treatment and is not a medical record. *State ex rel. NBC,* 82 Ohio App. 3d at 214, 611 N.E.2d at 846; *State ex rel. Ware v. City of Cleveland*, 55 Ohio App. 3d 75, 77, 562 N.E.2d 946, 948 (Cuyahoga County 1989).

Because of the treatment requirement, records created by the coroner are also excluded from the definition of medical records for purposes of the public records law. Routine records made by the coroner are public records. R.C. 313.10; *State ex rel. Dayton Newspapers, Inc. v. Rauch*, 12 Ohio St. 3d 100, 101, 465 N.E.2d 458, 459-60 (1984). Records made by the coroner as part of a criminal investigation, however, are included in the definition of confidential law enforcement investigatory records as "specific investigatory work product," and are, therefore, not subject to disclosure. R.C. 149.43(A)(2)(c); *State ex rel. Dayton Newspapers*, 12 Ohio St. 3d at 100, 465 N.E.2d at 459 (autopsy in homicide case); *State ex rel. Martinelli v. Corrigan*, 71 Ohio App. 3d 243, 247, 593 N.E.2d 364, 367 (Cuyahoga County 1991) (autopsy and forensic records in homicide case). To the extent that a coroner may have collected records from other sources that qualify as medical records in their own right, such

records retain their exemption from disclosure in the hands of the coroner. *Cf. Sheely*, 1993 Ohio App. LEXIS 5205 at *8 (emergency room report and surgical pathology report in prosecutor's case file not subject to disclosure); *Ingraham v. Ribar*, 80 Ohio App. 3d 29, 33, 608 N.E.2d 815, 817-18 (Medina County 1992) (medical records held in sheriff's case file not subject to disclosure).

If medical information is subject to express confidentiality requirements, it is subject to the public records exception for "records the release of which is prohibited by state or federal law." R.C. 149.43(A). For example, pursuant to R.C. 2317.02(B)(1), a physician is prohibited from testifying with respect to communications with a patient except under specified circumstances. In addition, pursuant to R.C. 4731.22(B)(4), a physician is subject to disciplinary action by the State Medical Board for betrayal of a professional confidence. Although these two prohibitions against disclosure are directed to physicians, these statutes also serve to remove privileged physician-patient communications in the hands of a public office from the definition of public record. *Cf. Woodman v. City of Lakewood*, 44 Ohio App. 3d 118, 541 N.E.2d 1084 (Cuyahoga County 1988) (determining attorney-client communications are not public records based on analogous restrictions on disclosure), *juris. mot. overruled*, 39 Ohio St. 3d 706, 534 N.E.2d 89 (1988). Examples of other prohibitions against the disclosure of medical information that could be pertinent to records collected by the Board under R.C. 4765.06 include those dealing with disclosure of the identity of persons diagnosed with AIDs or related conditions, R.C. 3701.243, those dealing with disclosure of information regarding medicaid recipients, 42 U.S.C § 1396a(a)(7); 42 C.F.R. §§ 431.301-.306; 12 Ohio Admin. Code § 5101:1-1-03, and those dealing with the confidentiality of nursing home patient records, 42 U.S.C. § 1396r(c)(1)(A)(iv); R.C. 3721.13(A)(10). When the release of a record collected by the Board is prohibited by state or federal law, the Board may release the record only under the conditions, if any, specified in the pertinent law.

The physician-patient privilege is limited by statute to patient communications with physicians and dentists. R.C. 2317.02(B)(1). The Ohio Supreme Court has declined to use agency theory as a basis for extending this privilege to other medical personnel. *See Weis v. Weis*, 147 Ohio St. 416, 72 N.E.2d 245 (1947) (holding that nursing notes in a hospital record were not subject to privilege); *see also State v. McDermott*, 72 Ohio St. 3d 570, 573-72, 651 N.E.2d 985, 988 (1995) (explaining how *Weis* applies in the context of the attorney-client privilege). Thus, the physician-patient privilege does not necessarily apply to all records that qualify as "medical records" under R.C. 149.43(A)(3). However, the statutory definition of "communications" at R.C. 2317.02(B)(4)(a) has been expanded since the *Weis* decision, and a number of Ohio appellate courts have held that this statutory definition is now broad enough to include records of observations by ancillary medical personnel when such personnel are assisting a physician in treatment or diagnosis of a patient. *See, e.g., State v. Wells*, No. C-940307, 1994 Ohio App. LEXIS 5721 (Hamilton County Dec. 21, 1994); *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), *mot. for leave to appeal overruled*, 61 Ohio St. 3d 1427, 575 N.E.2d 216 (1991); *Johnston v. Miami Valley Hosp.*, 61 Ohio App. 3d 81, 84-85, 572 N.E.2d 169, 171 (Montgomery County 1989), *juris. mot. overruled*, 44 Ohio St. 3d 706, 541 N.E.2d 626 (1989). Thus, even though emergency medical services are provided by emergency medical technicians or paramedics rather than by physicians, to the extent the records of such services are intended to assist a physician in treatment, such records may be subject to the

physician-patient privilege[2] in addition to qualifying as medical records under R.C. 149.43(A)(3). Regardless of the particular public records exception or exceptions applicable to a record collected by the Board, if the record is not a public record, the public has no right of access to the record and the Board is not required to disclose it under the provisions of R.C. 149.43(B) or R.C. 4765.06.

When the Board itself utilizes the records collected for the trauma system registry or the emergency medical services incidence reporting system, such use will generate additional records, such as reports or meeting minutes, that incorporate information from the original records collected for the two data bases. Like the records collected from other sources, any records generated by the Board itself are public records unless one of the exceptions provided in R.C. 149.43(A) applies. The exceptions to public records discussed above do not apply to records generated by the Board itself. The Board does not provide any treatment to patients, thus its own records do not qualify as medical records and are not subject to the physician-patient privilege. Nor is there any statute prohibiting the release of records created by the Board as such. R.C. 4765.06 does impose a duty on the Board to maintain the confidentiality of any information in non-public records collected pursuant to R.C. 4765.06 that would identify a specific patient of emergency medical services or trauma care. *See also* R.C. 4765.10(C); 4765.11(A)(20).[3] Thus, this particular information is excepted from the definition of public record because it cannot be released as a matter of law.

In light of this particularized confidentiality requirement and the fact that the Board's own records are public records, the Board must exercise care in its handling of patient-identifying information derived from non-public records. R.C. 4765.10(C) provides that "[i]n any report prepared by the Board, information regarding patients or recipients of emergency medical services or trauma care shall be presented only in aggregate statistical form." Thus, at least with respect to "reports," the Board is directed not to include any patient-identifying information in the document in the first place. To the extent that patient-identifying information from a non-public record is incorporated into some other type of public record created by the Board, the Board must redact the patient-identifying information but is required to release the remainder of the record. *See generally State ex rel. Fostoria Daily Review Co. v. Fostoria Hosp. Ass'n*, 40 Ohio St. 3d 10, 13, 531 N.E.2d 313, 316 (1988).

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[2] For instances in which the physician-patient privilege has been held not to apply to observations of ancillary medical personnel, see *State v. Grant*, No. 92-L-037 (Ct. App. Lake County July 16, 1993) (unreported); *Thomas v. Pierce*, No. 15859, 1993 Ohio App. LEXIS 2301 (Summit County Apr. 28, 1993); *In re Washburn*, 70 Ohio App. 3d 178, 590 N.E.2d 855 (Wyandot County 1990); *State v. McKinnon*, 38 Ohio App. 3d 28, 525 N.E.2d 821 (Summit County 1987).

[3] There is no definition in R.C. 4765.06 or elsewhere in R.C. Chapter 4765 of what constitutes information that would identify a specific patient of trauma care or emergency medical services. An analogous statute governing information collected for the health care data center, requires the confidentiality of "any information...that identifies an individual, including information pertaining to medical history, genetic information, and medical or psychological diagnosis, prognosis, and treatment." R.C. 3729.46(B).

It is, therefore, my conclusion, and I hereby advise you that when records collected for the trauma system registry or the emergency medical services incidence reporting system pursuant to R.C. 4765.06 constitute a medical record, as defined at R.C. 149.43(A)(3), or are confidential, pursuant to the physician-patient privilege of R.C. 2317.02(B), or some other provision of state or federal law, such records do not become public records and the State Board of Emergency Medical Services is not required to disclose such records to the public under R.C. 149.43(B) or R.C. 4765.06. Additionally, in utilizing such non-public records that have been collected in the trauma system registry or emergency medical services incidence reporting system under R.C. 4765.06, the Board is required to maintain the confidentiality of any patient-identifying information contained therein.