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OPINION	:	No. CV 78-26
of	:	February 9, 1979
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SUBJECT: ACCESS TO RECORDS—A patient's advocate has the right of access to records in treatment facilities specified in Welfare and Institutions Code section 5325. As to other facilities, such right of access is limited by Welfare and Institutions Code section 5238.

The Honorable Dale H. Farabee, M.D., Director of the Department of Mental Health, has requested an opinion on the following questions:

1. Does a Patients' Advocate, if he is a county mental health employee assigned pursuant to Title 9, California Administrative Code section 863, *et seq*., have the right of access to the records in *all* facilities specified in Welfare and Institutions Code section 5325, whether the facility is operated under contract with the county (including federal facilities) or is privately operated?

2. Does a Patients' Advocate, who is operating under contract with the county have access to confidential records to the same degree as the county-employed advocate?

3. Does the right of access to records extend beyond the discharge date of the patient?

The conclusions are:

1. A patients' advocate has a right of access to records in the treatment facilities referred to in question 1 to the extent that such facilities participate in a local mental health program under the jurisdiction of the local director who appointed the advocate. As to other facilities, such right of access is limited by Welfare and Institutions Code section 5238 requiring patient consent before such records can be released. However, once the required consent is obtained, the right of access is effective in facilities that are operated under a contract with the county and in facilities that are privately operated. This conclusion does not include federal facilities. An answer with respect to federal facilities requires that the particular type of facility be specified since each type of federal facility is governed by the regulations of the particular federal agency operating such facility.

2. The statutes make no distinctions between county-employed advocates and other advocates in connection with the right of access to confidential records.

3. The right of access to records extends beyond the discharge date of the patient.

ANALYSIS

The present question involves a reconciling of the provisions of two sections of the Welfare and Institutions Code, one affording specific rights to patients of mental treatment facilities (Welf. & Inst. Code, § 5325,[1] the other affording protection to the right of privacy of such patients by providing for the confidentiality of their treatment information and records (§ 5328)).[2]

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[1] Hereafter all section references are to the Welfare and Institutions Code unless otherwise specified.

[2] Section 5325 provides that "Each person involuntarily detained for evaluation or treatment under provisions of this part, each person admitted as a voluntary patient for psychiatric evaluation or treatment to any facility as defined in Section 1250 of the Health and Safety Code in which psychiatric evaluation or treatment is offered, and each mentally retarded person committed to a state hospital pursuant to Article 5 (commencing with Section 6500), Chapter 2 of Part 2 of Division 6 shall have the following rights . . . ."

The statute then specifies that the patient has the right to wear his own clothes and keep and use his own personal possessions and keep and spend a reasonable sum of money. The statute also provides for the right to private storage space, to see visitors daily, to have reasonable access to phones, and to letter writing material, to receive and send unopened mail, and to refuse convulsive treatment and psychosurgery.

Section 5328 provides:

"All information and records obtained in the course of providing services under

Division 5 (commencing with Section 5000), Division 6 (commencing with Section 6000), or Division 7 (commencing with Section 7000), to either voluntary or involuntary recipients of services shall be confidential. Information and records may be disclosed only:

"(a) In communications between qualified professional persons in the provision of services or appropriate referrals, or in the course of conservatorship proceedings. The consent of the patient, or his guardian or conservator must be obtained before information or records may be disclosed by a professional person employed by a facility to a professional person not employed by the facility who does not have the medical responsibility for the patient's care;

"(b) When the patient, with the approval of the psychiatrist or licensed psychologist in charge of the patient, designates persons to whom information or records may be released, except that nothing in this article shall be construed to compel a physician, psychologist, social worker, nurse, attorney, or other professional person to reveal information which has been given to him in confidence by members of a patient's family;

"(c) To the extent necessary for a recipient to make a claim, on behalf of a recipient for aid, insurance, or medical assistance to which he may be entitled;

"(d) If the recipient of services is a minor, ward, or conservatee, and his parent, guardian, or conservator designates, in writing, persons to whom records or information may be disclosed, except that nothing in this article shall be construed to compel a physician, psychologist, social worker, nurse, attorney, or other professional person to reveal information which has been given to him in confidence by members of a patient's family;

"(e) For research, provided that the Director of Mental Health designates by regulation, rules for the conduct of research. Such rules shall include, but need not be limited to, the requirement that all researchers must sign an oath of confidentiality:

" . . . . . .

"(f) To the courts, as necessary to the administration of justice;

"(g) To governmental law enforcement agencies as needed for the protection of federal and state elective constitutional officers and their families;

"(h) To the Senate Rules Committee or the Assembly Rules Committee for the purposes of legislative investigation authorized by such committee;

"(i) If the recipient of services who applies for life or disability insurance designates in writing the insurer to which records or information may be disclosed;

"(j) To the attorney for the patient in any and all proceedings upon presentation of a release of information signed by the patient, except that when the patient is unable to sign such release, the staff of the facility, upon satisfying itself of the identity of said attorney, and of the fact that the attorney does represent the interests of the patient, may release all information and records relating to the patient except that nothing in this article shall be construed to compel a physician, psychologist, social worker, nurse,

In order to effectively assure observance of the rights afforded to patients by section 5325, regulations were promulgated establishing a system of so-called "patients' advocates." (Cal. Admin. Code, tit. 9, §§ 860–868.)[3] Under these rules a "patient's advocate" is the person in a local mental health program assigned by the county mental health director to ensure that mental patients are afforded their rights by "handling" complaints regarding abuses or unreasonable denial of such rights (Cal. Admin. Code, tit. 9, §§ 863, 863.1, 863.2). The basic question here is whether such an advocate, in pursuit of his duties, has access to the patient's treatment records in view of the restrictions placed upon access to such records by section 5328.

We first note section 5326.1 which provides:

> "Quarterly, each local mental health director shall report to the Director of Mental Health, by facility, the number of persons whose rights were denied and the right or rights which were denied. The content of *these reports shall enable the Director of Mental Health to identify individual treatment records, if necessary, for further analysis and investigation.* These quarterly reports, except for the identity of the person whose rights are denied, shall be available, upon request, to Members of the State Legislature, or a member of a county board of supervisors.
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> "Information pertaining to a denial of rights contained in the person s treatment record shall be made available, on request, to the person, his

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attorney, or other professional person to reveal information which has been given to him in confidence by members of a patient's family;

"(k) Upon written agreement by a person previously confined in or otherwise treated by a facility, the professional person in charge of the facility or his designee may release any information, except information which has been given in confidence by members of the person's family, requested by a probation officer charged with the evaluation of the person after his conviction of a crime if the professional person in charge of the facility determines that such information is relevant to the evaluation. Such agreement shall only be operative until sentence is passed on the crime of which the person was convicted. The confidential information released pursuant to this subdivision shall be transmitted to the court separately from the probation report and shall not be placed in the probation report. The confidential information shall remain confidential except for purposes of sentencing. After sentencing, the confidential information shall be sealed.

" . . . . .

[3] See sections 5326, 5326.95 and 5400 authorizing the Director of Mental Health to promulgate such regulations.

> attorney, his conservator or guardian, or the State Department of Mental Health. Such information, except for the identity of the person whose rights are denied, shall be made available to the Members of the State Legislature or a member of a county board of supervisors."
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> (Emphasis added. See also Cal. Admin. Code, tit. 9, § 866.)

This section thus contemplates that individual treatment records shall be available to the Director of Mental Health to enable him to investigate, monitor and control abuses and denials of patients' rights. (See *Aden v. Younger* (1976) 57 Cal. App. 3d 662, 681.)[4] This section, which is specifically related to access to patient treatment records by the director in the fulfillment of his duty to protect patients' rights, constitutes an exception to section 5326 which is a general provision placing limitations upon access to such records.

> " . . . It is the general rule that where the general statute standing alone would include the same matter as the special act, and thus conflict with it, the special act will be considered as an exception to the general statute whether it was passed before or after such general enactment. (*People v. Gilbert* (1969) 1 Cal. 3d 475, 479. See also Code Civ. Proc., § 1859.)

Since section 5326.1 affords the Director the right of access to such records, without qualification, he may, if acting pursuant to his duties under section 5326.1, acquire such records without the necessity of first securing the patient's consent as required by section 5828. (See 53 Ops. Cal. Atty. Gen. 151, 158 (1970).)

But it is self-evident that the Director of the Department of Mental Health cannot personally undertake the investigation of all complaints alleging a denial of patient's rights and personally examine all of the pertinent treatment records. Like many other statutory duties conferred upon department heads, the duty of monitoring patients' rights must be subject to the power of being delegated to others if it is to be implemented with any reasonable degree of effectiveness. This administrative reality is reflected in Government Code section 11182 which provides that a department head may delegate his investigative power to officers in his department. It is also reflected in section 7 which provides:

> "Whenever, by the provisions of this code, a power is granted to a public officer of a duty imposed upon such an officer, the power may be exercised or the duty performed by a deputy of the officer or by a person authorized pursuant to law by the officer, unless it is expressly otherwise

[4] See also section 5326.9 further delineating the Director's investigative duties concerning denials of patients' rights.

provided."

An appropriate exercise of this power of delegation with respect to the duties in question here is evidenced in Title 9, California Administrative Code, section 863 subdivision (a) which provides:

> "The 'Patients' Rights Specialist' means the person in the Headquarters Office of the Department of Health delegated the responsibility for ensuring that mentally and developmentally disabled persons in facilities providing mental health services or residential care are afforded their statutory and constitutional rights."

We would thus conclude that like his principal, the Director of Mental Health, the "Patients' Rights Specialist" has the power of access to all patient treatment records reported under section 5326.1, which are pertinent to his investigations concerning patients' rights, unrestricted by the limitations of section 5328.

The possibility has been suggested that the Director of Mental Health may also delegate such power to "patients' advocates." We are, however, unable to conclude that the Director's authority to delegate this power extends to the subject of the present opinion request "patients' advocates" (Cal. Admin. Code, tit. 9, § 863 subdivision (b)), who are not part of the Department of Mental Health, nor designated by its director, but are designated in each locality by the particular county mental health director. (Cal. Admin. Code, tit. 9, § 863.1.)

The primary basis for concluding that this power is so limited is the proposition that any exceptions to the provisions for the confidentiality of treatment information and records under section 5328 are to be strictly construed. (*County of Riverside v. Superior Court* (1974) 42 Cal. App. 3d 478, 481; 53 Ops. Cal. Atty. Gen., *supra*, at pp. 156–157.)

The profound significance of the maintenance of confidentiality to the interests of the patient was recognized by the court in *Aden v. Younger, supra*, 57 Cal. App. 3d 662, which stated:

> " . . . The means of alleviating mental disorders generate their own kinds of fear and misunderstanding. This attitude touches our public affairs; the fact of treatment alone may impair our confidence in people of unquestioned talent and industry. Psychosurgery and (ECT) are viewed, rightly or wrongly, as drastic, radical forms of treatment compared to psychotherapy or drug therapy, and indicative of more severe illness. Public exposure, or even disclosure to limited numbers of government

> representatives, may have a chilling effect on patients' efforts to undergo these treatments, thereby restricting their freedom of thought." (Emphasis added. *Id*. at p. 680.)

Thus, even as to government employees, the operative policy of the statute constrains a narrowly drawn circle, excluding all but those who are specifically included. Accordingly, in *County of Riverside v. Superior Court*, *supra*, 42 Cal. App. 3d 478, the State Board of Chiropractic Examiners, acting to discipline a chiropractor for intemperance, was, pursuant to section 5328, denied access to records relating to the treatment of the chiropractor for alcoholism (*Id*. an p. 480). In denying such access to the state board, the court noted that the statute made no specific exception permitting disclosure to administrative agencies, and then stated:

> " . . . in section 5328 and succeeding sections the Legislature has specifically provided for disclosure to certain persons or agencies under certain circumstances. Had the Legislature intended to permit disclosure to administrative agencies such as State Board it would doubtless have added a specific authorization for such disclosure. (See, e.g., § 5328.2 . . .) Under the familiar maxim of *expressio unius est exclusio alterious* it is well settled that, when a statute expressed certain exceptions to a general rule, other exceptions are necessarily excluded." (*Id*. at p. 481. See also 53 Ops. Cal. Atty. Gen., *supra*, at pp. 156–157.)

As we have noted, the authority of the Director of Mental Health to procure treatment records, pursuant to section 5326.1, constitutes a statutorily authorized exception to the confidentiality restrictions of section 5328. Thus the requirement that such exceptions be strictly construed, and a pervading policy in favor of maintaining confidentiality (see Stats. 1976, Ch. 1109, § 1, p. 4992), of necessity requires a narrow delineation of the extent of the director's power to delegate this authority to others. As noted, the sections affording to the director the power of delegation provide that powers may be delegated to an authorized "officer of the department" (Gov. Code, § 11182) or to a "deputy of the [director] or by a person authorized pursuant to law by the [director] . . ." (§ 7.) Therefore, we conclude that the director's authority to delegate his power of access to treatment records (and thereby expand, in effect, an exception to the confidentiality provisions of section 5328) does not extend to one who is not an officer in his department or to one who is not designated by the director to exercise such power of access. Consequently, such authority to delegate would not comprehend the "patients' advocate" (Cal. Admin. Code, tit. 9, § 863 subdivision (b)), since, as noted above, he is not an employee of the director's department, nor indeed is he one who is even designated by someone in the director's department, or by someone subject to the director's managerial control. (Cal. Admin. Code, tit. 9, § 863.1.)

However, while concluding that the State Director of Mental Health's authority to delegate his power of record access does not extend to the locally designated patients' advocate, we note that a local mental health director also has the authority under section 7 to delegate his powers to "person[s] authorized pursuant to law by the officer." Since under the Administrative Code, the patients' advocate is defined as the person "delegated the responsibility" for ensuring that patients are afforded their rights (Cal. Admin. Code, tit. 9, § 863 subdivision (b)), and since in is specifically provided that such advocate shall be assigned by the local mental health director to handle complaints of denials of such rights (Cal. Admin. Code, tit. 9, § 863.1 subdivision (a)), it follows that the local director can delegate his power of access to records to his designated patients' advocate.

But the question that arises is, what is the extent of this power of access possessed by the local director? The answer to this question would appear to be provided by section 5607 which delineates the powers and duties of local directors. Among other things, that section provides that the local director "shall exercise general supervision over mental health services provided under the County Short-Doyle plan" (§ 5608 subdivision (c). See section 5600 describing the purpose of the Short-Doyle Act as establishing a system of locally administered and controlled mental health programs, and section 5651 specifying the elements of a Short-Doyle plan which are to include services provided state, county and private resources.) Section 5607 similarly provides that 'local mental health services shall be administered by a local director of mental health services. . . ."

This express statutory obligation of the local director to supervise the providing of mental health services under the local program, of necessity, requires the ability to examine the records of such services. "It is well settled in this state that governmental officials may exercise such additional powers expressly granted by statute, or *as may fairly be implied* from the statute granting the powers. (*Dickey v. Raisin Proration Zone No. 1* (1944) 24 Cal. 2d 796, 811; (court's emphasis).) Consequently, the local director has the power of access to the treatment records of all facilities providing mental health services in the program under his supervisory jurisdiction. (Such facilities may be either public or private (§ 5650).) It is this power of access that he can delegate to his designated patients' advocate pursuant to the duty of ensuring that mental health services are being provided in accordance with the statutory rights of the patients. (See Cal. Admin. Code, tit. 9, §§ 863 subdivision (b), 863.1 subdivision (a).) This power derived from the specific authority to supervise the mental health services in a local program would, as in the case of the state director's powers, constitute an exception to the confidentiality provisions of § 5328.[5]

[5] In concluding that a patients' advocate possesses a right of access to treatment records through delegation from the local director, it must be emphasized that the advocate is subject to the same restrictions on dissemination of such information, that the confidentiality provisions of section 5328 imposes upon the director himself.

Such a power does not, of course, extend to facilities which are not under the local director's jurisdiction.

However, our noting this limitation on the power of access does not amount to our determining that patients' advocates do not have access to patient records in those facilities not within the local program. What we do note is that such access is subject to the restrictions of section 5328. Section 5328 expressly allows disclosures of treatment information and records to any person who has been designated by the patient, with the approval of his psychiatrist or psychologist to receive such material (§ 5328 subdivision (b)), or has been so designated by the patient's parent, guardian or conservator, if the patient is a minor, ward or conservatee. (§ 5328 subdivision (d).)

The operation of such consent and approval is not limited by the statute to any particular type or class of treatment facility. Thus the patient or, where appropriate, his guardian can consent to the patients' advocate's access to the records of that patient in any facility, public or private, in which they might be kept.

We would, however, note one limitation in this regard: federal facilities. (Included in the present opinion request's enumeration of facilities are federal facilities operated under contract with the county.)

With respect to such facilities, the question of access to their records is governed by the proposition that state law cannot control the manner in which the federal government operates its own agencies and facilities. (*Ohio v. Thomas* (1899) 173 U.S. 276, 282–283; *Mann v. United States* (9th Cir. 1965) 347 F.2d 970, 974; *City of Los Angeles v. United States* (C.D. Cal. 1972) 355 F. Supp. 461, 464–465; U. S. Const., art. VI, cl. 2.)

Thus, the provisions of section 5328 do not establish the criteria for access to treatment records in federal facilities. Since each federal agency is governed by its own regulations regarding access to the records in the particular facilities it operates (see, e.g., 38 C.F.R. §§ 1.500–1.558 (1977) relating to access to records in veterans' administration facilities, and 42 C.F.R. §§ 1.101–1.180 (1977) relating to such access in public health facilities), we are unable to provide an answer that would be applicable to "federal facilities" in general. For a determination regarding access to federal facilities, the particular type of facility would first have to be specified, and the federal regulations pertinent to that facility would then have to be analyzed.

The next question considered is whether the degree of access to treatment records is the same for advocates operating under contract with the county as it is for advocates employed by the county.

As to the facilities in the local program under the local director's jurisdiction, we have already noted that the advocate's power of access to their records is derived through delegation from such director.

As provided in section 7, the local director can delegate his power to his deputy or to a person authorized pursuant to law" by the director. The Administrative Code describes the "patient's advocate" as the "person in a local mental health program" who has been delegated the responsibility for protecting patient's rights (Cal. Admin. Code, tit. 9, § 863 subdivision (b)).

This unqualified use of the term "person" in delineating the power to delegate or in defining a "patient's advocate" negates any basis for distinguishing between patient's advocates on the basis of their employment relationship with the county.

There is also a similar lack of basis for such distinction in connection with facilities not in the local program. As has already been noted, absent a specific exception, a government employee is afforded no greater status under section 5328 with respect to the right of access, as is a private person (see *County of Riverside v. Superior Court*, *supra*, 42 Cal. App. 3d at 481). Thus, so long as there has been compliance with the patient consent requirements of section 5328, the right of access to the consenting patient's treatment records in facilities outside of the local program, is the same whether the advocate is a county employee or an employee under contract with the county.

The final question presented is whether the right of access extends beyond the date of the patient's discharge.

Relevant to this question is the fact that the impact upon a patient of a violation of some of the rights afforded by section 5325, such as the right to refuse psychosurgery (§ 5325(g)) or the right to refuse convulsive treatment (§ 5325(f)), can, in significant dimensions, clearly persist long after the patient's discharge. (See Barnhart, Pinkerton and Roth, *Informal Consent to Organic Behavior Control* (1977) 17 Santa Clara law. 39, 57–63.) Thus, the fact that a patient has been discharged is irrelevant to the necessity of vindicating a violation of such rights. There is nothing in the terms of section 5328 which limits access to records only to the time prior to a patient's discharge, and if the patient has properly consented to such access, the statutory objective of confidentiality would be satisfied and would not require termination of such access merely because of such discharge.

On the other hand, because the necessity for investigating a rights violation would not necessarily terminate on the date of the patients' discharge, the purposes of securing the rights specified in section 5325 require a conclusion that the records remain available

after the date of discharge. Such a conclusion comports with a basic rule of statutory construction that statutes are to be construed so as to promote their objects and purposes. (*Steilberg v. Lacknei* (1977) 69 Cal. App. 3d 780, 785.)

In addition, persuasive support for this conclusion is afforded by the fact that in 1970 the Legislature deleted[6] from section 5328 subdivision (b) a provision added to that section in 1968 which provided that a record could not be released "after six months have elapsed since the record was made."[7] Thus, the Legislature has indicated by this deletion, an intent to eliminate durational limitations on the right of access to records.

We thus conclude that a patient's advocate's right of access to treatment records is not terminated by the discharge of the patient.

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[6] (Stats. 1970, ch. 592, § 1, pp. 1174-1175.)

[7] (Stats. 1968, ch. 1374, § 48, p. 2659.)