

## Opinion No. 42-4073

April 22, 1942

**BY:** EDWARD P. CHASE, Attorney General

**TO:** Dr. J. J. Johnson Superintendent New Mexico State Hospital Las Vegas, New Mexico

{\*186} By your letters of April 8 and 17, 1942, you have requested an opinion of this office as to whether or not attorneys may examine records kept in the New Mexico State Hospital, which records relate to the individual patients who are, or have been, confined, paroled or discharged therefrom or are deceased.

The statutes relating to the New Mexico State Hospital do not specify that records relating to patients must be kept, but Section 130-307, 1929 Compilation, specifies that it is the duty of the Board of Directors of the Hospital to promulgate rules and regulations for the government of said hospital, its employees and inmates. Under this broad provision, the Board has probably prescribed that records be kept as to each individual patient, that is, as to the date of admittance, nature of ailment, treatment given, response to treatment and whether the patient was discharged, paroled or became deceased.

If these records are public records, they may be inspected by certain persons under certain conditions. A general statement as to what constitutes a public record will be found in 23 R. C. L., page 155, Section 2, a part of which is here quoted for your convenience:

"It is said that a public record is one required by law to be kept, or necessary to be kept, or directed by law to serve as a memorial and evidence of something written, said or done. In all instances where by law or regulation a document is filed in a public office and required to be kept there, it is of public nature, but this is not quite inclusive of all that may properly be considered public records. For whenever a written record of the transactions of a public officer in his office is a convenient and appropriate mode of discharging the duties of his office, it is not only his right but his duty to keep that memorial, whether expressly required so to do or not; and when kept it becomes a public document -- a public record belonging to the office and not to the officer; it is the property of the state and not of the citizen, and is in no sense a private memorandum. So it is held that while a public officer may not be required to prepare an index to the books in his office, yet if he does do so in the administration of the office, the index is so far a public record that he cannot remove it at the end of his term."

It is stated in 53 C. J., page 604, Section 1, that:

"Memoranda of public officers made for their own convenience, even if made at the public expense, are not public records unless made so by statute."

And further:

"In the absence of statute, the nature and purpose of the record, and possibly, custom, usage, must be the guide in determining the class to which it belongs."

{\*187} No case can be found where records of the nature here involved are said to be either public records or private records.

In view of the circumstances surrounding the keeping of these records, I find it hard to say that they are not public records. In view of the provisions of Section 130-307, New Mexico Statutes Annotated, 1929 Compilation, I think that it would be appropriate for the Board of Directors of the Hospital to adopt certain rules and regulations prescribing that certain of the hospital records relating to individual patients are public records and that certain interested persons may make inspection thereof at fixed times for legitimate purposes, unless detrimental to the public interest.

You have also asked to be advised as to whether or not "a permit must be obtained to autopsy patients who have died in this institution."

Your attention is called to Section 79-1101, New Mexico Statutes Annotated, 1929 Compilation, which provides:

"It shall be the duty of each justice of the peace within his respective precinct, to inquire into and investigate the cause of the death of any human being that shall be found dead in the precinct of said justice of the peace, when it may appear that said death was caused by violence or any other illegal means, and it is hereby made the duty of every justice of the peace, when required so to do in writing, by any two persons, heads of families and voters in the precinct, to examine and inquire into the cause of the death of any human being, be the cause of the death what it may."

The above quoted section is the only one which I have been able to find which has any connection whatsoever with autopsies. It seems that under this section any two persons may request in writing the examination of a dead body for the purpose of determining the cause of death and that the justice of the peace in the precinct shall thereupon order an inquest. The hospital authorities might follow this same procedure if it should be their desire to determine the cause of death of one of the patients of the institution. This procedure might not be necessary if you can obtain the consent of parent, guardian or spouse of patients.

By GEO. H. HUNKER, Jr.,

Asst. Atty. General