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OPINION
OF
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Opinion No. 88-16

By: Lesley J. Lowe
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To: Gerald B. Stuyvesant, Director
Worker's Compensation Division
New Mexico Department of Labor
Albuquerque, New Mexico 87125-7198

QUESTION:

What information may be released to the public from Worker's Compensation Division files on particular worker's compensation cases?

CONCLUSION:

See analysis.

ANALYSIS:

I. General Principles

Section 14-2-1 NMSA 1978 (1987 Supp.) states:

Every citizen of this state has a right to inspect any public records of this state except:

A. records pertaining to physical or mental examinations and medical treatment of persons confined to any institutions;

B. letters of reference concerning employment, licensing or permits;

C. letters or memorandums which are matters of opinion in personnel files or student's cumulative files;

D. as provided by the Confidential Materials Act [14-3A-1, 14-3A-2 NMSA 1978]; and

E. as otherwise provided by law.

"Public records" are records that are required by law to be kept or necessarily are kept in discharge of a duty imposed by law. State ex rel. Newsome v. Alarid, 90 N.M. 790, 795, 568 P.2d 1236, 1241 (1977); Att'y Gen. Op. 69-89; Att'y Gen. Op. 66-131. A citizen has a fundamental right to have access to public records. Alarid, 90 N.M. at 797, 568 P.2d at 1243; Section 14-2-1 NMSA 1978 (1987 Supp.). The first issue therefore is whether worker's compensation claim files are "public records" within the meaning of Section 14-2-1.

Sections 52-1-31 and 52-1-58 of the Worker's Compensation Act, Chapter 52 NMSA 1978, requires the New Mexico Department of Labor, i.e., Worker's Compensation Division ("Division"), to maintain worker's compensation claim files. The Division maintains these files in the course of its statutory function of adjudicating claims filed by workers, which makes them "public records." Worker's compensation records traditionally have been held to constitute "public records" within the meaning of state "freedom of information" laws. Indus. Comm'n v. Holohan, 97 Ariz. 122, 397 P.2d 624 (1964); Rosenthal v. Hansen, 34 Cal. App. 3d 754, 110 Cal. Rptr. 257 (1973); Indus. Found. of South v. Texas Indus. Accident Bd., 540 S.W.2d 668 (Tex. Civ. App. 1976), cert. denied, 430 U.S. 931 (1976).

The second issue is the extent to which medical records generally are exempt from public inspection. Section 14-6-1 NMSA 1978 provides: "All health information that relates to and identifies specific individuals as patients is strictly confidential and shall not be a matter of public record or accessible to the public even though the information is in the custody of or maintained in the records of a governmental agency or its agent." Subsection 14-2-1(A) also states that records "pertaining to physical or mental examinations and medical treatment of persons confined to any institutions" are exempt from public inspection. The court in Alarid interpreted this subsection to include records pertaining to "illness, injury, disability, inability to perform a job task,

and sick leave." 90 N.M. at 794, 568 P.2d at 1240. Similar medical records contained in worker's compensation claim files therefore would be exempt from disclosure.

To the extent, however, any medical records that otherwise are exempt from disclosure are introduced into evidence during the course of a formal worker's compensation hearing, which is open to the public pursuant to Section 52-5-7 NMSA 1978, such records lose their exempt status and may be inspected by the public. Alarid, 90 N.M. at 784, 568 P.2d at 1240. The Supreme court of New Mexico in State ex rel. Bingaman v. Brennan, 98 N.M. 109, 111, 645 P.2d 982, 984 (1982), acknowledged the public's right to inspect and copy judicial records, including documentary and written records, videotapes, tape recordings, and other electronic records:

[T]here is a presumption in favor of inspection and copying of any item entered into evidence at a public session of a trial. Once the evidence has become known to members of the public ... it would take ... extraordinary circumstances to justify restrictions on the opportunity of those not physically in attendance at the courtroom to see and hear the evidence, when it is in a form that readily permits sight and sound reproduction.

Id. at 111, 645 P.2d at 984 (quoting Application of Nat'l Broadcasting Co., 635 F.2d 945, 952 (2d Cir. 1980)). The principles of Brennan apply equally to administrative hearings where evidence is entered and becomes a part of the tribunal's record. 98 N.M. at 112, 645 P.2d at 983.

The remaining statutory exceptions to the public's right to inspect public records are found in subsections 14-2-1(B), (C), (D), and (E). These subsections, which apply less frequently than subsection (A), also apply to worker's compensation claim files. This office also has stated:

Papers and memoranda in the possession of public officers which are not required by law to be kept by a public official as an official record may not be public records. Generally, reports of private individuals to government officials, correspondence of public officials to private individuals and memoranda of public officers made for their own convenience are not public records.

Att'y Gen. Op. 67-57. It thus is difficult to make a blanket statement categorizing the information that may be released to the public from worker's compensation claim files.

It must be remembered that the public's access to public records is not absolute. Brennan, 98 N.M. at 111, 645 P.2d at 984; Alarid, 90 N.M. at 797, 568 P.2d at 1241; Att'y Gen. Op. 69-89. The records custodian can make reasonable restrictions on access to public records. Id. at 798, 568 P.2d at 1241. The custodian first must determine that the person requesting access is a citizen and that he is requesting the information for a lawful purpose. Id. The burden is upon the custodian, however, to justify why the records sought to be examined should not be furnished. Id. Furthermore, in determining whether items of evidence properly are subject to public inspection, the custodian must consider the likelihood of injury to parties not involved in the particular case. Brennan, 98 N.M. at 112, 645 P.2d at 982.

II. Specific Documents

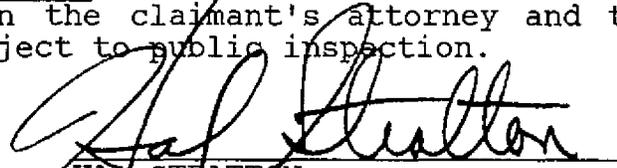
In your opinion request, you ask whether the following specific documents found in worker's compensation claim files should be made available for public inspection:

- a. Pleadings relating to a claim for workers' compensation benefits;
- b. Medical records received pursuant to a medical record authorization signed by a claimant or otherwise provided by a respondent relating to a claimant's medical or psychological condition. (It should be noted that some of the medical information in the file may never have been entered into evidence);
- c. Wage information provided by a respondent-employer for the three years before an accidental injury;
- d. Documents or information produced under interrogatory, request for production, or request for admission whose content may relate to any issue relevant under workers' compensation law;
- e. Depositions of expert or lay witnesses in written or videotape form which are typically kept in sealed envelopes;

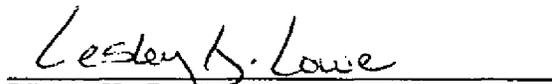
- f. Written statements from witnesses relating to the circumstances of an accidental injury;
- g. Copies of medical bills or statements of health care providers detailing dates of treatment, type of treatment, cost of treatment, and what balances remain unpaid, if any;
- h. Reports from vocational rehabilitation experts and vocational rehabilitation providers regarding a claimant's vocational circumstances or qualification for employment;
- i. A recommended resolution (a document prepared by the Division) proposing an outcome of a claim which is provided to the claimant and respondents but which is normally kept sealed in the file;
- j. Responses to the recommended resolution from claimant and respondents detailing parts of the resolution accepted or rejected, which are also kept sealed;
- k. The pre-hearing officer's notes detailing events at the initial conference between the parties and used by the pre-hearing officer in issuing a recommended resolution;
- l. Copies of correspondence between counsel and the Workers' Compensation Division which may refer to or discuss contents of the file or items on this list;
- m. Trial exhibits including all documents and tangible evidence offered in support or against a claim at the time of a merits hearing;
- n. A tape record of each proceeding at the formal level conducted by the hearing officer and relating to the claim (this type record is not physically attached to the file but is considered to be part of it);
- o. The hearing officer's finding of fact and conclusions of law along with a compensation order based on the foregoing findings of fact and conclusions of law.

Items a, c, d, e, f, i, j, m, n, and o are all public records pursuant to Section 14-2-1 and Brennan. Item k constitutes "memoranda of public officers made for their own convenience"; consequently, they are not public records. Att'y Gen. Op. 67-57. Items b and g are medical records and thus are not public records under Section 14-16-1 and Subsection 14-2-1(A) NMSA 1978. Medical records become public records, however, if they are entered into evidence at a formal hearing or trial. Brennan, 98 N.M. at 111, 645 P.2d at 984.

Reports from vocational rehabilitation experts, item h, would not be deemed public records if they pertained to physical or mental condition. Alarid, 90 N.M. at 794, 568 P.2d at 1240 (1977); Section 14-6-1 NMSA 1978; Subsection 14-2-1(A) NMSA 1978. Items i, j, and k would not be excluded under subsection 14-2-1(C), because worker's compensation claim files are not "personnel files." Correspondence between an attorney and his client, to which item l may refer, is privileged and is not a public record under Section 38-6-6(B) NMSA 1978. See State ex rel. State Hwy. Comm'n v. Steinkraus, 76 N.M. 617, 417 P.2d 431 (1966). Correspondence between the claimant's attorney and the Division, however, would be subject to public inspection.



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