

**STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL**

January 4, 2018

Opinion No. 18-01

Potential Liability for Disclosures Pursuant to Court Order

Question

Is a court order that requires a district attorney to provide copies of all information in his or her possession to defense counsel sufficient to protect the district attorney from liability if the information disseminated as a result of the order contains data that is otherwise legally protected from disclosure?

Opinion

Generally, yes.

ANALYSIS

Numerous provisions of the Tennessee Code protect particular information from disclosure. *See, e.g.*, Tenn. Code Ann. § 10-7-504 (certain public records); *id.* § 47-18-2110 (social security numbers); *id.* § 47-18-2204 (consumer information); *id.* § 49-1-708 (student information collected by educational operators); *id.* § 67-1-1702 (tax information); *id.* § 68-11-1501, et seq. (medical and health information). Federal law also provides for the confidentiality of particular information. *See, e.g.*, 20 U.S.C. § 1232g (student information); 26 U.S.C. § 6103 (tax information); 42 U.S.C. § 1320d-2, 45 C.F.R. pt. 164 (health and medical information); 42 U.S.C. § 290dd-2 (substance abuse treatment records). And the common law tort of invasion of privacy protects individuals against unwarranted invasions of privacy, including the distribution or disclosure of private information. *See* Restatement (Second) of Torts §§ 652A, 652D; *Brown v. CVS Pharmacy*, 982 F. Supp. 2d 793, 806 (M.D. Tenn. 2013).

In general, however, these privacy protections contain express exemptions for disclosures ordered by a court or pursuant to a subpoena. For example, the Tennessee Patient's Privacy and Protection Act prohibits the disclosure of identifying information about a patient, but clarifies that "it shall not be unlawful to disclose, nor shall there be any liability for disclosing, medical information in response to a subpoena, court order, or request authorized by state or federal law." Tenn. Code Ann. § 68-11-1503(d). Similarly, Tenn. Code Ann. § 47-18-2110 establishes criminal and civil liability for failure to protect the privacy of an individual's social security number, but it exempts from such liability any disclosure pursuant to "a lawful legal obligation." *Id.* § 47-18-2110(b)(1). And the Tennessee Public Records Act includes numerous provisions that permit the disclosure of otherwise confidential information when required by law, including disclosures by a district attorney to a defense counsel when required to protect the defendant's constitutional rights. *See, e.g.*, Tenn. Code Ann. § 10-7-504(a)(2)(A), (a)(4)(A), (a)(8), (a)(15)(H), (a)(16)(H), (f)(8)(C)(ii), (m)(1)(E), (q)(3), (u)(2). Other privacy laws have similar provisions permitting

disclosure when required by law, including by court order. *See, e.g., id.* § 47-18-2204(b)(1)(B) (permitting disclosure of consumer records “[p]ursuant to a court order” if certain conditions are met); *id.* § 49-1-708(4)(B) (disclosure of student information permitted “[t]o ensure legal and regulatory compliance”); *id.* § 67-1-1709(a) (establishing a felony for disclosures of tax information “except as authorized by law”).

Common law similarly recognizes a defense to liability for disclosures made pursuant to court order or other legal obligation. For example, the Restatement (Second) of Torts § 592A recognizes that an individual required by law to publish defamatory material is absolutely privileged to publish it. That section “rests upon the principle that one who is required by law to do an act does not incur any liability for doing it.” Restatement (Second) of Torts § 592A, cmt. a. As the U.S. Supreme Court has recognized, it would be “unconscionable” to “permit[] civil and perhaps criminal liability to be imposed for . . . conduct [a] statute demands.” *Farmers Educ. & Co-op. Union of Am. v. WDAY, Inc.*, 360 U.S. 525, 531 (1959); *see also Cucinotta v. Deloitte & Touche, LLP*, 302 P.3d 1099, 1101-02 (Nev. 2013) (holding that an accounting firm could not be held liable for a disclosure because the disclosure was required by federal securities laws). The same principle is true for conduct a court order demands.

The Code of Professional Responsibility governing lawyers incorporates a similar principle. Under the confidentiality rules, a lawyer shall not reveal client confidences except in enumerated circumstances. One of the circumstances in which disclosure is permitted is when the disclosure is reasonably necessary “to comply with an order of a tribunal requiring disclosure,” so long as the lawyer has asserted all non-frivolous claims of privilege in an attempt to prevent disclosure. Tenn. Sup. Ct. R. 8, Rule 1.6(c)(2).

Because each disclosure of potentially confidential or privileged information is unique, any liability for such a disclosure and each defense to any such liability would ultimately be determined by the statutes, common law doctrines, ethical rules, and particular circumstances relevant to that disclosure. Accordingly, it is not possible to determine in the abstract that a district attorney turning over information to defense counsel pursuant to a court order is, in all circumstances, immune from liability. For example, some confidentiality obligations require an individual to make reasonable efforts to protect information. In a given circumstance, a district attorney may have failed to make reasonable efforts by, among other things, neglecting to inform the court of the potential disclosure of information of a privileged or confidential nature.

In general, however, a district attorney turning over information to defense counsel pursuant to a mandate from the court will not be liable for the disclosure of confidential or privileged information. To subject an individual to liability for an act required by a court order would be, in the words of the U.S. Supreme Court, “unconscionable.” *Farmers Educ.*, 360 U.S. at 531.

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