

TO: Ernest Oertli, Director, Epidemiology and Surveillance Unit

CC: Alex Hathaway, M.D., M.P.H.
Assistant Commissioner, Prevention and Preparedness Services

FROM: Office of General Counsel *WJK*

DATE: February 23, 2005

RE: HIPAA permitted disclosures of PHI without authorization

BACKGROUND

Under the general authority of Title XI, Part C, Administrative Simplification, commonly known as the Health Insurance Portability and Accountability Act of 1996 (HIPAA) (Pub. L. No. 104-191, codified at 42 U.S.C. §1320d), the U.S. Department of Health and Human Services adopted the HIPAA Privacy Rule (45 CFR, Parts 160 and 164). These federal regulations establish certain minimum standards for the use and disclosure of individually identifiable health information (protected health information or PHI) for entities required to comply with HIPAA.

Although there are many state and federal laws protecting individually identifiable health information from unauthorized disclosures, the HIPAA Privacy Rule resulted in a heightened awareness of the uses and disclosures of PHI for several reasons, not the least of which were the federally enforceable, and remarkably severe civil and criminal penalties for “knowing” violations (42 U.S.C. §1320d-6). There were also many misconceptions and misunderstandings regarding their applicability in general and impact on the necessary, legitimate, and permissible flow of health information in specific. Many of these issues were addressed when the Privacy Rule was amended in 2002. (67 FR 53267, August 14, 2002) Others are being addressed through the efforts of federal public health agencies and the U.S. Department of Health and Human Services (<http://www.cdc.gov/mmwr/preview/mmwrhtml/m2e411a1.htm>) and state public health and legal authorities (<http://www.tdh.state.tx.us/hipaa/default.htm> and <http://www.oag.state.tx.us/notice/hipaa.pdf>).

QUESTION

Can a HIPAA covered health plan provide individually identifiable health information of its insured members to the Department of State Health Services (DSHS) HIV/STD Epidemiology and Surveillance Unit’s AIDS/HIV Unmet Needs Assessment and Analysis, without an authorization of the individual insured members?

ANSWER

Yes. State and Federal law authorize the disclosure of otherwise confidential information, without the consent or authorization of the individual to DSHS, and exceptions within HIPAA permit the disclosure of PHI that is authorized by law.

DISCUSSION

HIPAA makes it very clear that there was no intention to affect or interfere with the functions of public health, or state regulatory and oversight functions relating to covered entities. 42 U.S.C. §1320d-7, relating to the Effect on State Law, provides that:

“(b) PUBLIC HEALTH.—Nothing in this part shall be construed to invalidate or limit the authority, power, or procedures established under any law providing for the reporting of disease or injury, child abuse, birth, or death, public health surveillance, or public health investigation or intervention.

(c) STATE REGULATORY REPORTING.—Nothing in this part shall limit the ability of a state to require a health plan to report, or provide access to, information for management audits, financial audits, program monitoring and evaluation, facility licensure or certification, or individual licensure and certification.”

These exceptions are reflected in the Privacy Rule in 45 C.F.R. §164.512, relating to Uses and disclosures for which an authorization or opportunity to agree or object is not required. Relevant portions of Subsection (b), the Standard for uses and disclosures for public health activities are as follows:

- (b) Standard: uses and disclosures for public health activities.
 - (1) Permitted disclosures. A covered entity may disclose protected health information for public health activities and purposes described in this paragraph to:
 - (i) A public health authority that is authorized by law to collect and receive such information for the purpose of preventing or controlling disease, injury, or disability, including, but not limited to, the reporting of disease injury, vital events such as birth or death, and conduct public health surveillance, public health investigations; and public health interventions....

DSHS is the statutory state public health agency (Health and Safety Code (HSC) §11.004). DSHS is the lead agency for AIDS and HIV policy in Texas and the primary resource for HIV education, prevention, and policy, as well as coordinating the provision of services available through federal, state and locally funded programs, to prevent the unnecessary duplication of services, and award and distribute AIDS and HIV funds through grants and contracts. (See generally HSC, Chapter 85, relating to Acquired Immune Deficiency Syndrome and Human Immunodeficiency Virus Infection) DSHS is responsible for preventing and controlling disease

in the state, (HSC §81.021), identifying and collecting information on reportable diseases, including acquired immune deficiency syndrome (AIDS) and human immunodeficiency virus infection (HIV) (HSC §81.041) The department has authority to require epidemiological reports of individual cases of disease that are known to be of importance to public health, and to routinely analyze and determine trends in the incidence and prevalence of AIDS and HIV infection. (HSC §§81.047 and 81.052). DSHS is required to investigate the causes, and methods of prevention, of communicable disease. DSHS has the authority to require a person to provide records and other information to the department, on request, and according to the department's written instructions. (HSC §81.061).

DSHS is a Ryan White Title II grantee. (42 U.S.C. §300ff) DSHS is required to coordinate and collaborate with other public and non-profit private entities, and other available programs (including Medicaid) to ensure that the continuity of care and prevention services of individuals with HIV is enhanced. (42 U.S.C. §300ff-75) Grants are made based on estimated needs data collected through assessment tools provided by the Health Resources and Services Administration (HRSA). All grant applicants are required to submit the needs assessment to determine the allocation and distribution of grants.

DSHS is seeking to obtain relevant data from all sources that provide or fund services for persons living with HIV and AIDS. Health insurers are an obvious and important source, and collection of data from these sources would greatly enhance the accuracy of estimates of unmet needs. Health insurers are covered entities under HIPAA and have a legitimate and necessary concern that any data provided fits within an exception to the requirement that an authorization be obtained.

The above referenced statutes provide the necessary authority to establish:


- DSHS is the state public health authority;
- DSHS is authorized by state and federal law to collect and receive, without the consent or authorization of the individual, protected health information relating to persons living with AIDS and HIV;
- DSHS will use the information collected for appropriate and necessary public health activities, including, but not limited to, the prevention and control of communicable disease, and public health surveillance, investigations and interventions.

All of which bring disclosures of PHI to DSHS for the HIV/AIDS unmet needs survey squarely within the exceptions to authorization in 45 CFR §164.512.

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