



JACKSON WALKER L.L.P.

Texas Attorney General Interprets HIPAA Privacy Rule

Prepared by **James M. McCown**

Jackson Walker L.L.P.

jmccown@jw.com

(214) 953-5783

www.jw.com

Congress passed the Federal Health Insurance Portability and Accountability Act (“HIPAA”) in 1996 to improve the nation’s national health information system. Although HIPAA has been on the books since 1996, most people became familiar with HIPAA in April, 2003. That is when the federal government’s privacy regulations for personal health information, otherwise known as the “Privacy Rule,” became effective.

Since that time, questions and conflicts have arisen about the interplay between HIPAA and the privacy laws of the individual states, including Texas’ privacy laws. Generally, HIPAA and state privacy laws require medical providers and others to scrupulously protect the privacy of medical information.

However, other “freedom of information” laws, such as Texas’ Public Information Act (“PIA”), generally make information in the possession of a governmental body available to the public, subject to certain exceptions. This creates a particular conflict where a medical provider is also a governmental body.

After the HIPAA Privacy Rule was enacted, governmental entities in Texas interpreted the Privacy Rule as a bar to the dissemination of medical information that was otherwise public information under the PIA. Since April, 2003, reporters in Texas have been on the front line of a battle for access to information that is deemed public under the PIA, but yet is being withheld under the auspices of the HIPAA Privacy Rule.

The Texas Attorney General recently issued an opinion that should clarify at least some of these issues. On February 13, 2004, the Texas Attorney General issued Open Records Decision 681, which interpreted the HIPAA Privacy Rule in conjunction with the PIA, and determined whether certain governmental bodies, i.e. police departments and emergency “first responders,” were subject to the Privacy Rule. While the Attorney General’s decision should have eased access to certain records maintained by Texas governmental bodies, the practical effect of the decision has not necessarily resulted in the free flow of that

information. Many believe that the overly legal nature of the decision confuses the government officials who must determine whether to release information and what information can be released.

While the Attorney General’s decision leaves open some questions about what information can be released, it does clear up the relationship between the HIPAA Privacy Rule and the PIA, and offers guidance on the public nature of certain medical information. The following rules can be gleaned from the Attorney General’s decision:

- * The HIPAA Privacy Rule applies only to a health plan, a health care clearing house, or a health care provider. If a governmental body does not arguably fit under one of the foregoing three categories, HIPAA does not apply and information must be released in accordance with Texas freedom of information laws.

- * Even if a governmental body is subject to HIPAA, such as an emergency medical service [EMS], the HIPAA Privacy Rule does not make information subject to the PIA confidential. If the governmental body is subject to HIPAA and the request made is not made under PIA, the governmental body must comply with HIPAA. However, if information is requested under PIA, a governmental body must comply with the PIA in the same manner as it did before the HIPAA Privacy Rule was enacted, and information that is public under the PIA must be disclosed regardless of the HIPAA Privacy Rule.

- * Examples of the type of governmental information that is public under the PIA, and must therefore be disclosed, is listed in Texas Gov’t Code Section 552.022, a copy of which appears on page 4.

- * According to the Attorney General’s decision, the following information is considered “confidential information” and cannot be disclosed under the PIA and other Texas privacy laws (regardless of the HIPAA Privacy Rule): hospital health care information, physician medical records, mental health records, EMS medical records, information

about Medicare recipients, medical histories of applicants or employees under the Americans With Disabilities Act, individuals' illnesses or operations, physical handicaps, use of prescription drugs, and, in appropriate cases, sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment, attempted suicide, and injuries to sexual organs. There is also a general grant of confidentiality to personal information that is intimate or embarrassing and in which the public has no legitimate interest.

* A police department is not covered by HIPAA. Any record created by a police officer, including a record of the officer's observation of an individual's medical condition, is not protected by the Privacy Rule and must be disclosed unless it meets the description of "confidential information" above, or unless another legitimate reason for confidentiality exists (such as notification of next of kin or protection of an ongoing investigation).

* Doctors, hospitals, and EMS providers are, obviously, health care providers and they are covered by the HIPAA Privacy Rule. However, HIPAA allows these covered entities to disclose certain limited information to police officers and other public officials. Once this information has been provided to a police officer, the information is no longer protected by HIPAA and can be disclosed by the police officer or department under the PIA, unless it is the type of "confidential information" listed above or the disclosure would be inconsistent with the purpose for which the police obtained the information (in other words, if the information is sought in connection with

reporting about the commission of a crime and is not otherwise confidential information, it can be disclosed, but if the information is sought for reporting unrelated to the commission of the crime, it cannot be disclosed).

* A first responder is any emergency medical service personnel that provides immediate on-scene care to an injured person, but does not actually transport that person to a medical care facility. A first responder can be subject to the HIPAA Privacy Rule and an EMS technician, as stated above, is subject to the Privacy Rule. Notwithstanding, Texas law expressly provides that the nature or injury of the illness, and the age, sex, occupation and city of residence of a patient receiving emergency medical services is public information, which means a first responder or EMS technician can disclose this information.

* If a governmental body receives a request for information under the PIA from a reporter or other party and seeks to withhold any relevant information, it should seek a ruling from the Texas Attorney General's office to determine whether the withholding of information is appropriate.

The Attorney General's decision is complex and difficult to summarize. Nevertheless, we hope that the foregoing analysis assists you in obtaining public information from governmental bodies and encourage you to share this information with any person from whom you are seeking information.

Disclaimer: The foregoing article was written by Jackson Walker L.L.P. for general informational purposes only. It is not to be construed as legal advice to any particular individual or entity, nor is it intended to address any general or specific legal issues that may arise. No attorney-client relationship is intended by the dissemination of this article, and no attorney-client relationship exists between Jackson Walker L.L.P. and any individual or entity unless and until Jackson Walker L.L.P. is formally retained.

James M. ("Jim") McCown is a partner in the Litigation section of Jackson Walker, specializing in media law and litigation. He has represented newspaper throughout Texas in open records, libel defense, prior restraint, pre-publication review, and media matters.

Sec. 552.022. CATEGORIES OF PUBLIC INFORMATION; EXAMPLES.

a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

- (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108;
- (2) the name, sex, ethnicity, salary, title, and dates of employment of each employee and officer of a governmental body;
- (3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body;
- (4) the name of each official and the final record of voting on all proceedings in a governmental body;
- (5) all working papers, research material, and information used to estimate the need for or expenditure of public funds or taxes by a governmental body, on completion of the estimate;
- (6) the name, place of business, and the name of the municipality to which local sales and use taxes are credited, if any, for the named person, of a person reporting or paying sales and use taxes under Chapter 151, Tax Code;
- (7) a description of an agency's central and field organizations, including:
 - (A) the established places at which the public may obtain information, submit information or requests, or obtain decisions;
 - (B) the employees from whom the public may obtain information, submit information or requests, or obtain decisions;
 - (C) in the case of a uniformed service, the members from whom the public may obtain information, submit information or requests, or obtain decisions; and
 - (D) the methods by which the public may obtain information, submit information or requests, or obtain decisions;
- (8) a statement of the general course and method by which an agency's functions are channeled and determined, including the nature and requirements of all formal and informal policies and procedures;
- (9) a rule of procedure, a description of forms available or the places at which forms may be obtained, and instructions relating to the scope and content of all papers, reports, or examinations;
- (10) a substantive rule of general applicability adopted or issued by an agency as authorized by law, and a statement of general policy or interpretation of general applicability formulated and adopted by an agency;
- (11) each amendment, revision, or repeal of information described by Subdivisions (7)-(10);
- (12) final opinions, including concurring and dissenting opinions, and orders issued in the adjudication of cases;
- (13) a policy statement or interpretation that has been adopted or issued by an agency;
- (14) administrative staff manuals and instructions to staff that affect a member of the public;
- (15) information regarded as open to the public under an agency's policies;
- (16) information that is in a bill for attorney's fees and that is not privileged under the attorney-client privilege;
- (17) information that is also contained in a public court record; and
- (18) a settlement agreement to which a governmental body is a party.

(b) A court in this state may not order a governmental body or an officer for public information to withhold from public inspection any category of public information described by Subsection (a) or to not produce the category of public information for inspection or duplication, unless the category of information is expressly made confidential under other law.

Added by Acts 1993, 73rd Leg., ch. 268, Sec. 1, eff. Sept. 1, 1993. Amended by Acts 1995, 74th Leg., ch. 1035, Sec. 3, eff. Sept. 1, 1995; Acts 1999, 76th Leg., ch. 1319, Sec. 5, eff. Sept. 1, 1999.