STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL

June 5, 2015

Opinion No. 15-48

Release of Health Insurance Information for Members of the Tennessee General Assembly

Question

Is it a violation of the Privacy Rule of the federal Health Insurance Portability and Accountability Act (HIPAA) to release the following information in response to requests made pursuant to Tennessee's Public Records Act:

(i) the names of current and former members of the Tennessee General Assembly who, since 1992, have or have had health care insurance coverage under the State health insurance plan;

(ii) the years in which each current and former member participated in the plan and the level of coverage (i.e., single, single split, family, family split) in each year;

(iii) the amount each current and former member paid in premiums for each year of participation in the plan and the aggregate total amount of premium payments paid by each current and former member for all the years of his or her participation;

(iv) the aggregate total amount of premiums paid by all members combined for the period 1992-2007 and for the period 2008-2014;

(v) the amount contributed by the State towards each member's premium payment for each year of participation in the plan and the aggregate total amount contributed by the State for all member premiums combined for those same years;

(vi) the aggregate total amount of premiums for all members combined paid by the State for the period 1992-2007 and for the period 2008-2014;

(vii) the amount of the May 2015 premium payments (member and State combined) for former members; and

(viii) the aggregate total amount paid in claims for all members combined for the period 2010-2014.

Opinion

No. The release of the information in response to requests made under Tennessee's Public Records Act does not violate the HIPAA Privacy Rule.

ANALYSIS

The information listed in items (i) through (viii) above in the Question (collectively "the information") was released in response to requests made pursuant to Tennessee's Public Records Act, Tenn. Code Ann. §§ 10-7-503 through 10-7-506. In sum and substance, the information released identifies by name each current and former Tennessee legislator who had health care insurance coverage under the State plan between 1992 and 2015, the level of coverage, how much each member paid in premiums for each year of coverage and in the aggregate for certain periods, and how much the State contributed towards each member's premium payments for each year of coverage and in the aggregate for certain periods. Also released, as a lump-sum figure, was the total amount paid in claims for all the members combined for the years 2010 through 2014.

Tennessee's Public Records Act mandates that "[a]ll state, county and municipal records shall . . . be open for inspection by any citizen of this state." Tenn. Code Ann. § 10-7-503(a)(2)(A). Those in charge of the records may not refuse any citizen the right of inspection, unless otherwise provided by state law. *Id.*

The Public Records Act covers all records created or received by government in its official capacity and it "create[s] a presumption of openness and express[es] a clear legislative mandate favoring disclosure of governmental records." *Schneider v. City of Jackson*, 226 S.W.3d 332, 339-40 (Tenn. 2007). The Act broadly defines "public record" and "state record" to include "all documents, papers, letters, maps, books, photographs, microfilms, electronic data processing files and output, films, sound recordings, or other material, regardless of physical form or characteristics made or received pursuant to law or ordinance or in connection with the transaction of official business by any governmental agency." Tenn. Code Ann. § 10-7-301(6).

The information released comes within the Act's definition of "state record." It was made or received by the State as part of its official business, particularly as the employer of the members of the General Assembly. The request for the information was made by citizens of Tennessee. The State was, therefore, required to make the information open for inspection, and those in charge of the records were required to make them available since state law does not provide otherwise.[1]

[1] The Act does carve out some exceptions by designating as "confidential" certain records that would otherwise be open for public inspection. Tenn. Code Ann. § 10-7-504(a)(1). Included in the records designated as confidential are "medical records of patients in state, county and municipal hospitals and medical facilities, and the medical records of persons receiving medical treatment, in whole or in part, at the expense of the state, county, or municipality." *Id.* But the information released here does not come within this exception. It is plain from the context that the term "medical records," as used in § 10-7-504(a)(1), refers only to records reflecting medical treatment provided to a specific individual. That is also how the term is commonly and normally understood and that is how the term has been defined as it generally applies to the healing arts: "medical records" include "medical histories, records, reports and summaries, diagnoses, prognoses, records of treatment and medication ordered and given, X-ray and radiology interpretations, physical therapy charts and notes and lab reports." Tenn. Code Ann. § 63-2-101(c)(4). The term does not include—either in the general statutory definition, or as it is commonly understood—the kinds of records that were disclosed here, *i.e.*, records that pertain only to insurance coverage and that have nothing to do with treatment, diagnoses, or medications, and especially not of any individually identifiable person.

The HIPAA Privacy Rule generally prohibits a "covered entity" from using or disclosing "protected health information." 45 C.F.R. Part 160 and Subparts A and E of Part 164 (2013). For purposes of this Opinion only we will assume that the information was disclosed by a covered entity.

If information being disclosed is not "protected health information" (PHI) as defined in the Privacy Rule, there can be no HIPAA violation, since the Privacy Rule applies only to PHI. The Privacy Rule defines "protected health information" in essence as health information (1) that (a) relates to the past, present, or future physical or mental health or condition of an individual, or (b) relates to the provision of health care to an individual, or (c) relates to the past, present, or future payment for the provision of health care to an individual, and (2) that identifies the individual (or would allow the individual to be identified). 45 C.F.R. § 160.103 (2013). PHI does not include a covered entity's own employment records. *Id.*

It is not by any means a given that the information actually is PHI within that definition. The information released does not correlate to the health or condition of any individually identifiable person. Nor does it correlate to payment for the provision of health care to any identifiable individual; the claims-paid amount is not individually identifiable with any person since it is just one lump-sum total for all claims paid for all members combined during a multi-year period. Moreover, the mere fact that any individual member or his or her family members participated in the State's health insurance program cannot reasonably be deemed PHI, especially now when federal law requires every individual to have health care insurance coverage. We will, nevertheless, also assume—solely for purposes this of Opinion—that the information is "protected health information" as that term is defined by the Privacy Rule.

Even assuming that the information was disclosed by a covered entity and even assuming that the information is PHI, there is no violation of the HIPAA Privacy Rule. The Privacy Rule contains exceptions. As specifically applicable here, the Privacy Rule includes an exception that allows the disclosure of PHI when disclosure is "required by law."

> A covered entity may use or disclose protected health information to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law.

45 C.F.R. § 164.512(a)(1) (2013).

Accordingly, when Tennessee's Public Records Act requires a covered entity to disclose PHI, the covered entity is permitted under HIPAA's Privacy Rule to make the disclosure without running afoul of HIPAA as long as the disclosure complies with the Public Records Act. Disclosure of the information was, in this case, required by the Public Records Act. Therefore, regardless of whether the information is PHI, its release, in response to a Public Records Act request, does not violate the Privacy Rule.

The U.S. Department of Health & Human Services (HHS), the agency charged with promulgating and administering the Privacy Rule, publishes answers to "frequently asked questions" to serve as guidance for complying with the Privacy Rule. HHS has in fact provided

such guidance on the very question that is the subject of this Opinion. The following question and answer, quoted in relevant part (with emphasis added), are posted on the HHS website:[2]

> Question:
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> State public records laws, also known as open records or freedom of information laws, all provide for certain public access to government records. How does the HIPAA Privacy Rule relate to these state laws?
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> Answer:
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> . . . If a state agency is a covered entity . . . the Privacy Rule applies to its disclosures of protected health information. The Privacy Rule permits a covered entity to use and disclose protected health information as required by other law, *including state law*. See 45 CFR 164.512(a). Thus, *where a state public records law mandates that a covered entity disclose protected health information, the covered entity is permitted by the Privacy Rule to make the disclosure*, provided the disclosure complies with and is limited to the relevant requirements of the public records law.

The guidance provided by HHS pertains here and fully supports the conclusion that disclosure of the information does not violate the HIPAA Privacy Rule. There is no HIPAA violation when disclosure of information, even protected health information, is required by state law. Disclosure of the information at issue was made in response to a request for access to that information under Tennessee's Public Records Act. The Public Records Act mandates that the information be disclosed. Therefore, release of the information was "required by law." Because the release of the information was required by state law, its disclosure is permitted by the Privacy Rule and does not violate HIPAA.

HERBERT H. SLATERY III
Attorney General and Reporter

ANDRÉE SOPHIA BLUMSTEIN
Solicitor General

[2] http://www.hhs.gov/ocr/privacy/hipaa/faq/disclosures_for_law_enforcement_purposes/506.html (last visited on June 1, 2015).

Requested by:

The Honorable Kevin Brooks
State Representative
103 War Memorial Building
Nashville, Tennessee 37243

The Honorable Rick Womick
State Representative
G29 War Memorial Building
Nashville, Tennessee 37243