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OPINION COMMITTEE



**JOHNSON COUNTY
BILL MOORE
COUNTY ATTORNEY**

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January 23, 2013

The Honorable Gregg Abbott
Texas Attorney General
Office of the Attorney General
Attention: Opinion Committee
P.O. Box 12548
Austin, Texas 78711-2548

RQ-1105-GA

Certified Mail Number 7008 1830 0000 9415 4109
Return Receipt Requested

RE: Whether a county office that has possession of protected health information is considered a "covered entity" as that term is defined by § 181.001(b)(2), Texas Health and Safety Code, if the county office is not regularly engaged in the business of assembling, collecting, analyzing, using, evaluating, storing, transmitting, obtaining, or disclosing for marketing or financial gain the protected health information.

Dear General Abbott:

Pursuant to the authority to issue advisory opinions granted to the Attorney General in §22 of Article IV of the Texas Constitution and §402.041, et. seq. of the Texas Government Code, this letter is being submitted to you to request an opinion regarding certain provisions of the Texas Health and Safety Code.

BACKGROUND LAW AND FACTS

The 82nd Legislature passed House Bill 300, relating to the privacy of protected health information. The bill became effective on September 1, 2012.

The Texas Health & Safety Code Chapter 181 (titled "Medical Records Privacy") seeks to protect an individual's medical records. These statutes specifically address how "covered entities" are to handle "protected health information." Section 181.001 provides some definitions and defers to HIPAA (Health Insurance Portability and Accountability Act) for any term not defined in that section.

The term "covered entity" is defined by HIPAA as (1) a health plan, (2) a health care clearinghouse, or (3) a health care provider that conducts certain transactions in electronic form. 45 C.F.R § 106.103 (2006). In the Texas Health and Safety Code, a "covered entity" is defined more broadly and means any person who: (A) for commercial, financial, or professional gain,

monetary fees, or dues, or on a cooperative, nonprofit, or pro bono basis, engages, in whole or in part, and with real or constructive knowledge, in the practice of assembling, collecting, analyzing, using, evaluating, storing, or transmitting protected health information. The term includes a business associate, health care payer, governmental unit, information or computer management entity, school, health researcher, health care facility, clinic, health care provider, or person who maintains an Internet site; (B) comes into possession of protected health information; (C) obtains or stores protected health information under this chapter; or (D) is an employee, agent, or contractor of a person described by Paragraph (A), (B), or (C) insofar as the employee, agent, or contractor creates, receives, obtains, maintains, uses, or transmits protected health information. Texas Health and Safety Code § 181.001(b)(2).

The state law further provides that “a covered entity, as that term is defined by Section 181.001, shall comply with this chapter.” Texas Health and Safety Code § 181.004(b).

“Protected health information” (PHI) is defined by HIPAA as individually identifiable health information that is transmitted by electronic media, maintained in electronic media, or transmitted or maintained in any other form or media. 45 C.F.R § 106.103 (2006). “Individually identifiable health information” is information that is a subset of health information, including demographic information collected from an individual, and:

1. is created or received by a health care provider, health plan, employer, or health care clearinghouse; and
2. relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual; and
 - i. that identifies the individual; or
 - ii. with respect to which there is a reasonable basis to believe the information can be used to identify the individual. 45 C.F.R § 106.103 (2006).

“Health information” means any information, whether oral or recorded in any form or medium, that (1) is created or received by a health care provider, health plan, public health authority, employer, life insurer, school or university, or health care clearinghouse; and (2) relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual. 45 C.F.R § 106.103 (2006).

QUESTION PRESENTED

1. Is a county office that has possession of protected health information considered a "covered entity" as that term is defined by § 181.001(b)(2), Texas Health and Safety Code, if the county office is not regularly engaged in the business of assembling, collecting, analyzing, using, evaluating, storing, transmitting, obtaining, or disclosing for marketing or financial gain the protected health information?

DISCUSSION

There are a number of county offices that may come into contact and possession of people's medical records. Prosecutor's offices (County and District Attorneys) may have records to prosecute cases, for example, medical records related to a victim's injuries, cases of child abuse, drug testing, and mental health care. District and County Clerk's offices must maintain medical records that have been filed with the clerk or admitted into evidence by the court. The Sheriff's Office may collect medical records in the course of investigating crimes. Probation offices (Adult Probation and Juvenile Services) may collect medical records in the course of supervising probationers. Other offices could include the Indigent Healthcare, Veteran's Services, Personnel Department, Medical Examiner, and the medical office at the county jail.

Sections 181.151-153, Texas Health and Safety Code, discuss the acts which are prohibited by this chapter. The prohibited acts are limited to the following: (1) reidentifying or attempting to reidentify a person who is the subject of any protected health information, (2) failing to obtain permission from a person who is the subject of any protected health information prior to the disclosure of that person's protected health information for any marketing communication (some exceptions), and (3) disclosing an individual's protected health information in exchange for direct or indirect remuneration.

A county office with possession of medical records would not be considered a covered entity under the HIPAA definition. However, it appears that it would be considered a covered entity under the state's definition. The state's definition of covered entity appears to be very broad and encompasses not only those persons and businesses who regularly possess protected health information, but also *any person*, regardless of their occupation or purpose, who would come into possession of any protected health information. One could argue that any individual who possesses another individual's protected health information, for any reason, would be subject to this chapter.

The House Research Organization (HRO) drafted a bill analysis of HB 300. It stated that “CSHB 300 would prohibit certain persons who collect health information, commonly referred to as covered entities, from selling an individual’s protected health information unless it was for the purpose of treatment, payment, or health care operations or was otherwise authorized or required by state or federal law.” Further, the House Committee Report bill analysis states the background and purpose to be as follows: “Provisions of recent federal legislation establish incentives designed to increase the adoption of electronic health record systems among certain health care providers. The expanded use of such systems is likely to lead to the expansion of the electronic exchange of protected health information, which may require stronger state laws to better ensure the protection of that information. C.S.H.B. 300 seeks to increase privacy and security protections for protected health information.”

While some county offices do regularly deal with individual’s health care records and would be in the practice of assembling, collecting, analyzing, using, evaluating, storing, obtaining, or transmitting protected health information as a part of providing services, these offices are not engaged in any of the prohibited acts outlined in Chapter 181. Other county offices, such as prosecutor’s offices, sheriff’s office, district and county clerk’s offices, and probation offices, are not in the regular practice of assembling, collecting, analyzing, using, evaluating, storing, or transmitting protected health information. Rather, these offices keep protected health information on occasion for purposes of investigating crime, prosecuting offenders, and monitoring offenders. The health information maintained in these offices is not disclosed for monetary gain or for marketing purposes. Additionally, such health information is usually voluntarily delivered by the person themselves or obtained through means of a subpoena.

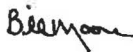
It would seem the Texas legislature did not intend for the definition of covered entity to be so expansive. HIPAA and HB 300 appear to contemplate regulating protected health information that is assembled, collected, analyzed, used, evaluated, stored, transmitted, or disclosed for marketing or financial gain by businesses that regularly engage in the assembly, collection, analyzing, use, evaluation, storage, transmission, or disclosure for marketing or financial gain of such protected health information. More simply, the HRO bill analysis essentially states the purpose of HB 300 is to regulate certain persons who collect and sell or exchange health information. The House Committee Report bill analysis essentially states the need for HB 300 is related to the need for increased privacy protections of electronically maintained health care information that is in the possession of health care providers as that information is increasingly transmitted electronically.

In reading the plain language of the statute, it does not appear the definition of covered entity was intended to be so broad. HB 300 gives three definitions for a covered entity. The first, third, and fourth definitions are specific to businesses or groups that are regularly involved with protected health information. The second definition - "any person who comes into possession of protected health information" - is a broad catchall presumably meant to close any loopholes left by the other three definitions that would allow a business to commit prohibited acts without being liable under the section. And in reading the rest of Chapter 181, it appears the statute is aimed at regulating those groups and businesses that regularly handle, market, and disclose for profit other's protected health information.

County offices are not regularly engaged in the assembly, collection, analyzing, use, evaluation, storage, transmission, or disclosure for marketing or financial gain of protected health information and should not be considered a covered entity as defined by the Texas Health and Safety Code § 181.001(b)(2).

Thank you for your time and consideration with regard to this matter. If you need any additional information, please do not hesitate to contact me.

Sincerely,



Bill Moore