

May 14, 2002

Alan M. Prysunka, Executive Director  
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Re: Authority of MHDO to gather PHI from covered entities

Dear Alan:

In my capacity as legal advisor to the Maine Health Data Organization, you have inquired as to whether the Maine Health Data Organization is a “public health authority” within the meaning of the Privacy Standard regulations ancillary to the Health Insurance Accountability and Portability Act of 1996 (“HIPAA”). In responding to your inquiry, please note this correspondence is not a formal opinion of the Office of Attorney General. The Office of Attorney General is authorized to issue formal written opinions upon questions of law submitted to him or her by the Governor, the head of state departments or state agencies, by either branch of the Legislature, or by any members of the Legislature on legislative matters.<sup>1</sup> Rather, this correspondence constitutes my views as to the application of the HIPAA Privacy regulations to the Maine Health Data Organization (“MHDO”).

It is my understanding that certain health insurance carriers have raised the issue of whether the MHDO is a “public health authority” within the meaning of the HIPAA regulations, a status which would allow the MHDO to require submission of otherwise protected health information (“PHI”) from the carriers in the discharge of its public health monitoring and surveillance responsibilities. For the reasons hereinafter cited, it is my view that the MHDO is a “public health authority” within the meaning of the HIPAA regulations.

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<sup>1</sup> 5 M.R.S.A. § 195.

### **I. Maine Health Data Organization**

The Maine Health Data Organization was established by the Maine Legislature in 1995<sup>2</sup> as the successor to the former Maine Health Finance Commission, authorized to collect clinical, financial, and restructuring data from health care facilities and providers of health care.<sup>3</sup> The legislatively established purpose of the MHDO is as follows:

It is the intent of the Legislature that uniform systems of reporting health care information be established; that all providers and payers who are required to file reports do so in a manner consistent with these systems; and that, using the least restrictive means practicable for the protection of privileged health information, public access to those reports be ensured.<sup>4</sup>

Organized as an independent executive agency, the MHDO was established to create and maintain a useful, objective, reliable and comprehensive health information database used to improve the health of Maine citizens. The MHDO is specifically charged with responsibility to collect, process, and analyze clinical and financial data as defined in its enabling legislation, codified at Title 22, Chapter 1683 of the Maine Revised Statutes.<sup>5</sup>

In the discharge of its responsibilities, the MHDO is accorded broad statutory authorization to collect, process, store and analyze a wide array of clinical, financial and restructuring data from health care providers, payers, third party administrators and carriers that provide only administrative services for plan sponsors.<sup>6</sup> In order to conduct quality improvement research to monitor health care utilization, analyses of cost effectiveness and patient-oriented outcomes of healthcare, develop quality improvement initiatives and implement practice guidelines, the MHDO board is authorized to designate quality improvement foundations which have acceptable, established protocols to safeguard confidential and privileged information.<sup>7</sup> The MHDO has established rules governing public access to its database which secure the confidentiality of PHI and allow limited access to confidential data for the purpose of public health research.<sup>8</sup>

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<sup>2</sup> *P.L. 1995, c. 653*. The enabling legislation for the Organization has been codified at 22 M.R.S.A. §§ 8701-8711.

<sup>3</sup> *See P.L. 1995, c. 653, § A-5*.

<sup>4</sup> 22 M.R.S.A. § 8701.

<sup>5</sup> 22 M.R.S.A. § 8703(1).

<sup>6</sup> 22 M.R.S.A. §§ 8704(1), 8704(10), 8708, 8709, 8710 & 8711.

<sup>7</sup> 22 M.R.S.A. § 8704(10).

<sup>8</sup> *See 22 M.R.S.A. § 8707; Maine Health Data Organization, Rules Relating to Release of Information to the Public, 90-590 CMR Ch. 120, Rules Relating to Health Care Information that Directly Identifies an Individual, 90-590 CMR Ch. 125.*

## 2. HIPAA Requirements Regarding Use or Disclosure of PHI

The Health Insurance Accountability and Portability Act of 1996<sup>9</sup> requires all health plans; health care clearinghouses; and health care providers which collect, process, store or transmit protected health information by electronic means to comply with federal standards designed to assure confidentiality, security, consistency and administrative simplification.<sup>10</sup> Although the U.S. Department of Health and Human Services is also in the process of developing standards for Electronic Transactions, Code Sets, Unique Health Identifiers, Electronic Signatures, and Security, the principal concern giving rise to the present inquiry is in the area of the Privacy Standard. Generally the Privacy Rule standards, set to be implemented April 14, 2003, prohibit a covered entity (health plan, health provider or clearinghouse) from using or disclosing protected health information in a manner not authorized by HIPAA.<sup>11</sup> Accordingly, PHI may not be used or disclosed unless pursuant to a qualifying consent or waiver, and such use or disclosure must be to the minimal extent necessary.<sup>12</sup> Thus, when using or disclosing protected health information or when requesting PHI from another covered entity, a covered entity must make reasonable steps to accomplish the intended purpose of the use, disclosure or request.<sup>13</sup> Subject to rather narrow restrictions, HIPAA will preempt state medical confidentiality laws unless the state statute is at least as restrictive as the HIAA standard.<sup>14</sup>

However HIPAA specifically exempts disclosures by covered entities to public health authorities which are required by state law.<sup>15</sup> Hence a covered entity may disclose PHI to a public health authority authorized by law to collect or receive information for the purpose of preventing or controlling disease, or conducting public health surveillance, public health investigations or public health interventions.<sup>16</sup> PHI may also be disclosed by covered entities to health oversight agencies for oversight activities authorized by law, including monitoring of the health care system.<sup>17</sup>

It should be noted that under Maine law health care practitioners<sup>18</sup> and health care facilities<sup>19</sup> are authorized to disclose confidential health information without patient authorization to federal, state or local governmental entities in order to protect the public health and welfare when reporting is required or authorized by law.<sup>20</sup>

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<sup>9</sup> P.L. 104-191

<sup>10</sup> 42 U.S.C. §§ 1320(d) et. seq.; 45 CFR § 160.102(a).

<sup>11</sup> 45 CFE, Part 164, Subpart E, § 164.502.

<sup>12</sup> 45 CFR § 164.502(a), (b).

<sup>13</sup> *Ibid.*

<sup>14</sup> 45 CFR Subtitle A, Part 160, Subpart B, § 160.202.

<sup>15</sup> 45 CFR Part 164, Subpart E, § 164.512((b)(i).

<sup>16</sup> *Ibid.*

<sup>17</sup> 45 CFR § 164.512(d).

<sup>18</sup> The term *health care practitioner* means a person licensed by the State to provide health care, 22 M.R.S.A. § 1711-C (1)(F).

<sup>19</sup> A *health care facility* in Maine law is defined as a licensed entity which offers health care to persons in the State. 22 M.R.S.A. § 1711-C1)(D).

<sup>20</sup> 22 M.R.S.A. § 1711-C (6)(E).

### 3. Discussion

In order to ascertain whether the MHDO is a “public health authority” within the meaning of the HIPAA regulations, it is important to evaluate the definition of the term “public health authority” under the HIPAA regulations and the underlying purpose of the HIPAA public health authority exception. The term “public health authority” is defined as follows:

*Public health authority* means an agency or authority of the United States, a State, a territory, a political subdivision of a State or a territory, or an Indian tribe, or a person or entity acting under a grant of authority from or contract with such public agency, including the employees or agents of such public agency or its contractors or persons or entities to whom it has granted authority, that is responsible for public health matters as part of its official mandate.<sup>21</sup>

Hence, a *public health authority* under HIPAA includes an agency of state government responsible for public health matters as part of its official duties.

HIPAA is designed to foster uniform privacy standards in the use and disclosure of protected health information by health plans, health care clearinghouses and health care providers. In explaining the policy basis for the Privacy Rule, the Office of Civil Rights of the U.S. Department of Health and Human Services, the lead agency charged with enforcement of the Privacy Rule, stated:

When it comes to personal information which moves across hospitals, doctors’ offices, insurers or third party payers, and state lines, our country has relied on a patchwork of federal and state laws. Under the current patchwork of laws, personal health information can be distributed-without either notice or consent-for reasons that have nothing to do with a patient’s medical treatment or health care reimbursement. Patient information held by a single plan may be passed on to a lender who may then deny the patient’s application for a home loan mortgage or a credit card-or to an employer who may use it in personnel decisions. The Privacy Rule establishes a federal floor of safeguards to protect the confidentiality of medical information. State laws which provide stronger privacy protections will continue to apply over and above the new federal privacy standards.

Health care providers have a strong tradition of safeguarding

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<sup>21</sup> 45 CFR, Subpart E, § 164.501.

private health information. But in today's world, the old system of paper records in locked filing cabinets is not enough. With information broadly held and transmitted electronically, the rule provides clear standards for all parties regarding protection of personal health information.<sup>22</sup>

Although complex and at times confusing, the HIPAA Privacy Rule regulations appear designed to bolster medical record confidentiality protocols pertaining to the use or disclosure of PHI by health plans, health care clearinghouses and health care providers. When governmental agencies discharge those functions, the HIPAA standards apply to them with the same force and effect as they do to private entities. However, when governmental entities engage in traditional public health maintenance, monitoring and surveillance functions, HIPAA exempts such governmental activities from its purview. Hence the use or disclosure of protected health information required to be reported to any public health authority is specifically exempted from HIPAA.

The MHDO is a state governmental entity authorized to impose assessments upon hospitals, health care facilities, providers, payers, carriers, and plan administrators to sustain its operation<sup>23</sup> and gather confidential health information from those same entities.<sup>24</sup> The primary mission of the MHDO is to develop and maintain a useful, objective, reliable and comprehensive health information database to improve the health of Maine citizens.<sup>25</sup> In so doing, it is engaged in a critical public health function: the development of a reliable database to assist policymakers in developing strategies to improve the health of Maine people. Accordingly, the MHDO is tasked with a critical aspect of public health monitoring and surveillance, *viz.*: the gathering of information regarding the health needs of Maine people.

This construction of the mission of MHDO is corroborated by its statutory charge to develop a comprehensive database regarding clinical, financial and restructuring data.<sup>26</sup> Furthermore, the MHDO is tasked with developing a comprehensive database to facilitate public health studies<sup>27</sup> and support the development of quality improvement foundations to conduct outcomes research, quality improvement research, and develop and implement practice guidelines.<sup>28</sup> The multifaceted charge to the MHDO to develop a comprehensive database to facilitate research into practice outcomes and quality improvement underscores the mission of the organization as a public health authority.

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<sup>22</sup> *Office of Civil Rights, Standards for Privacy of Individually Identifiable Health Information*, 45 CFR Parts 160 and 164).

<sup>23</sup> 22 M.R.S.A. § 8706.

<sup>24</sup> 22 M.R.S.A. § § 8707-8711.

<sup>25</sup> 22 M.R.S.A. § 8703(1).

<sup>26</sup> See 22 M.R.S.A. §§ 8708-8711.

<sup>27</sup> 22 M.R.S.A. § 8707(3)

<sup>28</sup> 22 M.R.S.A. + 8704(10).

**Conclusion**

In my view, the Maine Health Data Organization is a public health authority, within the meaning of the HIPAA Privacy Rule Standard, because the Organization is authorized to collect, analyze, and distribute, subject to strict confidentiality standards, clinical, financial and restructuring data from Maine providers, health care facilities, carriers, payers and plan administrators in order to develop a comprehensive database to assist health care policymakers in improving the health of Maine citizens. Accordingly, the MHDO is a state agency with a public health mission within the meaning of HIPAA.

Very sincerely yours,

(Original signed)

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NPG/s