

MEMORANDUM

TO: County Judges, County Treasurers, County Auditors
FROM: Quincy Quinlan, Assistant General Counsel,
TAC Legal Department
DATE: March 25, 2003
SUBJECT: COMPLIANCE WITH HIPAA PRIVACY RULE

This memorandum discusses the rule concerning privacy of protected health information promulgated pursuant to the federal Health Insurance Portability and Accountability Act of 1996 ("HIPAA"). **The Legal Department of the Texas Association of Counties ("TAC") distributes this memorandum as a public service. This memorandum is not legal advice. It does not take the place of discussions with your county attorney or other competent legal advisors or HIPAA consultants.**

As required by HIPAA, the United States Department of Health and Human Services ("HHS") has published a rule regarding the privacy of health information at 45 Code of Federal Regulations Parts 160 and 164 ("Privacy Rule"). You can view a copy of the complete rule at <http://www.hhs.gov/ocr/combinedregtext.pdf>. **Individuals or entities covered by the Privacy Rule must be in compliance with the Privacy Rule by April 14, 2003; small health plans with under \$5,000,000.00 in premiums have until April 14, 2004 to comply.**

HHS has promulgated a second rule in the area of the transmission of protected health information, specifically governing electronic health care transactions and code sets. Covered Entities must begin testing software and systems by April 16, 2003, and must be in full compliance by October 16, 2003. A third rule governing electronic security measures for covered entities requires the measures to be in place by April 21, 2005; small plans have until April 21, 2006 to comply. This memorandum does not discuss those two additional rules.

WHAT IS THE RULE ABOUT

The Privacy Rule establishes the concept of Protected Health Information ("PHI"). PHI is defined as individually identifiable health information that is transmitted by electronic media, or maintained in electronic media, or transmitted or maintained in any other form or medium. Individually identifiable health information does not include information in employment records or worker's compensation records. The county that is a covered entity can use or disclose PHI only if such use or disclosure is permitted or required by the Privacy Rule.

WHO IS COVERED BY THE RULE

A Covered Entity under the Privacy Rule is a health plan, or a health care clearinghouse, or a health care provider who transmits any health information in electronic form in connection with a transaction covered by the Privacy Rule.

A health plan is any individual or group plan that provides, or pays the cost of, medical care. The definition of health plan includes group health plans, which is a term that encompasses employee welfare benefit plans. It appears that if a county offers health coverages to its employees through the Texas Association of Counties Health and Employee Benefits Pool ("HEBP"), the county does not have a health plan for purposes of the Privacy Rule because HEBP is the health plan in that context. A similar analysis would also apply if a county has purchased health insurance for its employees from an insurance company. A self-insured county would appear to be classified as a health plan under HIPAA, however, and thus the administration of the health plan would need to comply with the Privacy Rule. The determination of whether a county is completely free of HIPAA requirements does not end with the analysis concerning the health plan.

A health care clearinghouse is an entity, including a billing service, repricing company, community health management information system or community health information system, that either: (1) processes or facilitates the processing of health information received from another entity in a non-standard format or containing non-standard data content into standard data elements or a standard transaction; or (2) receives a standard transaction from another entity and processes or facilitates the processing of health information into nonstandard format or nonstandard data content for the receiving entity. This letter will not discuss health care clearinghouses, as we do not believe counties are engaging in these types of activities.

A health care provider means a provider of services as defined in 42 United States Code 1395x(u); a provider of medical or health services as defined in 42 USC 1395x(s), and any other person or organization who furnishes, bills, or is paid for health care in the normal course of business. A provider of services as defined in 42 USC 1395x(u) means a hospital, skilled nursing facility, comprehensive outpatient rehabilitation facility, home health agency, or hospice program. A provider of medical or health services as defined in 42 USC 1395x(s) includes (please see statute for exhaustive list): physicians' services; services and supplies furnished as an incident to a physician's professional services; hospital services; outpatient diagnostic services furnished by a hospital; outpatient physical therapy and occupational therapy services; rural health clinic services and Federally qualified health center services; home dialysis supplies and equipment, and institutional dialysis services and supplies; physician assistant services, when performed under the supervision of a physician (but physician does not get paid); nurse practitioner or clinical nurse specialist services (where nurse works in collaboration with a physician); certified nurse-midwife services; qualified psychologist services; clinical social worker services; x-ray services; surgical dressings, and splints, casts and other devices used for reduction of fractures and dislocations; durable medical equipment; ambulance service where the use of other methods of transportation is contraindicated by the individual's condition, but only to the extent provided in regulations; screening mammography, screening pap smear and screening pelvic exam; and bone mass measurement. A county would be considered a

healthcare provider for purposes of the HIPAA Privacy Rule to the extent it provides any of the services listed above, or in the referenced statute, or furnishes, bills, or is paid for health care in the normal course of business.

A health care provider has to conduct certain transactions, as listed below, in electronic form in order to be a covered entity under the Privacy Rule. The term “transaction” is defined as the transmission of information between two parties to carry out financial or administrative activities related to health care. Although the term “electronic form” is not defined in the Privacy Rule, a companion rule issued by HHS defines the term “electronic media” as:

... the mode of electronic transmission. It includes the Internet (wide-open), Extranet (using Internet technology to link a business with information only accessible to collaborating parties), leased lines, dial-up lines, private networks, and those transmissions that are physically moved from one location to another using magnetic tape, disk, or compact disk media.

45 CFR 162.103. HHS has stated that a regular fax (placing a sheet of paper on a fax machine) is not an electronic transmission, but an electronic fax (faxing a document from a computer to another destination) is an electronic transaction.

The transactions covered by the Privacy Rule are: (1) health care claims or equivalent encounter information; (2) health care payment and remittance advice; (3) coordination of benefits; (4) health care claim status; (5) enrollment and disenrollment in a health plan; (6) eligibility for a health plan; (7) health plan premium payments; (8) referral certification and authorization; (9) first report of injury; and (10) health claims attachments. HHS has also reserved the right to add additional transactions at a later date. **If a county is a health care provider, and it performs any of these ten transactions using the technology listed above, it is a covered entity and needs to comply with the requirements of the Privacy Rule.** If the county has health care provider services, but it does not do any of the ten transactions electronically, it does not need to comply with HIPAA for the health care provider services.

A county may also want to analyze whether it qualifies as a hybrid entity under the Privacy Rule. A hybrid entity is a single legal entity that is a covered entity (health plan or health care provider) whose business activities include covered and non-covered functions, and that designates the parts of the organization that engage in the covered activities as health care components. As an example, a county that owns a county hospital could designate itself as a hybrid entity, and designate the hospital as a health care component of the hybrid entity. The advantage of the hybrid entity designation is that the Privacy Rule requirements would apply only to the designated health care component.

WHAT DOES A COVERED ENTITY HAVE TO DO

There are many procedures and policies that must be adopted and implemented if a county is classified as a health plan or a health care provider under the Privacy Rule. Achieving compliance with the Privacy Rule requires an extensive effort. If the county

officials who have access to protected health information have not already evaluated the Rule and assessed their operations, they should start immediately. We recommend that any county that believes it may be covered by the Privacy Rule should retain legal counsel or other HIPAA experts to assist in the development of a comprehensive plan that suits the needs of the county. If your office does not have primary responsibility for administering the county employee benefits program or the county's health care provider services (if applicable), you may wish to distribute a copy of this memorandum to the official or employee who has such responsibility.

Because of each county's unique circumstances, and because the Privacy Rule is extremely complex, it is not possible for us to develop a compliance plan for the counties. However, the following steps should probably be taken as part of any compliance plan, if the determination is made that the county is a Covered Entity under the Privacy Rule:

- Obtain a copy of the rule and read it. The Privacy Rule is published at 45 CFR Parts 160 and 164. It can also be found on the Internet at <http://www.hhs.gov/ocr/combinedregtext.pdf>. A copy of this memorandum is also on the TAC website. Instructions on accessing the website are given below. If you download the memorandum in RTF format, you will be able to click on the link in this paragraph that will take you directly to the Privacy Rule.
- The Commissioners Court may wish to appoint a Privacy Official and document the appointment. This person will be in charge of organizing the effort to achieve compliance.
- The Commissioners Court may wish to appoint a contact person who is responsible for receiving complaints about the use or disclosure of PHI. The Commissioners Court should document the appointment.
- The Commissioners Court may wish to appoint a committee to identify compliance issues, formulate a strategy for achieving compliance and establish policies to ensure the county's operations comply with the Rule.
- The HIPAA Committee may wish to identify the county employees that have access to PHI, the persons or entities that send PHI to the county and the persons and entities to whom the county discloses PHI.
- The HIPAA Committee may wish to identify the locations in the various county offices where PHI is stored and develop and implement such policies as are necessary to ensure that access to this information is limited to those employees who need PHI to perform plan administration functions or health care provider treatment and administrative functions.
- The HIPAA Committee may wish to develop a policy (to be ratified by the Commissioners Court and each elected officer) that requires the county, when requesting PHI from another person or entity, to identify the purpose for which the PHI is needed and request only the minimum amount of PHI necessary to accomplish the purpose.
- The HIPAA Committee may wish to develop a policy (to be ratified by the Commissioners Court and each elected officer) to develop a policy that requires the county, when it discloses PHI to another person or entity, to identify the purpose for

which the PHI is being disclosed and disclose only the minimum amount of PHI necessary to accomplish the purpose.

- The HIPAA Committee may wish to identify the uses and disclosures of PHI for which the county must obtain an authorization from the individual, and develop and use an authorization form for these occasions.
- Those to whom the county must disclose PHI for the purposes of performing a function pertaining to the county's health plan operations or health care provider operations are the county's Business Associates. The county's Business Associates must enter into Business Associates Agreements with a covered county. The Business Associates Agreements provide, among other things, that the Business Associates agree to use and disclose PHI only in compliance with the Privacy Rule.
- The county that is a Covered Entity under the Privacy Rule must prepare and disseminate to every participant in its health plan a Notice of Privacy Rights that sets forth individuals' rights concerning their PHI.
- If the county is a covered health care provider, and has a direct treatment relationship with individuals, each such person receiving medical services must be given a Notice of Privacy Rights that sets forth the individual's rights concerning their PHI.
- The Commissioners Court and all elected officials should develop and implement such policies as are necessary to ensure that an employee's PHI cannot be considered in making any employment decisions, and that PHI is not discussed openly in any forum for any reason.
- The Commissioners Court and elected officials may wish to develop policies that allow for an individual to access, amend and request restrictions on the use of his or her PHI.
- The Commissioners Court and elected officials may wish to develop a system for documenting non-routine disclosures of PHI and a policy of allowing an individual to obtain an accounting of those disclosures.
- The Commissioners Court and elected officials should train all employees by April 14, 2003 to ensure compliance with the HIPAA policies and the Privacy Rule, and document that training has occurred. If the Commissioners Court designates the county as a hybrid entity (an entity that has covered and non-covered functions), and designates the offices or departments that administer the health plan or the health care provider services as the health care component, then only the employees of the designated health care component would need to receive HIPAA training. **Further, the health care component would be the only part of the county that would need to comply with the HIPAA Privacy Rule.**
- The Commissioners Court and elected officials may wish to develop and impose appropriate sanctions for violations. Please note that the statute includes civil monetary penalties of up to \$25,000 and criminal penalties up to \$250,000 and 10 years incarceration.

We have posted the Business Associate Agreement, along with the policies, procedures and other forms that the Texas Association of Counties Health and Employee Benefits Pool will be using in its efforts to comply with the Privacy Rule. These documents can be viewed at TAC's website, <http://www.county.org>. At the website, go to "Online Resources," then click on HIPAA Policies and Procedures. The documents may be

downloaded. Again, these documents are posted for your convenience only, and are not intended to be legal advice to your county. We hope that this information is helpful as the county determines whether it needs to comply with the Privacy Rule.