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The Office of Information Practices (OIP) is authorized to issue this advisory opinion under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes (HRS) (the UIPA) pursuant to section 92F-42, HRS.

OPINION

Requester: Hawaii Tribune-Herald
Mr. David Bock, Editor
Agency: Hawaii County Fire Department
Date: June 29, 2012
Subject: Hawaii County Fire Department Records on Persons Rescued
(RFO-P 04-013)

REQUEST FOR OPINION

The Hawaii Tribune-Herald (Requester) asked whether, under the UIPA, the Hawaii County Fire Department (HCFD) must disclose names of persons rescued by HCFD. Requester amended its request in 2009, and now asks whether HCFD must disclose the name, gender, age, and hometown of persons rescued. OIP understands Requester's request to encompass all types of assistance from HCFD. This Opinion therefore refers to "persons rescued" as persons having received assistance from HCFD pursuant to calls for fire, medical, rescue, and motor vehicle accident assistance. Through its Corporation Counsel, HCFD stated it does not object to disclosure of gender and ages of persons rescued.

Unless otherwise indicated, this advisory opinion is based solely upon the facts presented, including e-mails from Requester of December 23, 2004, July 9, 2009, September 21 and 22, 2009; letters from HCFD dated February 1, 2005 (with enclosures), and August 7, 2009; a letter from the Department of Health Emergency Medical Services & Injury Prevention System Branch (DOH) dated July 24, 2009; e-mails from the Hawaii County Office of the Corporation Counsel (Corporation Counsel) dated January 19 and 23, 2012; telephone conversations with Requester

on April 13, 2012, with Hawaii Fire Chief Darren Rosario on November 23, 2011, with Battalion Chief Michael Gahan on May 14, 2012, with Corporation Counsel on November 28, 2011, April 11, and May 10, 2012, with the U.S. Department of Health & Human Services (DHHS) Office for Civil Rights (OCR), Region VI and Region IX offices, on May 10, 2012, and with OCR, Region VI office, on May 11, 2012; and facsimile transmittal from Corporation Counsel on April 13, 2012.

QUESTION PRESENTED

Whether the names and hometowns of persons rescued by HCFD are public under the UIPA.

BRIEF ANSWER

To the extent that HCFD is either a covered entity or a business associate under the Administrative Simplification subtitle of the Health Insurance Portability and Accountability Act of 1966, Public Law 104-191 (HIPAA), and the DHHS rules, 45 C.F.R. Parts 160 and 164, the Privacy Rule (HIPAA rule or Privacy Rule) promulgated under HIPAA, HCFD must determine on a case by case basis whether HIPAA or the Privacy Rules allow or prohibit disclosure of a person's identity. HCFD must also determine on a case by case basis whether the disclosure of hometowns of persons rescued, especially along with other information such as gender and age, could lead to discovery of the identity of an individual whose identity is protected under HIPAA. If so, then disclosure of the hometown is prohibited under HIPAA rules. If not, then disclosure is not prohibited by the HIPAA rules, and as the UIPA's privacy exception does not apply to de-identified information, HCFD would have no basis to withhold the hometown under the UIPA.

For HCFD's functions that are not subject to HIPAA or the HIPAA rules, the UIPA requires that in instances when the names of persons rescued by HCFD carry a significant privacy interest, the individual's privacy interest must be balanced against the public interest in disclosure on a case by case basis to determine whether disclosure of that person's identity is appropriate. An individual does not have an inherent privacy interest in his or her hometown, and thus where there is no basis under the UIPA's privacy exception to withhold the name of a rescued person, there is likewise no basis to withhold the name of the person's hometown. In instances in which HCFD may withhold the name of a rescued person under the UIPA's privacy exception, the issue of whether disclosure of the person's hometown, without the person's name, would amount to a clearly unwarranted invasion of personal privacy must be determined on a case by case basis. When disclosure of a hometown could lead to actual identification of an individual whose identity is protected from disclosure under the UIPA's privacy exception, HCFD may also withhold the person's hometown to protect the individual's identity.

FACTS

This opinion request did not result from a specific record request by Requester. Instead, Requester asked for an advisory opinion on whether, generally, HCFD is required under the UIPA to disclose the name, gender, age, and hometown of persons rescued by HCFD. Requester expressly stated it does not seek access to any medical information about any individual.

HCFD is unique in Hawaii in that it is a “fire-based EMS” department. HCFD provides both fire protection and emergency medical services (EMS). All HCFD firefighters are cross-trained to provide EMS as a requirement of employment. Thus, EMS-trained firefighters respond to every call.¹ HCFD receives calls for fire, medical, rescue, and motor vehicle accident assistance. Among its other duties,² HCFD contracts with DOH to provide emergency pre-hospital medical care and ambulance services on the island of Hawaii.

Pursuant to its contract with DOH, when a 911 call comes in to HCFD involving a potential injury or illness, HCFD personnel provide assessment and treatment, and obtain relevant information. HCFD’s letter to OIP dated February 1, 2005, stated that through its contract with DOH, HCFD is “held to the same expectations and standards” as DOH, and that information collected pursuant to work performed under the contract is protected under HIPAA rules at sections 164.102 through 164.534, and may not be disclosed to the media.

HCFD stated that most of, if not all, of the information it maintains regarding rescues that is not subject to HIPAA is provided via media releases that are routinely issued following its missions. HCFD does not object to disclosure of gender and age of persons rescued, and routinely discloses this information. HCFD also discloses hometowns for some persons rescued, depending on the circumstances, but not in all cases. This opinion therefore focuses on whether the

¹ By contrast, the counties of Maui and Kauai have county fire departments, but EMS services are provided by private contractors. The City and County of Honolulu has separate EMS and fire departments.

² The Hawaii County Code, at Chapter 2, Article 5, Section 2-14, requires, among other things, that the fire chief have the following powers, duties, and functions: perform firefighting and emergency services in order to save lives and property from fires and from emergencies arising on land or the sea and hazardous terrain; train, equip, maintain, and supervise a force of firefighting and emergency services personnel; monitor the construction and occupancy standards of buildings for the purpose of fire prevention and life safety; and provide educational programs related to fire prevention and life safety.

UIPA requires HCFD to disclose names and hometowns of persons rescued in all cases.

DISCUSSION

Under the UIPA, all government records are open to the public unless access is restricted or closed by law. HRS § 92F-11(a) (1993). Except as provided in section 92F-13,³ upon request by any person, an agency shall make its records available for inspection and copying. HRS § 92F-11(b). HCFD asserted that the names and hometowns (in some cases) of persons rescued fall under the UIPA exceptions for privacy and for records made confidential by another law. See HRS § 92F-13(1) and (4). This opinion discusses these arguments in turn, beginning with the UIPA's exception to disclosure at section 92F-13(4), HRS, for government records that are protected from disclosure pursuant to federal law.

As a preliminary note, the discussion in Part I pertains only to the applicability of HIPAA to HCFD. The discussions in Part II, starting on page 8, and Part III, starting on page 17, address the more general issues of whether the UIPA requires public disclosure of the names and hometowns of persons rescued as maintained by HCFD.

I. HIPAA'S APPLICABILITY TO HCFD

HCFD asserts the requested information is protected from disclosure by the federal HIPAA and the HIPAA rules. Some government agencies are subject to both the UIPA and HIPAA. OIP Op. Ltr. No. 03-05 at 2. As a county agency, HCFD is subject to the UIPA. HRS § 92F-3 (1993). HCFD asserts it is also subject to HIPAA.

HCFD's Status as a HIPAA Covered Entity

OIP's powers and duties are set forth at sections 92-1.5 and 92F-42, HRS. OIP does not have jurisdiction to decide HIPAA questions generally, and generally seeks to resolve UIPA disputes without opining on questions controlled by federal law. In a previous OIP opinion, a UIPA dispute raised the question of whether a program fell within the scope of a federal law setting confidentiality requirements. OIP Op. Ltr. No. 94-28. To resolve that initial question, OIP sought and obtained an advisory opinion from the appropriate federal agency. Id. at 4-5. However, in the absence of such an advisory opinion, and to the limited extent necessary to resolve a UIPA issue, OIP has itself interpreted federal laws raised as a basis for withholding access under the UIPA. See OIP Op. Ltr. No. 03-05 (examining federal law and regulations to

³ In addition, section 92F-4, HRS, states that agencies need not comply with the UIPA if compliance would cause the agency to lose or be denied federal funding, services, or other assistance.

determine that withheld records were protected under federal law and hence could be withheld under the UIPA).

HCFD asserted that it is directly subject to HIPAA and the HIPAA rules as a “covered entity.” A covered entity includes a health plan; a health care clearinghouse; or a “health care provider”⁴ who transmits any “health information”⁵ in electronic form in connection with a transaction covered under the HIPAA rules. 45 C.F.R. § 160.103.⁶ Under HIPAA rules, a covered entity may be designated as a

⁴ A “health care provider” includes a “provider of services (as defined in section 1861(u) of the [Social Security] Act, 42 U.S.C. 1395x(u)), a provider of medical or health services (as defined in section 1861(s) of the Act, 42 U.S.C. 1395x(s)), and any other person or organization who furnishes, bills, or is paid for health care in the normal course of business.” 45 C.F.R. § 160.103.

⁵ “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. § 160.103.

⁶ The term “transaction” as used in the definition of “covered entity” means:

the transmission of information between two parties to carry out financial or administrative activities related to health care. It includes the following types of information transmissions:

(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.

“hybrid” entity in order to avoid a global application of HIPAA to its non-HIPAA functions. 45 C.F.R. §§ 164.103, 164.105. Entities performing both covered entity functions and other functions may choose to be hybrid entities, so that the information held by the non-covered component is not subject to the Privacy Rule.⁷

HCFD’s prior Chief asserted in a letter to OIP dated August 7, 2009, that HCFD is a covered entity because it “is tasked with providing emergency medical services, treatment and transportation to the general public, as well [as] documenting and electronically transmitting our treatment via the Patient Care Reports (“PCR”).” More specifically, HCFD asserted that it is a hybrid covered entity under HIPAA with two divisions: (1) the Emergency Medical Services branch (EMS branch), which is the covered entity; and (2) the Fire Protection Division, which is not subject to HIPAA. The current Fire Chief indicated in a telephone conversation that this description is not entirely accurate, however, Corporation Counsel thereafter informed OIP that HCFD is a HIPAA hybrid covered entity.

OCR enforces the HIPAA Privacy Rule and other federal laws.⁸ For purposes of this opinion, OIP consulted with the DHHS OCR regarding what constitutes a covered entity and related topics. OCR did not make a determination on whether HCFD is subject to HIPAA or HIPAA rules, but the OCR, Region VI office, did explain that a health care provider that meets the definition of a covered entity (or the covered portion of a hybrid entity) “should be” billing health insurance electronically. HCFD does not send billings, electronically or otherwise, to health insurers of individuals who use ambulance services. Per its contract with DOH, HCFD sends its PCR reports electronically to DOH, and DOH submits billing to health insurers. Thus, most of HCFD’s EMS budget is paid for by the State through

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- (7) Health plan premium payments.
 - (8) Referral certification and authorization.
 - (9) First report of injury.
 - (10) Health claims attachments.
 - (11) Other transactions that the Secretary may prescribe by regulation.

45 C.F.R. § 160.104.

⁷ See DHHS website accessed April 12, 2012 at http://www.hhs.gov/ocr/privacy/hipaa/faq/ferpa_and_hipaa/522.html.

⁸ See DHHS website accessed May 14, 2012, at <http://www.hhs.gov/ocr/privacy/index.html>.

HCFD's contract with DOH, with the remainder funded by Hawaii County. OIP believes it is unnecessary for this opinion to determine whether HCFD is a covered entity in its own right for the reasons stated below, and as OIP does not have jurisdiction to opine whether HCFD is a HIPAA covered entity generally, OIP advises HCFD to consult with its own attorney on that question.

HCFD's Status as a Business Associate of DOH

HCFD also asserts that health information collected by its EMS branch is protected under HIPAA because HCFD is a business associate of DOH, which is a HIPAA covered entity. A business associate of a covered entity performs certain functions or activities that involve the use or disclosure of protected health information (PHI)⁹ on behalf of, or provides services to, a covered entity.¹⁰ The OCR, Region VI office, explained that two covered entities may enter into a business agreement; however, some business associates of covered entities are not themselves covered entities.

Under HIPAA rules, to be a business associate, an entity must enter into a business associate contract that includes a confidentiality agreement; thus, HIPAA requires a business associate of a covered entity to follow HIPAA's Privacy Rule even when the business associate is not itself a covered entity. In April 2003, HCFD and DOH executed a HIPAA Business Associate Agreement, as required under HIPAA rules, which states in relevant part:

Business Associate may Use Health Information for the proper management and administration of Business Associate or to carry out its legal responsibilities; provided that any Use or Disclosure described herein will not violate the Privacy Regulations or Hawaii law if done by Covered Entity. Except as otherwise limited in this Agreement, Business Associate may Disclose Health Information for the proper management and administration of the Business Associate, provided that with respect to any such Disclosure either (a) the Disclosure is required by law (within the meaning of the Privacy Regulations) or (b) Disclosure would not otherwise violate Hawaii law.

An agency may not contract away its UIPA obligations, so an agency's contractual obligation to keep information confidential is not generally a proper basis to withhold records under the UIPA. OIP Op. Ltr. No. 92-25 at 7, *citing* OIP Op. Ltrs. 89-10, 90-2, 90-39, and 92-21 (agency cannot bargain away its duties

⁹ See page 10 for the definition of PHI.

¹⁰ See DHHS website accessed June 6, 2012 at <http://www.hhs.gov/ocr/privacy/hipaa/understanding/coveredentities/businessassociates.html>.

under the UIPA with promises of confidentiality). In this situation, though, HCFD's obligation to keep information confidential results not just from its contract with DOH, but also from federal law, in that the HIPAA rules require such an obligation as a part of any contract between a covered entity and its business associate. OIP therefore is of the opinion that health information collected by HCFD's EMS branch is indeed subject to the confidentiality standards set by the HIPAA rules based on HCFD's status as a business associate of DOH, a HIPAA covered entity.

The OCR, Region VI office, explained that the federal Health Information Technology for Economic and Clinical Health (HITECH) Act, Title XIII of Division A and Title IV of Division B of the American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5 (Feb. 17, 2009), codified at 42 U.S.C. §§ 300jj et seq.; §§ 17901 et seq., requires DHHS to promulgate regulations in which business associates of covered entities that are not already covered entities themselves will be subject to most of the same HIPAA rules as covered entities they contract with. The regulations are not yet final. **Therefore, even if HCFD is not currently a covered entity, it appears that if it continues to be a business associate of DOH after the HITECH Act's regulations are promulgated, then HCFD will be directly subject to HIPAA.** Accordingly, this opinion next discusses HCFD records that are subject to HIPAA, and subsequently discusses HCFD records that are not subject to HIPAA.

II. HCFD RECORDS SUBJECT TO HIPAA

The issue here is whether names and hometowns of persons rescued are protected from disclosure under the HIPAA rules. OIP has not been asked to opine on a specific record request, and thus provides guidance that is general in nature.

OIP previously opined that information maintained by an agency that is protected from disclosure under HIPAA rules is also not subject to disclosure under section 92F-13(4), HRS, which does not require disclosure of government records that are protected from disclosure under federal law. OIP Op. Ltr. No. 03-05 at 4-5. OIP further advised that agencies maintaining records subject to HIPAA rules should use those rules to determine whether their records contain information that is barred from public disclosure. *Id.* at 5.

The OCR, Region VI office, explained that HIPAA and the Privacy Rule only apply to records pertaining to a covered entity's provision of health care¹¹ to an

¹¹ "Health care" is defined as:

care, services, or supplies related to the health of an individual.
Health care includes, but is not limited to the following:

individual¹², and not to a covered entity's other functions. **Thus, HIPAA and the Privacy Rule only apply to HCFD records that relate to its provision of health care either as a covered entity or as a business associate of DOH.**

DOH's letter to OIP dated July 24, 2009, asserted that the "Hawaii emergency ambulance service is **not permitted** to disclose the protected health information requested by the Hawaii Tribune-Herald under the HIPAA Privacy Rule (45 CFR § 164.502(a)(1)); neither does this request fall under any of the exceptions outlined in the Rule" (emphasis in original). The HIPAA Rule cited in DOH's letter sets forth general rules governing when covered entities may use or disclose PHI, for example, to the individual to whom it pertains. DOH's letter, however, does not cite to other relevant sections of the HIPAA rules that OIP finds necessary to discuss below.

The HIPAA rules include definitions that are relevant to this discussion. First, "individually identifiable health information" is defined as:

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.

(1) Preventative, diagnostic, therapeutic, maintenance, or palliative care, and counseling, service, assessment, or procedure with respect to the physical or mental condition, or functional status, of an individual or that affects the structure or function of the body; and

(2) Sale or dispensing of a drug, device, equipment, or other item in accordance with a prescription.

45 C.F.R. § 160.103.

¹² An "individual" under HIPAA rules means the person who is the subject of protected health information. 45 C.F.R. § 160.103.

45 C.F.R. § 160.103.

The HIPAA rules limit disclosure of “protected health information” (PHI), which means:

individually identifiable health information:

(1) Except as provided in paragraph (2) of this definition, that is:

(i) Transmitted by electronic media;

(ii) Maintained in electronic media; or

(iii) Transmitted or maintained in any other form or medium.

(2) Protected health information excludes individually identifiable health information in:

(i) Education records covered by the Family Education Rights and Privacy Act, as amended, 20 U.S.C. 1232g;

(ii) Records described at 20 U.S.C. 1232(a)(4)(B)(iv); and

(iii) Employment records held by a covered entity in its role as employer.

45 C.F.R. § 160.103.

HIPAA rules include a list of instances in which a covered entity may disclose PHI without first obtaining authorization from the individual to whom it pertains. OIP next discusses the HIPAA rule which allows a covered entity to use or disclose PHI 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). **In other words, HIPAA does not prohibit disclosure of PHI if disclosure is otherwise required by law. This section of the HIPAA rules necessitates an analysis of whether the UIPA is a law that requires disclosure of PHI.**

DHHS explained the interplay between HIPAA and public records laws, stating, in relevant part:

If a state agency is a covered entity, however, 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.

However, where a state public records law only permits, and does not mandate, the disclosure of protected health information, or where exceptions or other qualifications apply to exempt the protected health information from the state law's disclosure requirement, such disclosures are not "required by law" and thus, would not fall within § 164.512(a) of the Privacy Rules. For example, if a state public records law includes an exemption that affords a state agency discretion not to disclose medical or other information where such disclosure would constitute a clearly unwarranted invasion of personal privacy, the disclosure of such records is not required by the public records law, and therefore is not permissible under § 164.512(a). In such cases, a covered entity only would be able to make the disclosure if permitted by another provision of the Privacy Rule.

Accessed April 11, 2012 at http://www.hhs.gov/ocr/privacy/hipaa/faq/disclosures_for_law_enforcement_purposes/506.html. OIP notes that the above language only refers to state agencies, but we believe the same analysis would be true for a county agency that is subject to HIPAA.

While the UIPA contains a general presumption that government records are public, it also contains what DHHS has described as "exceptions or other qualifications" to its disclosure requirement. DHHS explained, as quoted above, that if a public records law includes an exception that allows an agency discretion not to disclose medical or other information where such disclosure would constitute a clearly unwarranted invasion of personal privacy, the disclosure is not required by the public records law, and, therefore, is not permissible under section 164-512(a) of the HIPAA rules, which allows disclosure of PHI if required by law.¹³ As in the DHHS example, the UIPA at section 92F-13(1), HRS, states that agencies need not disclose information which, if disclosed, would constitute a

¹³ Courts have noted the "problem of circular reference" in instances when a public records law requires disclosure unless prohibited by federal law, and HIPAA allows disclosure of PHI if required by state law. See e.g., Abbott v. Tex. Dep't of Mental Health & Retardation, 212 S.W. 3d 648, 662 (2006); State ex rel. Cincinnati Enquirer v. Daniels, 108 Ohio St. 3d 518, 524 (2006).

clearly unwarranted invasion of personal privacy. The UIPA provides examples of information in which an individual has a significant privacy interest, including “[i]nformation relating to medical, psychiatric, or psychological history, diagnosis, condition, treatment, or evaluation, other than directory information while an individual is present at such facility. . . .” HRS § 92F-14(b)(1). OIP therefore is of the opinion that, consistent with DHHS’ explanation above, the UIPA is not a law that *requires* disclosure of PHI.

OIP has not directly addressed HIPAA rule, section 164.512(a), in previous opinions. OIP has opined that under the UIPA, the HIPAA rules set the privacy standard for medical information maintained by an agency that is covered by the HIPAA rules, but serve only as a persuasive example in instances where a government agency is not directly covered by the HIPAA rules. OIP Op. Ltr. No. 03-19 at 7-10.¹⁴ In other words, for records directly covered by the HIPAA Rules, OIP has previously considered the standard of medical privacy set by the HIPAA Rules as controlling even where the UIPA’s privacy exception would not otherwise apply to the information in question.

Analyses by Courts

OIP is unaware of any Hawaii case law on point to this discussion. In such instances, OIP normally looks to cases decided under the federal Freedom of Information Act, 5 U.S.C. § 552 (FOIA), for guidance, but there do not appear to be any federal cases on point. OIP therefore briefly discusses court opinions of two other states on the interplay between HIPAA and their respective public records laws.

In Abbott v. Tex. Dep’t of Mental Health & Retardation, 212 S.W. 3d 648 (2006), the Texas Department of Mental Health and Mental Retardation (Department) received a request from a reporter for statistical information regarding allegations of abuse and subsequent investigations of abuse in state facilities, and for the names of those facilities. The Department believed the requested information was PHI under HIPAA. The Abbott Court noted that the information requested did not appear to be PHI, but presumed that it was for purposes of its opinion. Abbott, at 655, 657.

The Texas Public Information Act (PIA) requires that “each person is entitled, unless otherwise expressly provided by law, at all times to complete information about the affairs of government.” Abbott, at 653, *citing* Tex. Code

¹⁴ In that opinion, OIP concluded that very old medical information regarding deceased persons, held by a covered entity-agency, could not be disclosed despite the passage of time, whereas similar information held by a non-covered agency could be disclosed where the passage of time since death had reduced the privacy interest to the point of being outweighed by the public interest in disclosure.

Ann. § 552.001(a). The PIA also contains a provision requiring that it shall be liberally construed in favor of openness. Tex. Code Ann. § 552.001(b). Also, the PIA includes an exception to the general rule of disclosure for records that are confidential by law. Tex. Code Ann. § 552.101. These Texas laws are similar to provisions within the UIPA which are discussed herein. Reading Texas law together with HIPAA and the HIPAA rules, the Abbott Court concluded that the PIA is a statute requiring disclosure of PHI as described in section 164.512(a) of the Privacy Rule, which allows covered entities to disclose PHI to the extent that such use or disclosure is required by law. Abbott, at 660.

As the Abbott Court noted, the commentary to the Privacy Rule indicates that public information statutes are statutes that might result in the disclosure of PHI and provides that disclosures under FOIA fall under section 164.512(a) of the Privacy Rule if the disclosures meet FOIA's relevant requirements. Abbott, at 659, *citing* 65 Fed. Reg. at 82482. The commentary further states that if an agency receives a request for PHI, the agency must determine whether FOIA requires the disclosure or if an exemption applies, in which case the agency may redact the protected information. Id. In determining whether to release PHI in response to a FOIA request, the commentary states that an agency must look to the limits and exemptions in FOIA, not to the Privacy Rules. Id. at 660.

The Texas Court of Appeals concluded:

If the request asks for information that is protected health information, then the agency must ascertain if any exception to non-disclosure in the Privacy Rule applies. If no exception applies, the agency may release the information if potential identifiers are redacted or if a statistician determines that the release of the information cannot be used to identify any individual. 45 C.F.R. § 164.514. If an exception to non-disclosure does apply, the agency must release the information. For example, if the request is made under the authority of a statute that requires disclosure, then the exception found in section 164.512(a) applies, and the agency must disclose the information as long as the disclosure complies with all relevant requirements of the statute compelling disclosure. *Id.* § 164.512(a)(1).

If a request for protected health information is made under the Public Information Act, then the exception to non-disclosure found in section 164.512(a) of the Privacy Rule applies, and the agency must determine whether the Act compels the disclosure or whether the information is excepted from disclosure under the Act. For example, if the information is considered confidential by judicial decision, statute, or the constitution, then the information is not subject to disclosure under the "confidential" exception to disclosure found in the Public Information Act. *See* Tex. Gov't Code Ann. § 552.101; *see also* Tex. Occ.

Code Ann. § 159.002 (West 2004) (patient records and communications between patient and physician confidential).

Abbott, at 662-663. The Abbott Court decided that the information requested was subject to disclosure because the Privacy Rule permits disclosure of PHI if required by law, the PIA requires disclosure of public information unless an exception applies, and no exception to disclosure in the PIA applied to the release of statistical information regarding abuse at individual government facilities. Abbott, at 664.

Ohio followed a similar approach.¹⁵ These other states' approaches, however, would be inconsistent with OIP Opinion Letter Number 03-19, which, as discussed above, drew a distinction between agencies covered by HIPAA, for which HIPAA was treated as controlling, and agencies not covered by HIPAA, for which HIPAA was treated as persuasive only and not controlling.

The Texas and Ohio state court opinions were decided after OIP Opinion Number 03-19 was issued, and they may represent a trend toward treating state public record laws as controlling for records otherwise covered under the HIPAA rules.¹⁶ However, OIP notes that there has been as yet no federal court

¹⁵ The Ohio Supreme Court found, like the Abbott Court, that even if the records at issue (lead investigation reports) contained PHI, they would still fall under the "required by law" exception in the Privacy Rule because Ohio's public records law requires disclosure of the reports; and HIPAA does not supersede Ohio's open records requirements. State ex. rel. Cincinnati Enquirer v. Daniels, 180 Ohio St. 3d 518, 525 (2006). Conversely, in Hill v. E. Baton Rouge Parish Dep't of Emergency Medical Services, 925 So. 2d 17, 21 (2005), the Louisiana Court of Appeal found that 911 tapes were exempt from disclosure under that state's public records law because they fell into an exemption for "confidential Communication." Further, the court found, without detailed discussion, that the agency involved was a health care provider under HIPAA rules and the 911 tapes were protected from disclosure by HIPAA. Id. at 23.

¹⁶ By contrast, while Texas and Ohio opined on the interplay between HIPAA and their respective public records laws' general openness requirements, other jurisdictions have discussed the interplay of HIPAA and specific state laws expressly requiring disclosure of certain records. See e.g., State ex. rel. Adam's County Historical Society v. Nancy Kinyoun, 277 Neb. 749 (2009) (names of persons buried in a cemetery were public under state public records law which specifically excludes birth and death records from medical records that may be withheld from the public; thus, Privacy Rule would not prohibit disclose without prior authorization); Tex. Att'y Gen. OR2009-00331 (Jan. 8, 2009) (law requiring information about a patient treated by emergency medical services personnel be confidential, except for "the presence, nature of injury or illness, age, sex, occupation, and city of residence of a patient who is receiving emergency medical services" is a state law requiring disclosure of excepted information); Wisc. Att'y Gen. I-03-07 (September 27, 2007) (HIPAA allowed disclosure of name, address, and age of person to whom medical services provided, and location transported to as contained in ambulance records maintained by a fire department because that information is expressly required by state law to be public,

interpretation of the interaction between HIPAA and FOIA. Further, DHHS's interpretation of the Privacy Rule at section 164.512(a) may be more consistent with OIP's approach than those of the other states discussed herein. While OIP could reconsider a precedent based on a change in the law, OIP believes it would be premature at this time to find that the two state courts that have opined on this issue represent a change in the law requiring reconsideration of OIP Opinion 03-19. **OIP thus concludes that because the UIPA is a general public records law that allows but does not require disclosure of government records containing protected health information, disclosure is not permitted by section 164.512(a) of the Privacy Rule, unless there are other HIPAA exceptions allowing for disclosure.**

Names of Persons Rescued by HCFD's Emergency Services Division

Because section 164.512(a) of the Privacy Rule does not apply, it must next be determined whether any other exceptions allowing disclosure of PHI in section 164.512 apply. Other permitted exceptions include disclosures: for public health activities; about victims of abuse, neglect, or domestic violence; for health oversight activities; for judicial and administrative proceedings; for law enforcement purposes; certain uses and disclosures about decedents; for cadaveric organ, eye or tissue donation purposes; upon approval by a board established in accordance with HIPAA rules for waiver authorization; to avert a serious threat to health or safety; for specialized government functions; and for worker's compensation. 45 C.F.R. § 164.512. None of these exceptions appear to generally apply to the information at issue; however, one or more exceptions could apply in specific factual situations, and a case by case determination should be made upon each receipt of a request to HCFD for names of persons rescued insofar as they are contained within or are a part of PHI records created as part of HCFD's functions that are subject to HIPAA.¹⁷ **If no exceptions apply, then PHI is protected from disclosure**

and as such, is a permitted disclosure under HIPAA); Indiana Public Access Counselor letter to Virginia Perry (June 25, 2008) (state law expressly defines what information in a pre-hospital ambulance rescue or report record is public; and the Privacy Rule prohibits disclosure of any other patient medical information contained in the reports).

¹⁷ Under HIPAA rules, covered hospitals and providers may use a "facility directory" to disclose to interested persons a patient's name, health condition in general terms, and other information after the patient has had the opportunity to agree or object. This information may even be disclosed as allowed for emergency patients who have not had the opportunity to agree or object. The fact that a patient has been treated and released or died may also be released under HIPAA rules. See DHHS website accessed April 26, 2012, at <http://www.hhs.gov/ocr/privacy/hipaa/faq/facilitydirectories/483.html>; and at http://www.hhs.gov/ocr/privacy/hipaa/faq/facility_directories/485.html. These provisions are not relevant here because HCFD is not a covered hospital or provider with patients and does not maintain a facility directory.

absent a written authorization by the person about whom the PHI pertains. Thus, assuming that persons transported or treated by HCFD's Emergency Services Division have not so authorized public disclosure of their names in writing, the names are protected from disclosure by the HIPAA rules and may be withheld under the section 92F-13(4), HRS.¹⁸

Hometowns of Persons Rescued by HCFD's Emergency Services Division

The next issue to be decided whether hometowns may be disclosed. HIPAA rules allow disclosure of de-identified health information, meaning health information from which identifiers such as name and social security number have been removed. 45 C.F.R. §§ 164.502(d)(2), 164.514(a) and (b).

OCR, Region VI and Region IX offices, both indicated that disclosure of gender, age, and hometown, without the name or other identifiers of individuals is not prohibited by HIPAA or HIPAA rules. For example, general descriptions such as "twenty-two year old female from Honolulu" would be highly unlikely to lead to the actual identity of an individual. Both Region offices noted, however, that sometimes disclosure of smaller hometowns is not allowed under HIPAA rules. For example, if a response to a request for information about a person rescued was "twenty-two year old female from Kukuihaele," this could possibly allow others to ascertain identity since Kukuihaele has a population of less than 400 people. **Thus, HCFD should determine on a case by case basis whether disclosure of hometowns of persons rescued, especially along with other descriptive information such as gender and age¹⁹, could lead a person to ascertain the identity of an individual. If so, then disclosure would be prohibited under HIPAA rules. If not, then disclosure would not be prohibited by the HIPAA rules, and, as the UIPA's privacy exception would not apply to de-identified information, HCFD would have no basis to withhold the information under the UIPA.**

Responding to UIPA Requests for HCFD Records Protected Under HIPAA

HCFD is subject to the UIPA. **Thus, when it receives a request for information that is protected from disclosure by HIPAA or HIPAA rules, HCFD must nonetheless follow the requirements in the UIPA and OIP's**

¹⁸ Assuming no other permitted disclosures within the HIPAA rules apply, this conclusion remains the same even after the death of the person, as the Privacy Rules restrict disclosure of deceased persons' health information, no matter how old the information is. OIP Op. Ltr. No 03-19 at 7-8.

¹⁹ Because HCFD does not object to disclosure of gender and age of persons rescued, and because HIPAA rules allow disclosure of de-identified health information, OIP does not here discuss disclosure of this information in detail.

administrative rules at Chapter 2-71, Hawaii Administrative Rules (HAR), for responding to record requests. OIP Op. Ltr. No. 03-05 at 5.

III. HCFD'S RECORDS NOT SUBJECT TO HIPAA

UIPA Exception for a Clearly Unwarranted Invasion of Personal Privacy

Not all of HCFD's functions are covered by HIPAA. While the EMS branch is subject to the HIPAA as discussed above, HCFD has not argued that its Fire Protection Division is subject to HIPAA. This opinion next discusses application of the UIPA to HCFD records that are not maintained pursuant to HCFD's functions covered by HIPAA. OIP has not been asked here to opine on a specific record request, and thus again provides guidance that is general in nature. Because gender, ages, and sometimes the hometowns of individuals who have been rescued are already routinely disclosed by HCFD, the issues here are: (1) whether HCFD must also disclose the names of individuals rescued, and (2) whether hometowns must be disclosed for every rescue.

Names of Persons Rescued by HCFD

The UIPA provides an exception to disclosure at section 92F-13(1), HRS, for records which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy. In determining whether disclosure would constitute a clearly unwarranted invasion of personal privacy, the UIPA directs that "[d]isclosure of a government record shall not constitute a clearly unwarranted invasion of personal privacy if the public interest in disclosure outweighs the privacy interests of the individual." HRS § 92F-14(a) (Supp. 2011). The public interest to be considered is whether disclosure of information sheds light upon an agency's performance of its statutory duties and upon the actions and conduct of government officials. OIP Op. Ltr. Nos. 89-4; 89-16; 90-7; 90-9; 90-17; and 95-24. Where an individual has no significant privacy interest in a record, the record must be disclosed if there is a "scintilla" of public interest. OIP Op. Ltr. No. 95-24 at 10, *citing* H. Conf. Comm. Rep. No. 112-88, 14th Leg., 1988 Reg. Sess., Haw. H.J. 817, 818 (1988); S. Conf. Comm. Rep. No. 235, Haw S.J. 689, 690 (1988).

An individual's name contained in a government record can carry a significant privacy interest, depending upon the circumstances. OIP recognizes that, at least in some instances, names of individuals rescued may carry a significant privacy interest, such that disclosure would result in a clearly unwarranted invasion of personal privacy. For example, some records maintained by HCFD's Fire Protection Division could nonetheless contain medical information. OIP has opined that even agencies not covered by HIPAA should use HIPAA as a guide for how treat health records under the UIPA's privacy exception. OIP Op. Ltr. No. 05-05 at 4, *citing* OIP Op. Ltr. No. 03-19. **In other words, where records would be confidential under HIPAA if maintained by a HIPAA**

covered entity, the UIPA's privacy exception usually will apply to allow the records to be withheld from disclosure.²⁰ *Id.* It is also possible that records of a rescue by HCFD's Fire Protection Division could pertain to ongoing law enforcement investigations, or that such records could give rise to a privacy interest for a rescued person for reasons not yet anticipated. At the same time, there is also clearly a public interest in knowing about HCFD's publicly-financed missions.

It is OIP's opinion that, in the absence of particular circumstances elevating the privacy interest of a rescued person, such as where the records reveal a medical issue or the person's status as a crime victim, the names of persons rescued by HCFD's Fire Protection Division do not fall within the UIPA's privacy exception and may not be withheld on that basis. However, OIP cannot opine that disclosure of the names of persons rescued would be appropriate in every instance. In some instances the names of persons rescued by HCFD's Fire Protection Division would carry a significant privacy interest, which, depending upon the circumstances of the rescue, may or may not be outweighed by the strong public interest in disclosure. In such an instance, **the individual's privacy interest must be balanced against the public interest in disclosure on a case by case basis.**²¹

Hometowns of Persons Rescued by HCFD

An individual does not have an inherent privacy interest in his or her hometown, and thus where there is no basis under the UIPA's privacy exception to withhold the name of a rescued person, there is likewise no basis to withhold the name of the person's hometown. However, as discussed above, there may be instances in which HCFD's Fire Protection Division may withhold the name of a rescued person under the UIPA's privacy exception. In such an instance, the issue of whether disclosure of the person's hometown, without the person's name, would amount to a clearly unwarranted invasion of personal privacy must be determined on a case by case basis. **When disclosure of a hometown could lead to actual identification of an individual whose identity is protected from disclosure under the UIPA's privacy exception, HCFD's Fire Protection Division may also withhold the person's hometown to protect the individual's identity. The burden of proof to establish justification for**

²⁰ OIP did note there may be instances in which information protected under HIPAA rules might fail to qualify under the UIPA's privacy exception. OIP Op. Ltr. No. 03-05 at 4.

²¹ Where an individual whose name is requested has already died, the passage of time since death must be considered when balancing the individual's privacy interest against the public interest in disclosure, and that determination must be made on a case by case basis. OIP Op. Ltr. No. 03-19 at 10, 13.

nondisclosure of government records always rests with the agency. HRS § 92F-15(c) (1993); OIP Op. Ltr. No. 06-05 at 5.

Segregation, Readily Retrievable, and Administrative Burden

Every call to HCFD for assistance is recorded in HCFD's fire record management system (RMS). If a request for records is made to HCFD, a battalion chief is normally assigned to search for, review, and segregate records as necessary. HCFD asserts that in some cases, information that is protected from disclosure is so intertwined with other information contained in its reports that it is not reasonably segregable. **When a requested record contains both public and confidential information, an agency must disclose only reasonably segregable disclosable information.** § 2-71-17 HAR.

HCFD explained that, due to computer upgrades and other changes in technology, it is currently unable to print some fields of information from its databases, and in other cases only records for incidents within the past four to five years are retrievable. Other types of records are recorded over after a few years. An agency must compile information in response to a UIPA request if it is readily retrievable. Section 92F-11(c), HRS, states that “[u]nless the information is readily retrievable in the form in which it is requested, an agency shall not be required to prepare a compilation or summary of its records.” OIP Op. Ltr. No. 10-02 at 3, *citing* OIP Op. Ltr. No. 90-35 at 9-10. Whether information is readily retrievable is a matter that must be determined on a case-by-case basis. *Id.*

There is, however, no UIPA exception allowing withholding of a record on the basis that responding to a UIPA request will be burdensome to the agency. OIP Op. Ltr. No. 98-4 at 4 *citing* SHOPO v. Soc. Of Professional Journalists et al., 83 Haw. 378, 394-96, 927 P. 2d 386, 402-4 (1996). Further, the UIPA does not recognize as an exception to disclosure the possibility that disclosure will result in additional demands placed upon the agency. OIP Op. Ltr. No. 98-4 at 4. OIP's administrative rules do provide some relief to agencies faced with large or complex record requests. Under section 2-71-19, HAR, an agency may charge a record requester fees for searching for, reviewing, and segregating a record.

In addition, when extenuating circumstances exist, for example, when a record request requires extensive agency efforts to search for, review, segregate, or to otherwise prepare records for inspection or copying; or when the agency requires additional time to respond to the request in order to avoid an unreasonable interference with its other statutory duties and functions, OIP's rules give agencies additional time to respond to record requests. *See* §§ 2-71-13, 2-71-15(a), HAR. When extenuating circumstances are present, and when the requested records are voluminous, an agency may elect to make the records available in increments. § 2-71-15(b), HAR.

Right to Bring Suit

Requester has the right to bring an action in the circuit court to compel disclosure of the record. HRS §§ 92F-15 and -15.5(a). This action must be brought within two years, after agency denial. If Requester prevails, the court will assess against the agency Requester's reasonable attorney's fees and costs incurred in the action. HRS § 92F-15(d). If Requester files a lawsuit, Requester must notify OIP in writing at the time the action is filed. HRS 92F-15.3.

OFFICE OF INFORMATION PRACTICES

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