

April 11, 2003

Ms. Andrea Armitage
Department of Human Services
Queen Liliuokalani Building
1390 Miller Street
Honolulu, Hawaii 96813

Re: HIPAA and Part II of the Uniform Information Practices Act

Dear Ms. Armitage:

You asked the Office of Information Practices (“OIP”) whether there is any preemption of part II of the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes (“UIPA”), by 45 C.F.R. Parts 160 and 164, the medical privacy rules (“HIPAA rules”) promulgated by the federal Department of Health and Human Services as required by the Administrative Simplification subtitle of the Health Insurance Portability and Accountability Act of 1996, Public Law 104-191 (“HIPAA”).

ISSUE PRESENTED

Whether there is a conflict between part II of the UIPA, which provides for public access to government records, or the rules implementing it, chapter 2-71, Hawaii Administrative Rules, and the medical privacy rules under HIPAA.

BRIEF ANSWER

No. Information protected by the HIPAA rules would fall under one or more exceptions to disclosure under the UIPA: the exception for information protected by federal law and, in most instances, also the exception for

information whose disclosure would be a clearly unwarranted invasion of privacy. Haw. Rev. Stat. § 92F-13(1), (4) (1993). An agency with records subject to the HIPAA rules should therefore look to the HIPAA rules to determine whether records requested under the UIPA contain “protected health information” that is barred from public disclosure under the HIPAA rules. However, the agency should respond to the UIPA request using the procedures required by the UIPA and the rules implementing the UIPA.

BACKGROUND

The UIPA generally applies to state and county government agencies.¹ The HIPAA medical privacy rules generally apply to health care providers, health plans, and similar organizations.² There is some overlap between these two groups: some government agencies are subject to the HIPAA rules as well as the UIPA. When a government agency that is subject to the HIPAA rules receives a UIPA request that involves “protected health information” as defined in the HIPAA rules,³ the agency faces the question of how to fulfil its UIPA duties without violating the HIPAA rules’ protection of medical privacy.

DISCUSSION

I. PART II OF THE UIPA

Part II of the UIPA provides a public right of access to government records. Haw. Rev. Stat. § 92F-11 (1993). However, part II generally does not require an agency to disclose government records that fall within one of the five exceptions listed in section 92F-13, Hawaii Revised Statutes.⁴ Two exceptions are particularly relevant to requests for records that include health information protected by the HIPAA rules: the exception for records

¹ The definition of an “agency” under the UIPA is given in section 92F-3, Hawaii Revised Statutes.

² The HIPAA medical privacy rules define “covered entity” at 45 C.F.R. section 160.103 (2002).

³ The HIPAA medical privacy rules define “protected health information” at 45 C.F.R. section 164.501 (2002).

⁴ Records that are required to be disclosed “[a]ny other law to the contrary notwithstanding” under section 92F-12, Hawaii Revised Statutes, are not subject to the exceptions listed in section 92F-13, Hawaii Revised Statutes.

“which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy[,]” and the exception for records “which, pursuant to state or federal law . . . , are protected from disclosure. . . .” Haw. Rev. Stat. § 92F-13(1), (4) (1993).

The administrative rules implementing part II of the UIPA, chapter 2-71, Hawaii Administrative Rules, set out the process for requesters and agencies to follow in making and responding to government record requests. The administrative rules address such issues as the time an agency has to respond, what elements the response must contain, and what fees may be charged. E.g. Haw. Admin. R. §§ 2-71-13, -14, and -19 (1999).

II. HIPAA

The HIPAA rules discussed in this opinion set standards for privacy of protected health information.⁵ Broadly speaking, the HIPAA rules provide that patient-identifiable information in medical records must be protected from disclosures other than those permitted under the rules. The HIPAA rules also give a patient the right to access the patient’s own medical records, comparable to a person’s right to access personal records under part III of the UIPA. Because the HIPAA rules do not provide any general right of third party or public access to medical records, they do not include procedures for providing third party access comparable to the procedures set out in chapter 2-71, Hawaii Administrative Rules.

III. GOVERNMENT RECORDS SUBJECT TO HIPAA

A. Standards for Determining What Must be Disclosed

1. Privacy Exception to UIPA Disclosure

The UIPA’s privacy exception typically applies to protect medical records from public disclosure. Haw. Rev. Stat. §§ 92F-13(1), 14(b)(1) (Supp. 2002). The privacy exception, as applied to medical information, is the

⁵ This opinion does not address other, related rules required to be promulgated under HIPAA, which deal with such topics as security and electronic signature standards, electronic transaction standards, code set standards, and a national provider identifier. See HIPAA, Pub. L. No. 104-191, §§ 1173a-1173d (1996).

UIPA's parallel to the HIPAA rules' protection of medical privacy; however, the extent of that protection may not be identical from the HIPAA rules to the UIPA. For instance, under the UIPA, the privacy exception does not apply when there is a public interest strong enough to outweigh an individual's privacy interests. Haw. Rev. Stat. § 92F-14(a) (Supp. 2002). The likelihood of such a strong public interest in medical records may be remote, but it remains a possible limitation on privacy under the UIPA that has no parallel in the HIPAA rules.

Also, the OIP has previously opined that an individual's privacy interest ends at death. E.g. OIP Op. Ltr. No. 97-2 at 6 (March 11, 1997). The HIPAA rules, by contrast, continue to protect the privacy of an individual's medical records after the individual's death. See 45 C.F.R. § 164.502(f) (2002). The HIPAA rules represent a significant change to the law regarding privacy since the OIP last considered the issue of a deceased person's privacy interest, and the OIP may reconsider that issue if it arises in the future. However, at this time, the OIP has not been asked to reconsider that issue.

In sum, the UIPA's privacy exception will almost always apply to records that are protected under the HIPAA rules, but because the two laws are not identical it is possible that a record protected by the HIPAA rules could nonetheless fail to qualify for the UIPA's privacy exception.

2. Contrary Federal Law Exception to UIPA Disclosure

The differences between the extent of the UIPA privacy exception and the HIPAA rules' privacy protection do not create a potential conflict between the UIPA and the HIPAA rules, because the UIPA also has an exception to disclosure for records protected by federal law. Haw. Rev. Stat. § 92F-13(4) (1993). In any case where the HIPAA rules bar release of a record, the UIPA's exception for records protected by federal law will apply to exempt the protected health information from public disclosure.⁶ See, e.g., OIP Op.

⁶ The UIPA also provides that where compliance with a UIPA provision would cause an agency to lose federal "funding, services, or other assistance," the offending provision is waived to the extent necessary to avoid the loss. Haw. Rev. Stat. § 92F-4 (1993). The OIP would not expect section 92F-4, Hawaii Revised Statutes, to be applied based on the HIPAA rules, though, because records protected by HIPAA will always fall under the UIPA's exception for records protected by federal law. See Haw. Rev. Stat. § 92F-13(4) (1993).

Ltr. No. 94-13 (July 8, 1994) (federal regulations are federal law). An agency whose records may contain protected health information can thus follow the HIPAA rules to determine whether the information in requested records is protected from public disclosure by paragraph 92F-13(4), Hawaii Revised Statutes.

B. Process for Responding to a Record Request

Part II of the UIPA and the rules implementing it, chapter 2-71, Hawaii Administrative Rules, set out the process for an agency to follow in responding to a request for government records. The HIPAA rules do not address third party access—i.e., public access—to records and do not set out a process for responding to such requests.⁷ Thus, the rules set out in chapter 2-71, Hawaii Administrative Rules, do not have counterparts in the HIPAA rules that might set different standards. The area in which the HIPAA rules are significant to government record requests is in the substantive issue of whether a requester must be denied UIPA access to a government record containing a third person's protected health information, rather than the procedural issue of what steps and timelines an agency must follow in making its response to the requester. The HIPAA rules do not affect the steps and timelines that an agency must follow in responding to a request for government records, as set forth in chapter 2-71, Hawaii Administrative Rules.

CONCLUSION

An agency subject to the HIPAA rules must follow the UIPA's requirements, including the rules set out in chapter 2-71, Hawaii Administrative Rules, in responding to a record request under part II of the UIPA. However, the agency should look to the HIPAA rules to determine whether requested records contain protected health information that is barred from public disclosure. The agency may deny access to records protected by the HIPAA rules based on the UIPA's exception for records protected by federal law. See Haw. Rev. Stat. § 92F-13(4) (1993). In

⁷ The HIPAA rules do set out a patient's right of access to the patient's own medical records, comparable to part III of the UIPA, which covers an individual's right to access the individual's personal records. 45 C.F.R. § 164.524 (2002); Haw. Rev. Stat. §§ 92F-21 to -28 (Supp. 2002). This opinion does not discuss the interplay between part III of the UIPA and the HIPAA rules.

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addition, the UIPA's privacy exception will typically apply to medical information. See Haw. Rev. Stat. §§ 92F-13(1), -14(b)(1) (Supp. 2002).

Very truly yours,

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Staff Attorney

APPROVED:

Leslie H. Kondo
Director

JZB: ankd