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May 4, 2016

ATTORNEY GENERAL OPINION NO. 2016- 8

The Honorable Jim Kelly
State Representative, 11th District
State Capitol, 512-N
300 S.W. 10th Avenue
Topeka, Kansas 66612

Re: Public Health—Confidential Communications and Information—Privilege of Patient of Treatment Facility to Prevent Disclosure of Treatment and of Confidential Communications

Public Health—Health Care Data—Kansas Health Information Technology Act; Controlling Law on Confidentiality of Protected Health Information

Synopsis: The Kansas Health Information Technology Act does not abrogate a health treatment facility's duty to protect provider-patient privileged treatment information. Cited herein: K.S.A. 19-4001; 65-5602; K.S.A. 2015 Supp. 38-2223, 65-5603, 65-6823, 65-6825, 65-6828; 45 C.F.R. § 160.103; 45 C.F.R. § 164.512.

* * *

Dear Representative Kelly:

As the Representative for the Eleventh District, you ask our opinion on whether a community mental health center established pursuant to K.S.A. 19-4001, *et seq.*, is still bound by the provider-patient treatment records privilege found at K.S.A. 65-5602 following the passage of the Kansas Health Information Technology Act (KHITA), K.S.A. 2015 Supp. 65-6821, *et seq.* Because the KHITA was enacted with the purpose[1] of harmonizing state law with the Health Information Portability and Accountability Act of 1996 (HIPAA),[2] you ask if the KHITA's declaration that its terms control over "any provision of state law regarding the confidentiality, privacy, security or privileged status of

[1] K.S.A. 2015 Supp. 65-6823.
[2] Pub. L. No. 104-191, 110 Stat. 1936.

any protected health information"[3] effectively abolishes the provider-patient privilege contained at K.S.A. 65-5602 in favor of allowing any disclosure contemplated by HIPAA. For the reasons further discussed below, we believe that it does not.

Nature of the Privilege

K.S.A. 65-5602(a) provides,

> A patient of a treatment facility has a privilege to prevent treatment personnel or ancillary personnel from disclosing that the patient has been or is currently receiving treatment or from disclosing any confidential communications made for the purposes of diagnosis or treatment of the patient's mental, alcoholic, drug dependency, or emotional condition. The privilege extends to individual, family, or group therapy under the direction of the treatment personnel and includes members of the patient's family. The privilege may be claimed by the patient, by the patient's guardian or conservator or by the personal representative of a deceased patient. The treatment personnel shall claim the privilege on behalf of the patient unless the patient has made a written waiver of the privilege and provided the treatment personnel with a copy of such waiver or unless one of the exceptions provided by K.S.A. 2015 Supp. 65-5603 is applicable.

If, for example, a treatment facility is served with a subpoena duces tecum for the medical records of a patient or former patient, it must assert the privilege on the patient's behalf unless the patient or former patient has made a written waiver of the privilege or unless a statutory exception applies.[4]

The statutory privilege is not, however, absolute. There are sixteen exceptions in which the privilege contained in K.S.A. 65-5602(a) does not apply, including various instances involving emergency treatment, patient transfer, and bill collection, among others.[5]

We caution that not all situations covered by the enumerated exceptions may be readily apparent. For example, K.S.A. 65-5603(a)(4) allows treatment personnel to comply with, *inter alia*, the mandatory reporting requirements of K.S.A. 2015 Supp. 38-2223(a)(1)(B) regarding suspected physical, mental, or emotional abuse or neglect or sexual abuse of a child. The mandatory reporter, however, may also be required to "disclose protected health information freely and cooperate fully with the secretary and law enforcement throughout the investigation and subsequent legal process,"[6] which may include disclosing confidential communications made to the mandatory reporter.[7]

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[3] K.S.A. 2015 Supp. 65-6828.
[4] See *Hosey v. Presbyterian Church (U.S.A.)*, 160 F.R.D. 161 (D. Kan., 1995) (but also discussing limitations on application of the privilege in certain civil claims following the death of the patient).
[5] K.S.A. 2015 Supp. 65-5603(a)(1-16). This statute was recently amended by L. 2016, ch. 46, § 55 (effective July 1, 2016). The changes refer only to the location of terms defined in subsection (b) and do not affect our analysis.
[6] K.S.A. 2015 Supp. 38-2223(b)(2).
[7] *In re D.W.*, 2008 WL 624714, at *2 (Kan. Ct. App. 2008) (unpublished opinion).

Scope and Purpose of KHITA; Certain Permitted Disclosures under HIPAA

The KHITA generally prohibits a covered entity[8] from using or disclosing protected health information[9] except as allowed by federal regulations or limited statutory exceptions. We believe highlighting two types of permitted disclosures under the KHITA will help illustrate the way the KHITA affects pre-existing statutes, including the provider-patient privilege, in order to answer your question.

One of the areas of state law the KHITA was intended to harmonize with HIPAA is "facilitating the development and use of health information technology and the sharing of health information electronically."[10] To that end, the KHITA allows for covered entities to disclose protected health information to health information organizations[11] when certain threshold conditions are met[12] in order to facilitate the creation and maintenance of electronic infrastructure for moving protected health information between covered entities.[13] Two health information organizations have been awarded certificates of authority under the KHITA: the Kansas Health Information Network (KHIN) and the Lewis and Clark Information Exchange (LACIE).[14]

The KHITA also allows disclosure of protected health information "in a manner as permitted under 45 C.F.R. § . . . 164.512."[15] That regulation provides, in relevant part,

> A covered entity may disclose protected health information for a law enforcement purpose to a law enforcement official if the conditions in paragraphs (f)(1) through (f)(6) of this section are met, as applicable.
>
> (1) Permitted disclosures: Pursuant to process and as otherwise required by law. A covered entity may disclose protected health information:
>
> . . .
>
> (ii) In compliance with and as limited by the relevant requirements of:
>
> . . .
>
> (C) An administrative request, including an administrative subpoena or summons, a civil or an authorized investigative demand, or similar process authorized under law, provided that:

[8] K.S.A. 2015 Supp. 65-6822(d); 45 C.F.R. § 160.103.
[9] K.S.A. 2015 Supp. 65-6822(q); 45 C.F.R. § 160.103.
[10] K.S.A. 2015 Supp. 65-6823.
[11] K.S.A. 2015 Supp. 65-6822(j).
[12] K.S.A. 2015 Supp. 65-6825(b).
[13] See K.S.A. 2015 Supp. 65-6822(j).
[14] "Kansas HIO Contacts." Kansas Department of Health and Environment Health Information Technology. http://www.kanhit.org/participate.htm (accessed March 1, 2016).
[15] K.S.A. 2015 Supp. 65-6825(a)(2).

> (1) The information sought is relevant and material to a legitimate law enforcement inquiry;
>
> (2) The request is specific and limited in scope to the extent reasonably practicable in light of the purpose for which the information is sought; and
>
> (3) De-identified information could not reasonably be used.[16]

At first glance, these allowed disclosures would seem to establish a conflict between the KHITA and the provider-patient privilege statute, K.S.A. 65-5602, which requires treatment personnel to assert the privilege on the patient's behalf to prevent disclosure. Under the terms of K.S.A. 2015 Supp. 65-6828, the KHITA would control and the disclosures would be permitted.[17]

Resolving an Apparent Conflict

In order to determine whether—and the extent to which—an actual conflict exists, closer examination of K.S.A. 2015 Supp. 65-5603 is required. We believe that two separate statutory provisions resolve the question of whether the provider-patient privilege survives under the KHITA in the two situations we described above: sharing information with a health information organization and responding to a law enforcement inquiry.

We first note the provider-patient privilege contains an exception that allows treatment personnel to disclose:

> any communication and information by and between or among treatment facilities . . . regarding a proposed patient, patient or former patient for purposes of promoting continuity of care by and between treatment facilities . . . ; the proposed patient, patient, or former patient's consent shall not be necessary to share evaluation and treatment records by and between or among treatment facilities . . . regarding a proposed patient, patient or former patient.[18]

We assume without deciding that disclosing protected health information to a health information organization is consistent with promoting continuity of care among treatment facilities. In that situation no conflict exists between the KHITA and the provider-patient privilege statutes, so the privilege is preserved.

Next, we note the KHITA by its terms does not conflict with, or take precedence over, the provider-patient privilege found in K.S.A. 2015 Supp. 65-5602 because the KHITA expressly preserves "any statutory health care provider-patient evidentiary privilege applicable to a judicial or administrative proceeding" and provides that "[n]othing in [KHITA] shall limit or restrict the effect and application of" that privilege.[19] We also note

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[16] 45 C.F.R. § 164-512(f).
[17] K.S.A. 2015 Supp. 65-6828.
[18] K.S.A. 2015 Supp. 65-5603(a)(13).
[19] K.S.A. 2015 Supp. 65-6828(a).

the provider-patient privilege has an explicit exception for confirming "whether a person is or has been a patient of any treatment facility with the last six months."[20]

When read *in pari materia*, the KHITA and the provider-patient privilege statute require a mental health treatment facility to confirm whether a person is or has been a patient of the treatment facility within the last six months provided that person is,

> lawfully detained by a law enforcement officer upon reasonable suspicion that such person is committing, has committed or is about to commit a misdemeanor or felony, if such law enforcement officer has reasonable suspicion that such person is suffering from mental illness and such law enforcement officer has a reasonable belief that such person may benefit from treatment at a treatment facility rather than being placed in a correctional institution, jail, juvenile correctional facility or juvenile detention facility.[21]

Any such request must also satisfy the covered entity that: the information sought is relevant and material to a legitimate law enforcement inquiry; the request is specific and limited in scope to the extent reasonably practicable in light of the purpose for which the information is sought; and de-identified information could not reasonably be used.[22]

Other law enforcement requests for disclosure of protected health information remain subject to the rule preserving the provider-patient privilege in judicial or administrative proceedings as that rule existed prior to enactment of the KHITA.

Sincerely,

Derek Schmidt
Kansas Attorney General

Craig Paschang
Assistant Attorney General

DS:AA:CP:sb

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[20] K.S.A. 2015 Supp. 65-5603(a)(16).
[21] *Id.*
[22] 45 C.F.R. § 164.512(f)(1)(ii)(C)(1-3).