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ATTORNEY GENERAL OPINION NO. 2025-17

Michael Kagay
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Third Judicial District of Kansas
200 SE 7th Street, Suite 214
Topeka, Kansas 66603

Re: Procedure, Civil—Rules of Civil Procedure—Subpoenas

Procedure, Civil—Rules of Civil Procedure—Subpoenas of nonparty records

Courts—Contempts of Court—Indirect contempt; procedure

Synopsis: Law enforcement subpoenas and warrants that comply with regulations regarding disclosure of protected health information (PHI) promulgated under the Health Insurance Portability and Accountability Act (HIPAA) create a legal obligation on Kansas healthcare providers to disclose such information. A healthcare provider may not require a law enforcement agency to sign an agreement to be bound by HIPAA's disclosure requirements before the provider discloses PHI to law enforcement as required by law. Withholding PHI that is required to be disclosed based on such a contingency may subject the healthcare provider to adverse action, such as contempt. Moreover, a healthcare provider may not rely on inapplicable out-of-state disclosure restrictions that are more stringent than HIPAA to avoid compliance with Kansas subpoenas and court orders requiring disclosure of PHI. Cited herein: K.S.A. 60-245; K.S.A.

20-1204a; 42 U.S.C. §§ 1320d-5, 1320d-6, 1395x; 45 C.F.R. §§ 160.103, 160.202, 160.203, 164.103, 164.104, 164.502, 164.512.

* * *

Dear Mr. Kagay:

As the District Attorney for the Third Judicial District of Kansas, you ask:

(1) Whether Kansas healthcare providers can lawfully refuse to disclose protected health information (PHI) despite a properly issued subpoena or court order for such PHI.

(2) Whether law enforcement subpoenas and warrants create a legal obligation to disclose PHI, notwithstanding the "may disclose" language in the Health Insurance Portability and Accountability Act (HIPAA) regulations.

(3) Whether prosecuting agencies could incur liability or waive immunity by signing agreements to comply with HIPAA when HIPAA does not apply to them.

(4) Whether Kansas law preempts any attempts by healthcare providers to comply with out-of-state disclosure restrictions that contradict Kansas subpoenas and court orders.

In your request for opinion, you note that healthcare providers in Kansas have been refusing to disclose PHI pursuant to lawful subpoenas and court orders based on the providers' interpretation of HIPAA and regulations promulgated under that act.

HIPAA and the Privacy Rule

Under the authority granted by HIPAA, the United States Department of Health and Human Services (HHS) has issued final regulations related to the security and privacy of certain healthcare information.[1] The Standards for Privacy of Individually Identifiable Health Information, commonly referred to as the "Privacy Rule," address the use and disclosure of individuals' identifiable health information (called "protected health information") by organizations subject to the Privacy Rule (called "covered entities").[2]

Covered entities are defined as health plans, health case clearinghouses, and healthcare providers who transmit health information in electronic form in

[1] 42 C.F.R. § 160 *et seq.* and 45 C.F.R. § 164 *et seq.*
[2] 45 C.F.R. § 164 *et seq.*

connection with certain transactions.[3] A healthcare provider includes all "providers of services" (institutional providers such as hospitals and nursing facilities), "providers of medical or health services" (non-institutional providers such as physicians, dentists, and other practitioners), and any other person or organization that furnishes, bills, or is paid for health care in the normal course of business.[4]

Under the Privacy Rule, a covered entity may not use or disclose PHI, except as permitted or required by the Privacy Rule.[5] Relevant to this opinion, a covered entity may disclose PHI as permitted in 45 C.F.R. § 164.512.[6] Subsection (a) of 45 C.F.R. § 164.512 provides:

> (1) A covered entity may use or disclose protected health information 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.
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> (2) A covered entity must meet the requirements described in paragraph (c), (e), or (f) of this section for uses or disclosures *required by law*.[7]

The Privacy Rule specifically defines the phrase "required by law" as "a mandate contained in law that compels an entity to make a use or disclosure of protected health information and that is enforceable in a court of law."[8] This definition of "required by law" goes on to provide a non-exclusive list of examples:

> [C]ourt orders and court-ordered warrants; subpoenas or summons issued by a court, grand jury, a governmental or tribal inspector general, or an administrative body authorized to require the production of information; a civil or an authorized investigative demand; Medicare conditions of participation with respect to health care providers participating in the program; and statutes or regulations that require the production of information, including statutes or regulations that require such information if payment is sought under a government program providing public benefits.[9]

Subsection (e) of 45 C.F.R. § 164.512 governs disclosures for judicial and administrative proceedings, which distinguishes disclosures in response to a court

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[3] 45 C.F.R. § 164.104.
[4] 45 C.F.R. § 160.103; 42 U.S.C. § 1395x.
[5] 45 C.F.R. § 164.502.
[6] 45 C.F.R. § 164.502(a)(1)(vi)(B).
[7] Emphasis added.
[8] 45 C.F.R. § 164.103.
[9] 45 C.F.R. § 164.103.

order from disclosures in response to a subpoena or discovery order not accompanied by a court order. Covered entities may disclose PHI in a judicial or administrative proceeding if the request for the information is through an order from a court or administrative tribunal.[10] A covered entity may also disclose PHI in response to a subpoena, discovery request, or other lawful process, that is not accompanied by an order of a court or administrative tribunal only if certain "satisfactory assurances" regarding notice to the individual or a protective order are provided.[11] The provisions of subsection (e) do not supersede other provisions of 45 C.F.R. § 164.512 that otherwise permit or restrict uses or disclosures of protected health information.[12]

Most pertinent to your inquiry, subsection (f) of 45 C.F.R. § 164.512 applies to disclosures of PHI to law enforcement officials for law enforcement purposes. A law enforcement official is:

> [A]n officer or employee of any agency or authority of the United States, a State, a territory, a political subdivision of a State or territory, or an Indian tribe, who is empowered by law to:
>
> (1) Investigate or conduct an official inquiry into a potential violation of law; or
>
> (2) Prosecute or otherwise conduct a criminal, civil, or administrative proceeding arising from an alleged violation of law.[13]

Under 45 C.F.R. § 164.512(f), covered entities may disclose PHI to law enforcement officials for law enforcement purposes under the following six circumstances, and subject to specified conditions: (1) as required by law (including mandatory reporting, court orders, court-ordered warrants, subpoenas) and administrative requests; (2) to identify or locate a suspect, fugitive, material witness, or missing person; (3) to provide information about a victim or suspected victim of a crime; (4) to alert law enforcement of a person's death, if the covered entity suspects that criminal activity caused the death; (5) when a covered entity believes that PHI is evidence of a crime that occurred on its premises; and (6) in a medical emergency not occurring on the covered entity's premises, when necessary to inform law enforcement about the commission and nature of a crime, the location of the crime or crime victims, and the perpetrator of the crime. The inquiry here deals with disclosures required by law under 45 C.F.R. § 164.512(f)(1).

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[10] 45 C.F.R. § 164.512(e)(1)(i).
[11] 45 C.F.R. § 164.512(e)(1)(ii)-(v).
[12] 45 C.F.R. § 164.512(e)(2).
[13] 45 C.F.R. § 164.103.

45 C.F.R. § 164.512(f)(1) provides that a covered entity "may disclose" protected health information:

> (i) As required by law including laws that require the reporting of certain types of wounds or other physical injuries, except for laws subject to paragraph (b)(1)(ii) or (c)(1)(i) of this section; or
> (ii) In compliance with and as limited by the relevant requirements of:
> (A) A court order or court-ordered warrant, or a subpoena or summons issued by a judicial officer;
> (B) A grand jury subpoena; or
> (C) An administrative request for which response is required by law, including an administrative subpoena or summons, a civil or an authorized investigative demand, or similar process authorized under law, provided that:
> (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.

Importantly, unlike required disclosures not accompanied by a court order in judicial proceedings under subsection (e), no required disclosures to law enforcement are predicated on the covered entity obtaining "satisfactory assurances" regarding notice or protective orders before they release PHI.[14]

Your inquiry suggests that healthcare providers claim the discretionary language of "may disclose" contained in the relevant portions of 45 C.F.R. § 164.512 means they need not comply with subpoenas or court orders requiring disclosure. While healthcare providers do not violate HIPAA by refusing disclosure, they violate Kansas law and court orders requiring disclosure.

As explained below, HIPAA sets out a federally mandated floor of procedural requirements before disclosing PHI to law enforcement. While states may provide more stringent standards before PHI may be disclosed, HIPAA is more stringent than any of Kansas's privilege statutes.[15] So if Kansas law or a court order requires disclosure of PHI, and HIPAA's procedural requirements are satisfied, then a covered entity is required to disclose such information.[16]

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[14] *Compare* 45 C.F.R. § 164.512(f)(1), *with* 45 C.F.R. § 164.512(e)(1)(ii)-(v).
[15] Kan. Att'y Gen. Op. No. 2004-21 (July 7, 2004).
[16] As a policy matter, the "'HIPAA Privacy Rule strives to balance the interest of individuals in maintaining the confidentiality of their health information with the interests of society in obtaining, using, and disclosing health information to carry out a variety of public and private activities.'"

Law enforcement subpoenas and warrants that comply with HIPAA regulations create a legal obligation on Kansas healthcare providers to disclose PHI.

In response to your first two questions, we believe that (1) Kansas healthcare providers cannot rely on HIPAA or the Privacy Rule to refuse to disclose PHI pursuant to a properly issued subpoena or court order and (2) law enforcement subpoenas and warrants create a legal obligation to disclose PHI, notwithstanding the "may disclose" language in HIPAA regulations.

"HIPAA was passed to ensure an individual's right to privacy over medical records, it was not intended to be a means for evading prosecution in criminal proceedings."[17] And considering 45 C.F.R. § 164.512(f)(1), it is "evidently denudate" that a purpose of HIPAA and the Privacy Rule is that health information that would otherwise be protected is to be provided to law enforcement when required by law, or when a covered entity is provided a lawful court order or subpoena.[18]

Courts interpreting the disclosure procedures under 45 C.F.R. § 164.512 have long held that they merely provide the required procedures for disclosure.[19] As a result, they "do not create a privilege or govern disclosure in court actions."[20] And ultimately, "'HIPAA regulations do not trump the rules of civil procedure with respect to discovery obligations or questions of relevance.'"[21] As a result, when a subpoena or court order meets the procedural requirements in the HIPAA regulations, a covered entity is required to provide the relevant PHI.[22] Failure to

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Menorah Park Center for Senior Living v. Rolston, 164 Ohio St. 3d 400, 406, 173 N.E.3d 432, 438 (Ohio 2020) (quoting Tovino, *A Timely Right to Privacy*, 104 Iowa L. Rev. 1361, 1367 (2019)). In enacting the Privacy Rule, the HHS determined that an individual's privacy interest in their health information givens way when law enforcement meets the procedural requirements of 45 C.F.R. § 164.512(f)(1). And allowing the "may disclose" language in the Privacy Rule to supersede Kansas law requiring disclosure would thwart the HHS's intent allowing PHI to be obtained and used in carrying out law enforcement functions.

[17] *United States v. Zamora*, 408 F. Supp. 2d 295, 298 (S.D. Tex. 2006).

[18] *Bayne v. Provost*, 359 F. Supp. 2d 234, 237 (N.D.N.Y. 2005). The court in *Bayne* addressed subpoenas issued in civil judicial proceedings and noted that, under 45 C.F.R. § 164.512(e), "it is evidently denudate that a purpose of HIPAA was that health information, that may eventually be used in litigation or court proceedings, should be made available during the discovery phase." *Id.* at 237. *See also In re Grand Jury Subpoena John Doe No. A01-209*, 197 F. Supp. 2d 512, 515 (E.D. Va. 2002) ("the HIP[A]A regulations themselves make clear that any privacy interest patients have in their medical records is trumped by a grand jury subpoena . . . .").

[19] *See, e.g.*, *Northwestern Memorial Hosp. v. Ashcroft*, 362 F.3d 923, 925-26 (7th Cir. 2004); *In re Estate of Broderick*, 34 Kan. App. 2d 695, 702, 125 P.3d 564 (2005).

[20] *Loyning v. Potter*, 2024 WY 82, ¶ 26, 553 P.3d 128 (Wyo. 2024).

[21] *Id.* (quoting *Polk v. Swift*, 339 F.R.D. 189, 195-96 (D. Wyo. 2021)).

[22] *Chapman v. Health and Hospitals Corps.*, 7 Misc. 3d 933, 939, 796 N.Y.S.2d 876, 880 (Sup. Ct. 2005) (noting that "[t]he present order is a qualified protective order that satisfies HIPAA and its regulations, so the Hospital now must provide the relevant medical records.")

comply with the subpoena or court order may result in adverse action to the covered entity, such as contempt of the court in which an action is pending.[23]

Without knowing the terms of agreements to abide by HIPAA, we are unable to opine on whether a prosecuting agency could incur liability by signing such agreements. However, covered entities may not require that law enforcement agencies sign an agreement to be bound HIPAA's disclosure requirements before disclosing PHI as required by law.

HIPAA provides both civil and criminal penalties for improper disclosures of medical information.[24] Congress has provided for the administrative enforcement of its provisions by HHS, as well as by state attorneys general.[25] However, law enforcement agencies, including prosecuting attorney offices, are not covered entities under HIPAA and are not subject to its restraints on the use or receipt of protected medial information.[26]

Your inquiry suggests that healthcare providers have been asking or demanding your office to sign agreements to comply with HIPAA before disclosing PHI. However, we are unaware of the terms or language of these agreements. As a result, we cannot accurately opine on the extent the prosecuting agency could incur liability by signing such an agreement. That said, such agreements are not required under HIPAA or its regulations before a covered entity must disclose PHI to law enforcement pursuant to a HIPAA-complaint subpoena or court order.

In some circumstances, HIPAA regulations require that covered entities obtain certain guarantees from recipients of PHI that the information will not be unlawfully disclosed. For example, as previously noted, before PHI may be disclosed in a judicial proceeding pursuant to a non-court ordered discovery request, the covered entity must obtain "satisfactory assurances" from the party requesting the information that such party either (1) gave notice to the individual or (2) is securing a qualified protection order.[27] And, more akin to the proposed agreements you described, before disclosing PHI to business associates, HIPAA regulations require that covered entities enter into written agreements with the business associate that obligates that associate to abide by HIPAA's restriction on PHI disclosures.[28] But a law enforcement agency is not a business associate where such agreement is

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[23] K.S.A. 60-245(e); K.S.A. 20-1204a; *see also Sebelius v. LaFaver*, 269 Kan. 918, 924, 9 P.3d 1260 (2000).
[24] 42 U.S.C. §§ 1320d-5, d-6.
[25] *Id.* Notably, HIPAA does not provide a private cause of action. *Bonney v. Stephens Memorial Hospital*, 2011 ME 46, ¶ 20, 17 A.3d 123, 128 (2011).
[26] *United States v. Elliott*, 676 F. Supp. 2d 431, 440 (D. Md. 2009).
[27] 45 C.F.R. § 164.512(e)(1).
[28] 45 C.F.R. § 164.502(e); 45 C.F.R. §164.504(e); *Monarch Fire Protection District of St. Louis County, Missouri v. Freedom Consulting & Auditing Services, Inc.*, 678 F. Supp. 2d 927, 932 (E.D. Mo. 2009), *aff'd*, 644 F.3d 633 (8th Cir. 2011).

required before disclosure.[29] If the HIPAA-regulation drafters desired disclosure to law enforcement to be contingent on their agreement to comply with HIPAA, they certainly knew how to do so. This shows the drafters did not intend to require the procedure for disclosing PHI to law enforcement under 45 C.F.R. § 164.512(f)(1) to include an agreement by law enforcement to comply with HIPAA regulations.[30] And refusal to disclose PHI as required by court order or subpoena that otherwise satisfies 45 C.F.R. § 164.512(f)(1) based on such additional requirement with no basis in HIPAA would subject the healthcare facility to potential adverse action.

Inapplicable out-of-state disclosure restrictions have no bearing on whether a healthcare provider complies with Kansas subpoenas or court orders.[31]

HIPAA and its regulations expressly preempt state medical privacy laws except when those laws are more stringent than the standards promulgated by the HHS.[32] As a result, HIPAA permits more stringent state laws to remain in effect. A state law is more stringent than HIPAA if the state law increases the privacy protections afforded, provides the patient access to more information than HIPAA requires, increases an individual's right to access or amend health information, or restricts the use or disclosure of information that HIPAA would otherwise permit.[33]

Several states have laws that provide more restrictions on disclosure of PHI than HIPAA and its regulations.[34] However, neither HIPAA nor its regulations make these more stringent restrictions applicable in Kansas.[35] And a healthcare provider

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[29] *See* 45 C.F.R. § 160.103 (definition of "[b]usiness associate").
[30] *See Kansas/Iowa ex rel. Sec'y of Soc. & Rehab. Servs. v. Bohrer*, 286 Kan. 898, 915, 189 P.3d 1157 (2008).
[31] This section assumes no out-of-state nexus. In the event there is some connection to another state, the analysis depends on the facts. *See*, *e.g.*, *State v. Heaney*, 689 N.W.2d 168, 176 (Minn. 2004) (finding that, in a Minnesota criminal case, Wisconsin's laws governing physician-patient privilege applied to medical records and a blood sample located at Wisconsin hospital); *Inghram v. Mutual of Omaha Ins. Co.*, 170 F. Supp. 2d 907, 909-10 (W.D. Mo. 2001) (finding that Missouri law, not Kansas law, governed Missouri insured's claim against Nebraska health insurer for producing her medical records in Kansas court without moving to quash subpoena issued by Kansas court for use in third-party proceeding in Kansas).
[32] 45 C.F.R. § 160.203.
[33] 45 C.F.R. § 160.202.
[34] *See*, *e.g.*, *Wade v. Vabnick-Wener*, 922 F. Supp. 2d 679, 691 (W.D. Tenn. 2010) (finding that Tennessee law was more stringent than HIPAA's privacy rules concerning *ex parte* communications with health care providers); *Isidore Steiner, DPM, PC v. Bonanni*, 292 Mich. App. 265, 274, 807 N.W.2d 902 (2011) (Michigan law regarding disclosures was more stringent than HIPAA).
[35] *See* Standards for Privacy of Individually Identifiable Health Information, 64 Fed. Reg. 59918, 60000 (Nov. 3, 1999) ("[W]e do not believe that it is the intent of [section 264(c)(2) of Public Law 104-191] to give an effect to State law that it would not otherwise have in the absence of section 264(c)(2)."); *In re Grand Jury Proceedings*, 450 F. Supp. 2d 115, 119 (D. Me. 2006) (noting that state medical-privacy law, even if more stringent, is inapposite when dealing with a federal grand-jury subpoena).

cannot rely on inapplicable out-of-state medical privacy laws to avoid compliance with a Kansas subpoena or court order that complies with HIPAA.[36] As a result, healthcare providers must comply with HIPAA compliant subpoenas and court orders even if compliance would violate inapplicable out-of-state disclosure restrictions.

Conclusion

Kansas healthcare providers are legally required to comply with subpoenas and court orders requiring disclosure of PHI that satisfy the procedural requirements of 45 C.F.R. § 164.512(f)(1). Failure to comply with such subpoena or order may subject the provider to contempt proceedings. A healthcare provider may not demand a law enforcement agency to subject themselves to HIPAA's requirements before releasing the required PHI. And, finally, a healthcare provider may not rely on inapplicable out-of-state disclosure restrictions as a basis to refuse complying with a lawful Kansas subpoena or court order.

Sincerely,

/s/ Kris W. Kobach

Kris W. Kobach
Attorney General

/s/ Andrew J. Lohmann

Andrew J. Lohmann
Assistant Solicitor General

[36] *Grand Jury Proceedings*, 450 F. Supp. 2d at 119 (denying hospital's motion to quash subpoena because state medical-privacy law did not apply to a federal grand-jury subpoena).