

# MEMORANDUM

State of Alaska

Department of Law

TO: Melanie Millhorn, Director  
Division of Retirement & Benefits  
Department of Administration

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FILE NO: 661-04-0589

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FROM: Toby N. Steinberger  
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SUBJECT: Application of HIPAA to  
PERS/TRS Disability  
Proceedings

You have requested an opinion regarding the application of the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”) to disability hearings before the Public Employees’ Retirement Board (“PERB”) and Teachers’ Retirement Board (“TRB”), referred hereto collectively as (the “Boards”).<sup>1</sup> Only a “covered entity” must comply with HIPAA when it releases protected health information. When the Division presents its disability cases, it is not acting as a “covered entity.” In addition, the Boards are not covered entities under HIPAA. Therefore, the Division and the Boards are not required to comply with HIPAA’s disclosure requirements concerning the release of protected health information during disability hearings, except if a protective order or stipulation for confidentiality between the litigants applies. However, in issuing orders and subpoenas to covered entities regarding protected health information, the Boards should be familiar with the HIPAA requirements.

## I. DISCUSSION

### a. **The Division and the Boards are not covered entities for purposes of disability hearings.**

HIPAA protects patients from the disclosure of their protected health information by health plans, health care providers, and healthcare clearinghouses, otherwise known as “covered entities.” As a covered entity, a health plan, health care provider, or healthcare

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<sup>1</sup> This memorandum only addresses the requirements of HIPAA. It does not address other laws that may address the privacy and release of health information.

clearinghouse and their business associates<sup>2</sup> must comply with HIPAA's privacy rules. A non-covered entity does not have to comply with HIPAA. Therefore, if a non-covered entity receives protected health information from a covered entity, the non-covered entity does not have to comply with HIPAA's privacy rules, unless a protective order applies or the non-covered entity has stipulated to maintain the confidentiality of the protected health information.<sup>3</sup>

Thus the first question is whether the Division of Retirement and Benefits is a "covered entity." The Division does administer a health plan, Alaska Care, which is a covered function. But it also performs non-covered functions, such as making retirement and disability determinations. When an entity performs both covered functions and non-covered functions, HIPAA allows the entity to declare itself a hybrid; in other words, the entity must establish procedures that provide that the section that performs a covered function does not share protected health information with the section that performs non-covered functions, unless disclosure is allowed under a HIPAA exception. 45 C.F.R. 164.105(a).

Since the Division administers a covered function (the health plan) but also conducts non-covered functions (retirement and disability determinations), the Division has elected under the HIPAA regulations to be a hybrid entity. As a hybrid, the Division maintains a firewall between its health plan and the remainder of the Division's responsibilities (retirement and disability determinations); the health care plan section of the Division cannot share protected health information with the rest of the Division unless disclosure is otherwise allowed under HIPAA.<sup>4</sup> However, when the Division is performing its non-covered functions, the Division is not required to comply with HIPAA

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<sup>2</sup> A "business associate" is any person or entity who performs functions on behalf of a covered entity if those functions involve the use or disclosure of protected health information.

<sup>3</sup> HIPAA allows a court or administrative tribunal to issue protective orders and allows litigants to enter into stipulations to maintain the confidentiality of the protected health information. 45 CFR 164.512(e)(5).

<sup>4</sup> For example, a person can sign an authorization meeting the requirements of 45 CFR 164.508(c) to allow a covered entity to release protected health information. In addition, for purposes of an administrative or judicial proceeding, a party can subpoena protected health information from a covered entity if certain requirements are met. 45 CFR 164.512(e).

when it releases protected health related information, unless a protective order applies or the Division has agreed to maintain the confidentiality of the health information.<sup>5</sup>

Similarly HIPAA does not apply to the Boards when they receive evidence in proceedings for retirement and disability determinations since the Boards are not a health plan, health care provider, or healthcare clearinghouse. Thus, when the Boards receive evidence from the member or the Division that contains health related information, the Boards are not required to comply with HIPAA's privacy requirements, unless a protective order or agreement to maintain the confidentiality applies.

**b. Under HIPAA, the Boards can order a covered entity to produce protected health information; parties can subpoena private health information from a covered entity if the subpoena meets HIPAA requirements.**

Although HIPAA requires a covered entity to protect health information, it allows a covered entity to release protected health information under a number of exceptions, two of which are relevant to disability proceedings.

First, HIPAA specifically allows a covered entity to release protected health information if a court or administrative tribunal orders the covered entity to produce the protected health information. 45 CFR 164.512(e)(1)(i). However, the court or administrative tribunal should ensure that there is notice and opportunity for the person whose protected health information is sought to object to the release. Thus, if a member is unwilling to sign an authorization requiring a covered entity to release protected health information, the Boards can order a covered entity to release protected health information, if the member has received notice and has had an opportunity to object. The Board can also issue a protective order prohibiting parties from using or disclosing the

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<sup>5</sup> The Division will obtain medical information in its non-covered capacity in a number of ways. A member may voluntarily have his/her health care providers release medical information to the Division for the Division to consider with respect to his/her claim for disability. Once the member voluntarily releases the medical information, this information is not protected under HIPAA. In addition, the Division will obtain medical information from a non-covered governmental body, such as the Division of Workers' Compensation. HIPAA does not govern the release of this medical information. The Division will at times engage a physician to examine the member and render an opinion. The Division should have the member sign a HIPAA authorization allowing the physician to provide his/her findings to the Division. Otherwise, the physician will be reluctant to release the findings to the Division.

protected health information for any purpose other than the litigation at issue and requiring that the protected health information be destroyed or returned to the covered entity at the end of the litigation. 45 CFR 164.512(e)(1)(i) and (e)(1)(v).

Second, HIPAA allows a party to subpoena private health information from a covered entity so long as the subpoena meets HIPAA requirements. 45 CFR 164.512(e)(1)(ii). For a subpoena to be enforceable, HIPAA requires that the requesting party demonstrate that

- (1) it has made a good faith effort to provide notice to the person whose health information the party seeks;
- (2) it gave sufficient information and time to allow the person to object to the release of the information;
- (3) the time for objection has elapsed; and
- (4) no objection was made or any objection has been resolved in favor of releasing the requested health information.

45 CFR 164.512(e)(1)(ii).

## II. CONCLUSION

In summary, the Division and the Boards are not covered entities under HIPAA for purposes of disability hearings and therefore do not have to comply with HIPAA's privacy requirements, unless a protective order or stipulation applies. HIPAA allows a covered entity, like a health provider, to release protected health information if ordered by the Boards. In addition, a party can subpoena protected health information from a covered entity so long as the party complies with the HIPAA requirements for subpoenaing protected health information.

TNS/kmh  
attachment

cc: Robert Johnson  
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