



COMMENTS OF THE ELECTRONIC PRIVACY INFORMATION CENTER

to the

OFFICE FOR CIVIL RIGHTS

of the

DEPARTMENT OF HEALTH AND HUMAN SERVICES

HIPAA Privacy Rule and the National Instant Criminal Background Check System (NICS)

45 CFR Parts 160 and 164

June 7, 2013

By notice published on April 23, 2013, the Office for Civil Rights of the Department of Health and Human Services (“HHS”) issued an advance notice of proposed rulemaking (“ANPRM”) relating to the Health Insurance Portability and Accountability Act of 1996 Privacy Rule (“HIPAA Privacy Rule”) and the National Instant Criminal Background Check System (“NICS”).¹ HHS issued the ANPRM to solicit comments in advance of its proposal to create “an express permission in the HIPAA rules for reporting relevant information to the NICS by those HIPAA covered entities responsible for involuntary commitments or the formal adjudications that would subject individuals to the mental health prohibitor, or that are otherwise designated by the States to report to the NICS.”²

Pursuant to the HHS’s notice, the Electronic Privacy Information Center (“EPIC”) submits these comments to address the privacy issues that the HHS’s proposal raises and to urge to agency to adopt privacy-enhancing recommendations should it amend the HIPAA Privacy Rule. Specifically, EPIC

¹ HIPAA Privacy Rule and the National Instant Criminal Background Check System (NICS) Advance Notice of Proposed Rulemaking, 78 Fed. Reg. 23, 872 (proposed Apr. 23, 2013) (to be codified at 45 CFR Parts 160 and 164) [hereinafter HIPAA ANPRM].

² *Id.* at 23,873.

recommends that: (1) HHS should not amend the HIPAA Privacy Rule until the Department of Justice (“DOJ”) revises its Gun Control Act regulations to clearly define the standards under which an individual is prohibited from shipping, transporting, receiving, or possessing firearms; (2) HHS should assign liability to states that disclose excess mental health data for NICS purposes; (3) HHS should mandate states notify NICS as soon as possible but no later than 10 business days of an incorrect or outdated mental illness record; and (4) HHS should encourage states to maintain mental health record accuracy.

EPIC is a public interest research center in Washington, D.C., established in 1994 to focus public attention on emerging civil liberties issues and to protect privacy, the First Amendment, and constitutional values. EPIC has been a longtime advocate for medical record privacy.³

As discussed below, mental health records are a particularly sensitive subset of health records. Accordingly, we encourage the HHS to be deliberative if it amends the HIPAA rule to increase disclosures to NICS and ensure stringent privacy protections for mental health records disclosed to NICS.

Scope of the ANPRM

On January 16, 2013, President Barack Obama announced his gun control proposal to reduce domestic gun violence.⁴ His proposal includes efforts to improve the National Instant Criminal Background Check System, the Federal government’s “background check system for the sale or transfer of firearms by licensed dealers.”⁵ The NICS prohibits certain individuals from accessing firearms, including individuals “who have been involuntarily committed to a mental institution, found incompetent to stand trial or not guilty by reason of insanity, or otherwise adjudicated as having a serious mental

³ See, e.g., *Medical Record Privacy*, EPIC, <http://epic.org/privacy/medical/> (last visited June 7, 2013); *Genetic Privacy*, EPIC, <http://epic.org/privacy/genetic/> (last visited June 7, 2013); Comments of the Elec. Privacy Info. Ctr. to the Presidential Comm. for the Study of Bioethical Issues, On Privacy Access with Regard to Human Genome Sequence Data (May 25, 2012), available at <http://epic.org/privacy/genetic/EPIC-Human-Gene-Seq-Data-Comments.pdf>; Comments of the Elec. Privacy Info. Ctr. to the Food and Drug Admin., On Consumer-Directed Promotion of Regulated Medical Products, Dckt. No. 2005N-0354 (Oct. 11, 2005), available at <http://epic.org/privacy/medical/dtcltr10.11.05.html>; *Maryland v. King*, EPIC, <http://epic.org/amicus/dna-act/maryland/> (last visited June 7, 2013).

⁴ HIPAA ANPRM at 23,872.

⁵ *Id.*

condition that results in the individuals presenting a danger to themselves or others or being unable to manage their own affairs.”⁶ HHS refers to these prohibitions as “mental health prohibitors.”⁷

HHS states that information within the NICS is “typically . . . limited to the names of ineligible individuals and certain other identifying information, such as their dates of birth . . . and the prohibited category that applies to the individual.”⁸ According to HHS, more detailed health information like underlying diagnosis and treatment is not disclosed to the DOJ or maintained in the NICS.⁹ Although no state is currently required to submit mental health prohibitor information to the NICS, there are federal incentives for states to disclose this information.¹⁰

HHS states that the ANPRM arose from “concerns” from some states that the HIPAA Privacy Rule prohibits states from “reporting the identities of individuals subject to the mental health prohibitor to the NICS.”¹¹ Specifically, although the Privacy Rule permits states to disclose information to the NICS pursuant to state statute, HHS references a 2012 GAO report finding that “the absence of explicit state-level statutory authority to share mental health records was an impediment to making such records available to NICS.”¹²

Because of these concerns, HHS is considering amending the HIPAA Privacy Rule to permit state HIPAA covered entities to report mental health prohibitor information to the NICS.¹³ HHS states that in crafting the amendments, it will consider limiting data disclosure to the minimum information necessary for NICS background checks and disclosure done only by “covered entities that order involuntary commitments, perform relevant mental health adjudications, or are otherwise designated as State repositories for NICS reporting purposes.”¹⁴

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* at 23,874.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 23,872-83.

¹² *Id.* at 23,875.

¹³ *Id.* at 23,873.

¹⁴ *Id.* at 23,875.

In assessing the correct approach to its proposal in advance of a final rulemaking, HHS posed a series of questions to stakeholders, including states, individuals, and privacy advocates. EPIC has provided answers to some of HHS's inquiries below.

Question 11: Are there privacy protections in place, under State law or otherwise, for data collected by State entities for reporting to NICS?

Currently, there are not enough adequate privacy protections in place, under State law or otherwise, for data collected by state entities for reporting to the NICS. As the 2012 GAO report on states and NICS details, many states do not have privacy laws that explicitly address privacy protection of mental health records and availability to the NICS.¹⁵ A handful of states provide varying levels of privacy protection for mental health records submitted to the NICS. For example, Alabama's Criminal Justice Information Commission promulgates regulations to perform NICS checks and those proposed rules must "go through the privacy and security committee of the commission" in consultation with Alabama authorities and consumer advocates.¹⁶ Colorado and Iowa require their state officials to cancel NICS mental health prohibitor records upon findings that the mental health record prohibitor no longer applies (e.g., "based on a finding that the person is no longer an incapacitated person").¹⁷ The process in Iowa is particularly expedient, requiring its Department of Public Safety to "update, correct, modify, or remove the petitioner's record in any database that the department of public safety makes available to the national instant criminal background check system and shall notify the United States Department of Justice that the basis for such record being made available no longer applies" as soon as practicable "but not later than ten business days."¹⁸ These state provisions recognizing data amendment are particularly important because they limit the amount of sensitive, extraneous medical information in federal databases.

Although certain states arguably have strong privacy protections for state data disclosed to the NICS, other states have relatively weak privacy protections. Georgia and Nevada, for example, absolve

¹⁵ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-684, GUN CONTROL: SHARING PROMISING PRACTICES AND ASSESSING INCENTIVES COULD BETTER POSITION JUSTICE TO ASSIST STATES IN PROVIDING RECORDS FOR BACKGROUND CHECKS 12 (2012).

¹⁶ Ala. Code § 41-9-649 (2013).

¹⁷ Colo. Rev. Stat. Ann. § 13-9-123 (2013). *See also* Iowa Code Ann. § 724.31 (2013).

¹⁸ Iowa Code Ann. § 724.31.

themselves and officials from liability stemming from inaccurate information submitted to the NICS.¹⁹ In addition to inaccurate information arising from inaccurate information sent to the NICS, Georgia absolves itself from “any liability for defamation, invasion of privacy, negligence, or any other claim in connection with the dissemination pursuant to [the NICS] and shall be immune from suit based upon any such claims.”²⁰

The federal Privacy Act mandates specific and extensive privacy protections for agency records held in databases like the NICS.²¹ Under the Privacy Act, federal agencies must uphold individual privacy by, among other actions, only collecting necessary and relevant information, accounting to individuals for their records, and providing individuals the opportunity to amend their records. The Privacy Act is the cornerstone privacy law that protects sensitive individual records, including mental health records, held by the federal government. But the FBI has claimed numerous exemptions for its NICS database from important Privacy Act protections, and therefore records contained in the NICS are not subject to Privacy Act provisions that require, among other things, the FBI to account for disclosures, and the requirements that the FBI only collect relevant and necessary information.²²

On both the state and federal level, there are very few privacy protections for state data submitted to NICS. Therefore, should HHS amend the HIPAA Privacy Rule, it must incorporate stringent privacy protections. EPIC recommends a nonexhaustive list of protections in response to Question 13 below.

Question 12: What are the mental health implications for the mental health community in revealing the identities of individuals who are subject to the mental health prohibitor reported for NICS purposes?

Mental health records are a particularly sensitive type of medical record because mental health records are routinely scrutinized and stigmatized in ways that other sensitive, private medical information is not. Countless studies and articles show that society perceives individuals with mental illness

¹⁹ N.R.S. 179A.165 (2011). Ga. Code Ann. § 35-3-34 (2013).

²⁰ Ga. Code Ann. § 35-3-34.

²¹ 5 U.S.C. § 552a.

²² Exemption of Federal Bureau of Investigation Systems—limited access, 28 C.F.R. § 16.96 (2012).

differently from individuals with other medical ailments, like diabetes, cancer, and AIDS.²³ Research also shows that society is quick and eager to label those with mental illness as “dangerous,” “incompetent,” and “unpredictable.”²⁴ Further, this social stigma translates into workplace, housing, and social discrimination against those with mental illness.²⁵ Moreover, “stigma surrounding mental illness presents itself in ways” that could “curtail individual liberty” as is evidenced by this ANPRM, which will prohibit certain individuals from possessing hand guns.²⁶ Recently, the Obama Administration launched a mental health initiative to combat mental illness stigmas and to encourage individuals to seek medical help for mental health issues.²⁷

Because mental health records are particularly sensitive medical records, and because this Administration has recently committed to assisting those with mental illness, we urge HHS to uphold the HIPAA Privacy Rule for those with mental illness. Should the Department amend the HIPAA Privacy Rule to permit additional disclosure of medical information, the disclosures should be narrowly tailored and restricted.

Question 13: Are there ways that HHS may address or mitigate any unintended adverse consequences, for individuals seeking needed mental health services that may be caused by creating express regulatory permission to report relevant information to the NICS?

HHS may mitigate unintended adverse consequences caused by its proposal by implementing stringent privacy protections.

First, HHS should not amend the HIPAA Privacy Rule until the DOJ revises its Gun Control Act regulations to clearly define the standards under which an individual is prohibited from shipping,

²³ Jon Bauer, *The Character of the Questions and the Fitness of the Process: Mental Health, Bar Admissions and the Americans with Disabilities Act*, 49 UCLA L. Rev. 93, 115 (2001). See also Patrick W. Corrigan and Amy C. Watson, Understanding the Impact of Stigma on People with Mental Illness, 1 World Psychiatry 1 (2002), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1489832/>.

²⁴ Wendy F. Hensel & Gregory Todd Jones, *Bridging the Physical-Mental Gap: An Empirical Look at the Impact of Mental Illness Stigma on ADA Outcomes*, 73 Tenn. L. Rev. 47, 52-54 (2005).

²⁵ Corrigan and Watson, *supra* note 23.

²⁶ Austin Baumgarten, *Medical Treatment Demands Medical Assessment: Substantive Due Process Rights in Involuntary Commitments*, 45 U.C. Davis L. Rev. 597, 623 (2011).

²⁷ Roberta Rampton, *Obama Urges Great Openness in Dealing with Mental Illness*, REUTERS (June 3, 2013, 7:37 PM), <http://www.reuters.com/article/2013/06/03/us-usa-guns-mentalhealth-idUSBRE9520BN20130603>. See also Matt Compton, *The National Conference on Mental Health*, EXEC. OFFICE OF THE PRESIDENT (June 3, 2013, 1:34 PM), <http://www.whitehouse.gov/blog/2013/06/03/national-conference-mental-health>.

transporting, receiving, or possessing firearms. As the ANPRM details, DOJ regulations define “committed to a mental institution” as a “formal commitment of a person to a mental institution by a court, board, commission, or other lawful authority” including “commitment[s] for mental defectiveness or mental illness, as well as commitments for other reasons, such as for drug use.”²⁸ The phrase “for other reasons” is overly broad and vague. Although the DOJ has illustrated that drug use is an example of “commitments for other reasons,” the nebulous language would grant the DOJ sweeping authority to prohibit individuals from possessing firearms, a constitutionally protected right. We recognize that HHS does not have authority to amend DOJ regulations. But, because HHS proposes to amend its Privacy Rule so that states can comply with the DOJ’s rule, HHS should not amend its privacy regulations to facilitate states implementation of the DOJ’s broad rule. Thus, until the DOJ clearly defines and enumerates the types of formal commitments that can bar gun ownership, HHS should not amend its regulations to release sensitive mental health information to the DOJ.

Second, HHS should assign liability to States that disclose excess mental health data for NICS purposes. As discussed above, certain states have waived any liability for improper disclosure to NICS. By imposing penalties and dissuading states from releasing excess information, HHS can protect mental health record privacy.

Third, HHS should mandate states notify NICS as soon as possible but no later than 10 business days of an incorrect or outdated mental illness record. If NICS examiners are only given three business days to resolve initial NICS background discrepancies,²⁹ then surely ten business days is sufficient time for states to notify NICS of data errors.

Fourth, should HHS choose to create an exception for disclosure, HHS should work to encourage states to maintain mental health record accuracy. As discussed above with the examples of Georgia and Nevada, certain states excuse liability from inaccurate records. And although the FBI is in charge of

²⁸ HIPAA ANPRM at 23,873 at n.2.

²⁹ *Id.* at 23,874.

maintaining accurate NICS records, it only conducts audits of its information every three years.³⁰

Therefore, HHS should require that any state disclosing information to the NICS pursuant to the proposed exception regularly audit and maintain accurate information.

Conclusion

As HHS contemplates permitting additional disclosure of medical information under HIPAA, it must stay true to the spirit and goals of the HIPAA Privacy Rule by stringently protecting mental health information.

Respectfully submitted,

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³⁰ U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 15, at 54.