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**U. S. Department of Justice**

Office of Intergovernmental Affairs

Office of the Director

*Washington, D.C. 20530*

August 20, 1997

**MEMORANDUM FOR:** Elena Kagan
Deputy Assistant to the President and
Deputy Director of Domestic Policy

FROM: Nicholas M. Gess
Director of Intergovernmental Affairs
Department of Justice

SUBJECT: Medical Records Privacy

Pursuant to our conversation this morning, I am enclosing a copy of a draft white paper which has been prepared by the Justice Department's Criminal Division regarding law enforcement access to medical records. The white paper is an outstanding summary of the concerns raised by any legislative proposal, report or other statement of Administration position which do not include an appropriate law enforcement exception.

The current Administration position is that any medical records privacy legislation ought to contain a law enforcement exception. This was decided after the matter could not be resolved by OMB or the agency principals (the Attorney General and the Secretary of HHS). The matter was ultimately decided by the Chief of Staff Leon Panetta. Any change will represent a change in Administration position.

The National Association of Attorneys General and the National District Attorneys Association have huge concerns here and have previously expressed those to the President, the Attorney General and other senior Administration officials, both privately and publicly. I also know, from my own discussions with them, that both the International Association of Chiefs of Police (IACP) and the National Sheriffs Association (NSA) favor a law enforcement exception as well.

We want to work with HHS and avoid any last-minute or hurried consideration. The Department's lead on this issue is Bob Litt (514-2636) and I will be working on this issue as well.

Please feel free to call me if we can provide any further information. Many thanks in advance for your help.

Enclosure

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**Law Enforcement Access to Medical Records**

The issue of law enforcement access to and use of information contained in medical records has been the subject of much historical debate. The growth of the private and public health care insurance plans with a parallet growth in health care fraud investigationshas significantly increased law enforcement use of medical records. The need for law enforcement access to health records to investigate and root out pervasive health care fraud which is draining the resources of both government and private health insurance programs is compelling. Further, patients participating in these programs routinely agree to the disclosure of their medical records to document their treatment as a condition of receiving reimbursement for their health care costs. In fact, without the ability of law enforcement to access and use patient medical records, our health care fraud efforts would collapse.

Likewise, medical records may also contain important evidence of crimes not involving health care fraud. Law enforcement agencies have traditionally been able to obtain such records through judicial or administrative compulsory process, or through voluntary disclosure by health providers of limited health information in emergency situations, such as a kidnapping, a search for an injured, but armed assailant, or a search for a fugitive. The privacy of medical records disclosed to law enforcement are protected by grand jury secrecy requirements, Privacy Act requirements, administrative regulations, and the important interest of law enforcement in maintaining the confidentiality of investigations.

No evidence has been presented which demonstrates that law enforcement agencies engage in widespread abuse of medical information in non-health care matters. The National Committee on Vital and Health Statistics ("NCVHS") conducted six full days of hearings as a prelude to this report. A number of representatives of the federal and state law enforcement community testified about law enforcement's excellent track record in accessing and using medical records. No contradictory evidence was presented to the NCVHS.

The law enforcement community argued convincingly that new, burdensome and costly restrictions on legitimate law enforcement activities should not be imposed without some evidence of widespread abuse by the law enforcement community. Law enforcement witnesses testified that the imposition of new restrictions and procedures would divert investigative resources, impede and delay legitimate law enforcement activities, and even lead to the termination of otherwise legitimate investigations. State and local law enforcement representatives testified that medical record evidence could be critically important in a number of cases such as kidnapping, murder, assault, rape and locating fugitives.

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The fact of the matter is that by far, the vast majority of disclosures of health information to law enforcement occurs in the context of health care fraud investigations. Carving out for enhanced protection, the comparably small subset of disclosures to law enforcement which occur in the context of non-health care investigations, will not provide any meaningful new or widespread privacy protection to patients. In contrast, demonstrable and substantial burdens and costs would be imposed on law enforcement.

Some privacy advocates have expressed a willingness to exempt investigations of a limited number of violent crimes from new medical record privacy legislation. While this addresses some law enforcement concerns, the resulting patchwork of varying standards would force the judiciary into second-guessing which legislative determinations criminalizing specific behavior should be enforced and which should not. The inevitable inconsistent judicial determinations of which crimes warrant the disclosure of medical records and which do not, would inject new and unwarranted arbitrariness in the enforcement of federal and state laws.

Under current law, law enforcement does not presently exercise unfettered access to health information. Current practice requires generally, except in emergency situations, that law enforcement obtain compulsory process to obtain medical records. Information produced pursuant to a grand jury subpoena is subject to strict secrecy requirements. Search warrants are approved by judicial authorities only on a showing of probably cause that a crime has occurred and a likelihood that the items specified in the search warrant, which could include medical records, will contain evidence of that crime. Administrative subpoenas cannot be issued without meeting statutory and regulatory requirements as well. Also, existing statutes and regulations protect the societal interest in reducing drug abuse by promotion of treatment programs, which would likely be deterred across the board if participating patients could be prosecuted for violating drug laws. Finally, judicial decisions have also generally provided enhanced protection for sensitive mental health records.

The Administration carefully considered and reviewed these arguments in the context of proposed S.1360, the "Medical Records Confidentiality Act of 1995." In the absence of documented abuse by law enforcement, the Administration was extremely reluctant to impose expensive new restrictions on the federal and state law enforcement communities which could substantially impede legitimate law enforcement investigations.

Furthermore, exempting law enforcement from health information privacy legislation would not expand or enhance existing law enforcement access to health care information, but would merely maintain the status quo. Law enforcement would still be subject to existing statutes, court decisions, procedures and policies with respect to obtaining health

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information and maintaining its privacy. Consequently, the Administration determined to support a law enforcement exemption from pending medical record privacy legislation and communicated this position to Congress in April, 1996.

In the ensuing review of this issue which preceded this report, including the hearings conducted by the NCVHS, no new evidence emerged of law enforcement misconduct with respect to medical records. In the absence of such evidence, there simply is no current justification to impose new burdensome and costly restrictions on law enforcement. Therefore, the Administration affirms its previous position and urges that law enforcement be exempted from any new medical record privacy legislation.