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11/97 VA [Veterans Affairs] Amendment to Title 38

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THE WHITE HOUSE

WASHINGTON

MEMORANDUM FOR JANET FORSGREN

From: Todd Summers
Deputy Director
Office of National AIDS Policy
(202) 632-1090

Date: December 5, 1997

Re: Comments on VA Amendment to Title 38

The Office of National AIDS Policy would like to provide the following comments in reference to the proposal by the Veterans Administration to amend Title 38 to permit the Secretary of VA to release certain confidential records.

The proposed changes to Title 38 are overly broad and, in certain crucial respects, may not be consistent with accepted standards of data privacy and fair information practices or with existing medical records confidentiality policies of the Department of Health and Humans Services.

In general, acceptable standards of data privacy dictate that:
1) Medical information should only be released with the informed consent of the patient.
2) Exceptions to the rule of informed consent should only occur in compelling circumstances;
3) If, in fact, compelling circumstances exist, only the most limited and necessary amount of information should be released to satisfy the compelling need;
4) Disclosure should only be made to the fewest and most appropriate authorities who are necessary to address the compelling circumstance;
5) Once released, the information should not be retained for longer than necessary to accomplish the purpose for which it has been released; and
6) Information released for one purpose cannot be used for another purpose.

The proposed changes would allow for release of very sensitive information including drug abuse, alcohol abuse, HIV infection and sickle cell anemia. In each of the four areas proposed for amendment, greater attention must be paid to the principles described above. Specifically:

Civil Commitment

For purposes of **civil commitment**, it may be justifiable to release limited pertinent information to a medical professional qualified to assess the competence of the individual. However, information should only be released to the specific professionals who are to be making the assessment and then should be returned to the originating source. They are not treatment records

and thus need not be retained by that professional as such. The assessing professionals can, of course, maintain their own notes of the assessment, but ideally all of that information should be contained in one record maintained by the original entity seeking commitment.

Cases of Abuse or Neglect

Information has historically been released for the purpose of reporting cases of **abuse or neglect**. Again, the release of information must be limited both in substance and in scope. Only those individuals who are directly involved in the investigation of such reports should have access to such information and the information should only be retained for as long as necessary to investigate the complaint. Generally speaking information regarding HIV and/or sickle cell anemia would not be relevant to a report of abuse or neglect. Specific guidelines must set out what information should be released in those circumstances.

Law Enforcement

The proposed changes regarding **law enforcement** access to medical records pose serious problems both in terms of medical privacy but also in terms of 4th and 5th Amendment rights against unwarranted search and self-incrimination. The proposed standard of access based upon "reasonable belief" derived from "independently gathered evidence" is significantly less than the current "probable cause" standard and is without any independent judicial evaluation. It is, in effect, a non-standard. Law enforcement authorities will have access upon their own declaration of "reasonable belief" and will not be required to produce a warrant, subpoena or involve a judicial authority in any manner. This will pose a significant problem for medical privacy and threatens to significantly degrade the doctor-patient communication in the context of VA treatment programs. Court ordered examination of such documents is the only protection patients currently enjoy and should not be abandoned in favor of free access.

Medical Records in VA Claimant Files

The retention of **medical records in VBA claimant files** should not continue for longer than is necessary to complete the review of that claim. One of the primary threats to privacy occurs because of the retention of such information in perpetuity, especially if such information is digitally recorded. Understanding of course that some information may be necessary for appeals or other legal challenges to claims decisions, it would be proper to allow the retention of such information only if the medical records were either sealed separately within the file and/or encrypted if held in a digital format. A specific protocol should guide how the information is handled while maintained in a sealed or encrypted format and under what circumstance such information should be "opened". Only a few specific and limited number of individuals should have the ability to pen these files under certain proscribed circumstances. Again, the information would not be used for any purpose other than the specific adjudication of that claim and for any disputes regarding that specific claim raised after a decision has been reached. Under no circumstances should such information be deposited into any general database and used for any secondary purpose.

In each case a very specific review should be made of each exception to determine if they conform to the original principles stated above. As proposed, the amendments fall short of these generally accepted data standards.

Total Pages: 16

LRM ID: SGE59

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
Washington, D.C. 20503-0001

Monday, November 24, 1997

LEGISLATIVE REFERRAL MEMORANDUM

TO: Legislative Liaison Officer - See Distribution below

FROM: Janet R. Forsgren (for) Assistant Director for Legislative Reference

OMB CONTACT: Stephen G. Elmore
PHONE: (202)395-3924 FAX: (202)395-6148

SUBJECT: **VETERANS AFFAIRS Draft Bill: Amend Title 38 to Permit the Secretary of VA to Release Certain Confidential Records**

DEADLINE: **Noon Friday, December 5, 1997**

In accordance with OMB Circular A-19, OMB requests the views of your agency on the above subject before advising on its relationship to the program of the President. **Please advise us if this item will affect direct spending or receipts for purposes of the "Pay-As-You-Go" provisions of Title XIII of the Omnibus Budget Reconciliation Act of 1990.**

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LRM ID: SGE59 **SUBJECT:** VETERANS AFFAIRS Draft Bill: Amend Title 38 to Permit the Secretary of VA to Release Certain Confidential Records

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RESPONSE TO
LEGISLATIVE REFERRAL
MEMORANDUM

If your response to this request for views is short (e.g., concur/no comment), we prefer that you respond by e-mail or by faxing us this response sheet. If the response is short and you prefer to call, please call the branch-wide line shown below (NOT the analyst's line) to leave a message with a legislative assistant.

You may also respond by:
(1) calling the analyst/attorney's direct line (you will be connected to voice mail if the analyst does not answer); or
(2) sending us a memo or letter
Please include the LRM number shown above, and the subject shown below.

TO: **Stephen G. Elmore Phone: 395-3924 Fax: 395-6148**
Office of Management and Budget
Branch-Wide Line (to reach legislative assistant): 395-7362

FROM: _____ **(Date)**

_____ **(Name)**

_____ **(Agency)**

_____ **(Telephone)**

The following is the response of our agency to your request for views on the above-captioned subject:

_____ **Concur**

_____ **No Objection**

_____ **No Comment**

_____ **See proposed edits on pages** _____

_____ **Other:** _____

_____ **FAX RETURN of** ____ **pages, attached to this response sheet**

THE SECRETARY OF VETERANS AFFAIRS

WASHINGTON

The Honorable Newt Gingrich
Speaker of the House of
Representatives
Washington, D.C. 20515

Dear Mr. Speaker:

There is transmitted herewith a draft bill "to permit the Secretary of Veterans Affairs to release certain confidential records." We request that it be referred to the appropriate committee for prompt consideration and enactment.

The draft bill amends section 7332 of Title 38, United States Code, which mandates that the Department of Veterans Affairs (VA) provide strict confidentiality for clinical treatment records for four specific medical conditions: drug abuse, alcoholism and alcohol abuse, infection with the human immunodeficiency virus and sickle cell anemia.

Section 7332 also lists a very limited number of situations in which VA may disclose these records outside the treatment setting without the patient's prior written consent. If any other disclosure is necessary, such as to comply with another Federal law, VA must obtain a court order authorizing the agency to release the records. The Department has identified three additional situations in which release of the treatment information without the patient's consent is consistent with the desire to protect the confidentiality of this information. The Department is also clarifying the authority to maintain such information in veterans' benefits files.

The first situation concerns the section's restrictions on the disclosure of information necessary to make informed treatment decisions. Absent a court order, the statute does not permit VA to disclose such records (without the patient's prior written consent) to health care-related entities outside the VA in order for them to make decisions concerning the care of incompetent VA patients.

An illustration of the problem may be helpful. VA medical personnel or a third party on occasion determine that it is necessary to initiate civil commitment proceedings concerning a veteran. In one state, a "pre-Petition Screening Committee" - consisting of social workers and other personnel - is required to evaluate the case, interview the patient, review the medical

chart, discuss less-restrictive alternatives to commitment with the patient and/or family. Only if the committee finds there is reason to believe that a commitment is necessary, may the case be referred to the County Attorney's Office to file a petition seeking commitment with the Court. The VA's records and testimony are often essential for the Committee to make an informed decision in the matter.

Unless VA first obtains a court order, the Department has no authority to release the records to the Committee, the County Attorney or the Court. Similarly, there is no authority to discuss any treatment matters absent a court order. (In many instances, the veteran will not consent to release of the records because, regardless of the medical evidence, the veteran does not want to be committed.) For VA to obtain a court order authorizing release of the records, the VA would have to initiate court proceedings under a pseudonym for the veteran; notice to the veteran must be provided, as well as an opportunity for him or her to appear in person or to file a responsive statement, followed by an in camera hearing unless the patient consents to a hearing in open court.

The effort required by the VA medical facility to make disclosures to support consideration for proper medical placement of veterans being treated for one of the conditions covered by section 7332 is extensive, burdensome, complex and time-consuming. Legislative relief from these procedural requirements is appropriate where VA seeks to release information to the appropriate authorities or entities in order for them to make an informed decision as to the proper medical placement or treatment of the individual.

The second change to section 7332 would add language allowing VA to include this type of information in VA reports of incidents of suspected abuse or neglect of children, the elderly, and spouses to the Federal, State, or local governmental authority which has the responsibility to investigate such allegations. Section 7332 does not currently allow VA to release protected information for these purposes unless the individual provides consent or VA obtains a court order. Both of these options are either impractical or time-consuming, and may lead to delays in reporting the allegations.

Currently, as suggested above, the VA's policy is to report such incidents without revealing the information which is protected by section 7332, i.e., the fact of treatment for one

of the protected conditions. However, it may be helpful for the investigating entity to know that fact in evaluating the need for expediency in investigating the allegation.

In addition to making section 7332 conform with the disclosure provision of 42 U.S.C. § 290dd-2 governing child abuse and neglect reporting, the amendment would remove any possible conflict with 18 U.S.C. §§ 1169 and 2258 and 42 U.S.C. § 13031(a which impose a duty on certain professionals, including some VA employees, to report incidents of suspected child abuse, and make it a criminal offense to fail to do so.

The third change would be to amend section 7332 by adding language allowing law enforcement authorities to use covered records, without consent of the patient or court order, to investigate a patient or subject where a reasonable basis exists, based upon independently gathered evidence, that the patient or subject has committed or attempted to commit a Federal felony involving VA programs or operations. Under current law, absent consent or court order, there is concern that section 7332 acts as a bar to effective criminal investigation and prosecution of serious crimes committed by patients or subjects in section 7332-related treatment or counseling programs. An individual cannot be expected to consent to release of possibly incriminating information.
Law enforcement authorities often lack sufficient identifying information on the patient or subject to obtain a court order. The amendment would eliminate this special, unwarranted protection, while preserving safeguards against investigation or prosecution of conduct which occurred prior to, or which forms the basis for, the patient's or subject's entry into the VA program.

Finally, VA wishes to clarify that copies of treatment records, protected by section 7332, may be retained in the veteran's claims file when relevant to a benefits determination. Currently, Veterans Health Administration (VHA) regularly provides clinical medical records to the Veterans Benefits Administration (VBA) for use in the adjudication of a veteran's claim for benefits. Of the estimated 23.5 million VBA claimant records, perhaps one-third (almost 8 million), contain information that could be considered as being subject to the protection of section 7332.

The Honorable Newt Gingrich

Copies of the records containing section 7332 information are retained in the claim files as part of the administrative record relied upon in reaching benefits decisions. However, there is legislative history which indicates that these records should not be retained in the claims file once they are no longer needed for that immediate decision. The General Counsel has issued a broad interpretation of the legislative history of section 7332 to permit some retention of these records in the VA beneficiary's claim file, but the matter is not entirely clear and requires dispositive legislation.

Given the number of claim files involved, the return of such records to VHA is impractical at best. If VBA were to be required to continually monitor, identify, and remove such information from the involved VBA claimant records, such actions would be unduly burdensome. Additionally, the culling of section 7332 information itself would detract from the integrity of the file, and any future action, such as BVA review, which might depend on this information, would be hampered.

Section 7332 should be amended to explicitly allow the VA to perpetually maintain such information in the beneficiary's claim file where relevant to the claim. Of course, the record in the claim file would still be subject to the protections of section 7332 and could be disclosed by the agency only where permitted by the statute.

105th CONGRESS
1st Session

A Bill

To amend Title 38, United States Code, to permit the Secretary of Veterans Affairs to release certain confidential records

Be it enacted by the Senate and House of Representatives of the United States of America In Congress assembled,

Section 7332 of Title 38, United States Code, is amended--

(a) by adding at the end of subsection (b)(2) the following new paragraph:

"(E) To authorized personnel or entities when necessary in order for them to make decisions concerning the proper care or treatment of a patient who lacks the capacity to make decisions concerning his or her health care.''

(b) by redesignating subsection (c) as subsection (c)(1) and adding after the phrase ``Except as authorized by a court order granted under subsection (b)(2)(D)'' the following language:

``or as authorized under subsection (c)(2)''.

(c) by adding the following new paragraph after the newly-designated subsection (c)(1):

``(2) Law enforcement authorities may use such

records without consent to investigate a patient or subject where a reasonable belief exists, based upon independently gathered evidence, that the patient or subject has committed, or attempted to commit, a felony under federal law involving Department of Veterans Affairs programs or operations. Law enforcement authorities shall not review such records absent individualized suspicion directed towards a patient or subject. Such records shall not be used under any circumstances to investigate conduct which occurred prior to the date the patient or subject was initially referred for treatment in the program or activity referred to in subsection (a), or conduct which is the basis or reason for such treatment or referral.''

(d) by adding at the end of subsection (e) the following language:

"The prohibitions of this section shall not prevent the retention of copies of records within those components of the Department responsible for decisions concerning eligibility or continued eligibility for benefits under this title when the records are or have been relevant to any such determination.''

(e) by redesignating subsection (g) as subsection (h) and by inserting the following after subsection (f):

"(g) The prohibitions of this section do not apply

3.

to the reporting under Federal or State law of incidents of suspected child, elderly, or other abuse and neglect to the appropriate Federal, State or local authorities."

CHANGE IN EXISTING LAW MADE BY DRAFT BILL

Changes in existing law made by this bill are shown as follows: existing law proposed to be omitted is enclosed in bold brackets and struck out, new matter is printed in italic, and existing law in which there is no proposed change is shown in Courier.

sec. 7332. Confidentiality of certain medical records

(a)(1) Records of the identity, diagnosis, prognosis, or treatment of any patient or subject which are maintained in connection with the performance of any program or activity (including education, training, treatment, rehabilitation, or research) relating to drug abuse, alcoholism or alcohol abuse, infection with the human immunodeficiency virus, or sickle cell anemia which is carried out by or for the Department under this title shall, except as provided in subsections (e) and (f), be confidential, and (section 5701 of this title to the contrary notwithstanding) such records may be disclosed only for the purposes and under the circumstances expressly authorized under subsection (b).

(2) Paragraph (1) prohibits the disclosure to any person or entity other than the patient or subject concerned of the fact that a special written consent is required in order for such records to be disclosed.

(b)(1) The content of any record referred to in subsection (a) may be disclosed by the Secretary in accordance with the prior written consent of the patient or subject with respect to

whom such record is maintained, but only to such extent, under such circumstances, and for such purposes as may be allowed in regulations prescribed by the Secretary.

(2) Whether or not any patient or subject, with respect to whom any given record referred to in subsection (a) is maintained, gives written consent, the content of such record may be disclosed by the Secretary as follows:

(A) To medical personnel to the extent necessary to meet a bona fide medical emergency.

(B) To qualified personnel for the purpose of conducting scientific research, management audits, financial audits, or program evaluation, but such personnel may not identify, directly or indirectly, any individual patient or subject in any report of such research, audit, or evaluation, or otherwise disclose patient or subject identities in any manner.

(C)(i) In the case of any record which is maintained in connection with the performance of any program or activity relating to infection with the human immunodeficiency virus, to a Federal, State, or local public-health authority, charged under Federal or State law with the protection of the public health, and to which Federal or State law requires disclosure of such record, if a qualified representative of such authority has made a written request that such record be provided as required pursuant to such law for a purpose authorized by such law.

(ii) A person to whom a record is disclosed under this paragraph may not redisclose or use such record for a purpose other than that for which the disclosure was made.

(D) If authorized by an appropriate order of a court of competent jurisdiction granted after application showing good cause therefor. In assessing good cause the court shall weigh the public interest and the need for disclosure against the injury to the patient or subject, to the physician-patient relationship, and to the treatment services. Upon the granting of such order, the court, in determining the extent to which any disclosure of all or any part of any record is necessary, shall impose appropriate safeguards against unauthorized disclosure.

(E) To authorized personnel or entities when necessary in order for them to make decisions concerning the proper care or treatment of a patient who lacks the capacity to make decisions concerning his or her health care.

(3) In the event that the patient or subject who is the subject of any record referred to in subsection (a) is deceased, the content of any such record may be disclosed by the Secretary only upon the prior written request of the next of kin, executor, administrator, or other personal representative of such patient or subject and only if the Secretary determines that such disclosure is necessary for such survivor to obtain benefits to which such survivor may be entitled, including the pursuit of legal action, but then only to the extent, under such circumstances, and for such purposes as may be allowed in regulations prescribed pursuant to section 7334 of this title.

(c) *(1)* Except as authorized by a court order granted under subsection (b)(2)(D) *or as authorized under subsection (c)(2)*, no record referred to in subsection (a) may be used to initiate or substantiate any criminal charges against, or to conduct any investigation of, a patient or subject.

(2) Law enforcement authorities may use such records without consent to investigate a patient or subject where a reasonable belief exists, based upon independently gathered evidence, that the patient or subject has committed, or attempted to commit, a felony under federal law involving Department of Veterans Affairs programs or operations. Law enforcement authorities shall not review such records absent individualized suspicion directed towards a patient or subject. Such records shall not be used under any circumstances to investigate conduct which occurred prior to the date the patient or subject was initially referred for treatment in the program or activity referred to in subsection (a), or conduct which is the basis or reason for such treatment or referral.

(d) The prohibitions of this section shall continue to apply to records concerning any person who has been a patient or subject, irrespective of whether or when such person ceases to be a patient.

(e) The prohibitions of this section shall not prevent any interchange of records--

(1) within and among those components of the Department furnishing health care to veterans, or determining eligibility for benefits under this title; or

(2) between such components furnishing health care to veterans and the Armed Forces.

The prohibitions of this section shall not prevent the retention of copies of records within those components of the Department responsible for decisions concerning eligibility or continued eligibility for benefits under this title when the records are or have been relevant to any such determination.

(f)(1) Notwithstanding subsection (a) but subject to paragraph (2), a physician or a professional counselor may disclose information or records indicating that a patient or subject is infected with the human immunodeficiency virus if the disclosure is made to (A) the spouse of the patient or subject, or (B) to an individual whom the patient or subject has, during the process of professional counseling or of testing to determine whether the patient or subject is infected with such virus, identified as being a sexual partner of such patient or subject.

(2)(A) A disclosure under paragraph (1) may be made only if the physician or counselor, after making reasonable efforts to counsel and encourage the patient or subject to provide the information to the spouse or sexual partner, reasonably believes that the patient or subject will not provide the information to the spouse or sexual partner and that the disclosure is necessary to protect the health of the spouse or sexual partner.

(B) A disclosure under such paragraph may be made by a physician or counselor other than the physician or counselor referred to in subparagraph (A) if such physician or counselor is unavailable by reason of absence or termination of employment to make the disclosure.

(g) "The prohibitions of this section do not apply to the reporting under Federal or State law of incidents of suspected child, elderly, or other abuse and neglect to the appropriate Federal, State or local authorities.

[~~(g)~~] *(h)* Any person who violates any provision of this section or any regulation issued pursuant to this section shall be fined, in the case of a first offense, up to the maximum amount provided under section 5701(f) of this title for a first offense under that section and, in the case of a subsequent offense, up to the maximum amount provided under section 5701(f) of this title for a subsequent offense under that section.