

## MEMORANDUM

TO: Chairman/Commissioner Alan J. Croce

FROM: Brian M. Callahan

SUBJECT: HIPAA's effect on the Commission's access to medical/mental health records maintained in a correctional facility

DATE: April 27, 2004

This memorandum is provided to address the New York State Commission of Correction's authority to require correctional facilities to provide inmate medical and mental health records. As of late, several local correctional facilities have inquired as to whether the recently effective provisions of the Health Insurance Portability and Accountability Act (HIPAA) would preclude such a transfer of records. For the reasons set forth below, the Commission is exempt under both New York State law and the provisions of HIPAA that require either a court order or patient authorization to lawfully release and disclose protected health information.

Article 3 of the New York State Correction Law imposes several investigative duties upon the Commission of Correction which require the access of medical and mental health records. For example, Correction Law §45(3) requires the Commission to "[v]isit, inspect and appraise the management of correctional facilities with specific attention to matters such as safety, security, health of inmates..." In addition, Correction Law §47 requires the Correction Medical Review Board of the Commission to both "[i]nvestigate and review the cause and circumstances surrounding the death of any inmate of a correctional facility" and "[i]nvestigate and report to the commission on the condition of systems for the delivery of medical care to inmates of correctional facilities and where appropriate recommend such changes as it shall deem necessary and proper to improve the quality and availability of such medical care."

In the exercise of the above functions, powers and duties, the Commission has been granted statutory authority to issue and enforce a subpoena and a subpoena duces tecum,

administer oaths and examine persons under oath [see Correction Law §46(2)]. Additionally, the Commission has been granted statutory access at any and all times to any correctional facility or part thereof and to all books, records, and data pertaining to any correctional facility deemed necessary for carrying out the commission's functions, powers and duties [see Correction Law §46(1)]. Such access to records includes records otherwise delineated by statute as privileged and confidential. Croce v. Bhattacharyya, 1 Misc.3d 863, 767 N.Y.S.2d 564 (Alb. Sup. Ct. 2003). Finally, the Commission is entitled, for the same purposes, to otherwise confidential mental health records pursuant to Mental Hygiene Law §33.13(a)(5), and confidential HIV and AIDS related information pursuant to Public Health Law §2782(1)(o).

In 1996, Congress enacted the Health Insurance Portability and Accountability Act (HIPAA) to regulate the "portability" or transfer of health insurance coverage. In doing so, the Act also addressed the confidentiality of medical records as it applied to their transfer between doctors, hospitals, HMOs and insurance providers. The Act, particularly the portions related to privacy, has been supplanted by federal regulations, a major portion of which now appear at 45 CFR Parts 160 and 164. These regulations generally require the written consent or authorization of an individual before an entity may use or disclose the individual's protected health information. Exceptions to this requirement, however, are set forth in 45 CFR §164.512, which provides various uses and disclosures for which the individual's consent and authorization is not required. As further explained below, the Commission of Correction, in performing its statutorily mandated duties set forth in the New York State Correction Law, qualifies for at least three (3) of the exceptions provided in 45 CFR §164.512.

45 CFR §164.512(a)(1) provides that "[a] covered entity may use or disclose protected health information to the extent that such use or disclosure is required by law." "Required by law" is defined by 45 CFR §164.501 as "a mandate contained in law that compels a covered entity to make a use or disclosure of protected health information and that is enforceable in a court of law. *Required by law* includes ... an authorized investigative demand." Given the Commission's statutory authority granting access at any and all times to all books, records and data of a correctional facility pursuant to Correction Law §46(1), such a release of protected health information by a correctional facility in response to a Commission request would be "required by law," as defined in 45 CFR §164.501.

Secondly, 45 CFR §164.512(b)(1)(i) provides that "[a] covered entity may disclose protected health information for the public health activities and purposes described in this paragraph to a public health authority that is authorized by law to collect or receive such information for the purpose of preventing or controlling disease, injury, or disability, including, but not limited to, the reporting of disease, injury, vital events such as birth or

death, and the conduct of public health surveillance, public health investigations, and public health interventions.” “Public health authority” is defined by 45 CFR §164.501 as “an agency or authority of ... a State ... that is responsible for public health matters as part of its official mandate.” Clearly, given its statutory mandate to investigate both inmate deaths and the condition of systems for the delivery of medical care to inmates of correctional facilities, the Commission would constitute a “public health authority” under this provision of HIPAA. As such, 45 CFR §164.512(b)(1)(i) would allow the disclosure of protected health information to the Commission for purposes relative to its statutory mandates.

Lastly, 45 CFR §164.512(d)(1)(i) allows that a “covered entity may disclose protected health information to a health oversight agency for oversight activities authorized by law, ... or other activities necessary for appropriate oversight of the health care system.” “Health oversight agency” is defined by 45 CFR §164.501 as “an agency or authority of ... a State ... that is authorized by law to oversee the health care system (whether public or private) or government programs in which health information is necessary to determine eligibility or compliance, or to enforce civil rights laws for which health information is relevant.” Given the Commission’s statutory mandate to investigate the condition of systems for the delivery of medical care to inmates of correctional facilities, it clearly constitutes a “health oversight agency” to which the disclosure of protected health information is allowed pursuant to 45 CFR §164.512(d)(1)(i).

As set forth above, 45 CFR §164.512 allows for the disclosure of protected health information to the Commission of Correction relative to its duties in fulfilling certain statutory mandates, since the Commission constitutes a “public health authority,” a “health oversight agency,” and since such disclosure is “required by law,” all as defined in 45 CFR §164.501. Accordingly, in order that future matters may be investigated expeditiously, it would be both prudent and economical for a correctional facility’s files and procedures to be amended to reflect the Commission’s statutory authority.