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Public Health Legal Preparedness
Briefing Memorandum # 2[1]

Proprietary Uses of Reporting Data[2]

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ISSUE: When hospitals and pharmacies consider their data to be proprietary information (e.g., prescription records, research) are there legal protections to facilitate or ensure reporting?

RESPONSE: Although there are no reported examples of record, private entities, while potentially possessing a proprietary interest in health data, may not invoke this interest to excuse them from compliance with state surveillance reporting requirements. Even where the private entity possesses a proprietary interest in the data, the state's interest in surveillance will almost certainly trump a proprietary interest. It is possible, but unlikely under current jurisprudence, that the state would be liable to compensate the private entity for use of the data unless the private entity could demonstrate that the value of the data has been completely diminished.

Federal and state public health surveillance programs frequently require private entities such as hospitals, pharmacies, managed care organizations, and insurance carriers to report health data to the Centers for Disease Control and Prevention ("CDC") or to state public health departments. These reporting requirements assist federal and state agencies in their disease tracking initiatives and provide an important resource for

[1] On December 11, 2002, the CDC Public Health Law Program, the Association of State and Territorial Health Officials, and the National Association of County and City Health Officials sponsored a peer consultation workshop on selected legal and policy issues related to public health legal preparedness for bioterrorism. The *Center for Law and the Public's Health* hosted the workshop. This memorandum was prepared in response to an issue of shared interest to workshop participants.

[2] This Memorandum is intended as a guide for use by public health attorneys and practitioners attending the Workshop. It is not intended to be, and cannot be relied upon to offer, specific legal advice.

detecting, measuring, and controlling outbreaks of infectious diseases or targeting preventive interventions for a multitude of conditions that affect the health and safety of the population. States may have additional powers to collect or access data during emergency situations.[3]

One concern related to the collection of health data is that private entities will refuse to cooperate with state-mandated reporting systems, out of concern for protecting health data in which they claim to possess a proprietary interest. This memorandum examines whether private entities may consider health data in their possession to be proprietary information exempt from disclosure to the state pursuant to reporting requirements. Preliminary research reveals that:

1) private entities have not attempted to invoke a proprietary interest theory to shield health data from state public health reporting requirements; and

2) any such a claim would likely not succeed under current law.

In order for a private entity to successfully argue that its proprietary interest in health data voids its obligations to comply with state reporting requirements, it would have to demonstrate that:

1) the health data in question constituted proprietary information; and
2) the entity's privacy interest in the proprietary information supercedes the state's interest in conducting public health surveillance.

The related issue of whether the private entity is entitled to compensation based upon the government's regulation and use of its proprietary information is also briefly discussed.

Why would a private entity want to claim health data as proprietary?

Private entities such as hospitals or pharmacies may have a substantial interest in shielding health data relating to their patients from the government. For example, a pharmacy may consider its prescription data proprietary because: a) substantial resources were used to collect and aggregate the data into a useful and meaningful database; b) such information may constitute trade secrets,[4] or contain market share or other private business information; or c) third parties who gain access to the information (e.g. a list of customers for a specific product) may attempt to target specific customers based upon this information or sell the information to other interested parties (e.g. pharmaceutical companies who want to sell competing products to these customers).

Does a private entity have a proprietary interest in health data?

[3] Since September 11, 2001, state public health reporting provisions have focused on syndromic reporting in an attempt to improve the efficiency and effectiveness of public health surveillance.

[4] The Restatement of Torts defines a trade secret as "any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it." Restatement of Torts § 757.

A "proprietary interest" is "the interest in an owner of property with all rights appurtenant thereto."[5] Courts have recognized proprietary interests in private financial information, trade secrets, and other business data.

An individual does not have a property right in his or her medical records or the information contained in these medical records. Rather, the entity that created the records or data owns these records. This private entity may have a proprietary interest in the data to the extent that it falls within the definition of property under state law. Owners of intangible property, such as trade secrets or private financial information, may receive protection under the law.[6] It is conceivable, therefore, that certain types of health data (e.g. a list of customers who purchase a specific product) that may have economic value could be considered proprietary.[7]

Will a private entity's proprietary interest outweigh the state's interest in collecting public health surveillance data?

If data compiled in medical or pharmacy records were deemed proprietary to a private entity, the mere existence of this property right would not necessarily trump the right of the public agency to collect the information. Public health reporting requirements authorized under state law serve an important beneficial public purpose and will almost certainly supercede proprietary claims over health data. The state could explicitly give precedence to one right over the other, although no specific example of any such provision has been found pursuant to an electronic search for any statutory example of this requirement among states.

Case law demonstrates that when a state regulates the use of property, the remedy for economic loss to the owner is compensation rather than enjoining the regulation. Nevertheless, while courts have occasionally awarded compensation to the private entity for a reduction in value of the property, courts are reluctant to grant compensation unless the value of the property has been completely diminished (which would probably not be case with information reported to the state).[8] Therefore, states may compel a private entity to report health data, even if such data constitutes proprietary information, but may be forced to compensate the private entity for use of this data under certain circumstances.

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[5] BLACK'S LAW DICTIONARY, at 1291 (1990).

[6] Commentators disagree about the extent to which collections of data constitute proprietary information. *See* Fred H. Cate, The Changing Face of Privacy Protection in the European Union and the United States, 33 Ind. L. Rev. 174 (1999); Ronald J. Krotoszynski, Jr., Identity, Privacy, and the New Information Scalpers: Recalibrating the Rules of the Road in the Age of the Infobahn: A Response to Fred H. Cate, 33 Ind. L. Rev. 233 (1999).

[7] Of course, the sale of patient data from medical or prescription records is proscribed in some states.

[8] *See* Lucas v. South Carolina Costal Council, 505 U.S. 1003, 1029 (1992). However, some states, such as Maryland, have discussed compensating private entities for use of information seized during an emergency situation.

Conclusion

Private entities seeking to avoid reporting requirements based on proprietary interests in their data should be unsuccessful, because the state's compelling interest in obtaining the information overrides proprietary claims. Variability in state laws related to property rights and reporting requirements, and the dearth of case law related to this issue leaves open the possibility that a court could require the state to compensate the private entity for use of the proprietary information. Nevertheless, the absence of readily identifiable cases advancing proprietary claims suggests that such claims will not impede state surveillance and reporting activities.