UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

CARMEN CARDONA, Claimant-Appellant, v. ERIC K. SHINSEKI, Secretary of Veterans Affairs, Respondent-Appellee, and BIPARTISAN LEGAL ADVISORY GROUP OF THE U.S. HOUSE OF REPRESENTATIVES, Intervenor-Appellee.	Vet. App. No. 11-3083

REPLY IN SUPPORT OF MOTION OF THE BIPARTISAN LEGAL ADVISORY GROUP OF THE U.S. HOUSE OF REPRESENTATIVES FOR ACCESS TO THE RECORD BEFORE THE AGENCY

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July 13, 2012

Neither claimant-appellant Carmen Cardona nor respondent-appellee Erik K. Shinseki ("Secretary") has any response to the citation by the Bipartisan Legal Advisory Group of the U.S. House of Representatives ("House") to this Court's plain language rule:

> **Access of Parties or Representatives to Original Record.** After a Notice of Appeal has been filed [i.e., now], the Secretary *shall permit* a party [e.g., the House] or a representative of a party [e.g., the House Office of General Counsel] to inspect and to copy, subject to reasonable regulation by the Secretary, any original material in the record before the agency [("RBA")] that is not subject to a protective order [i.e., the entirety of the RBA in this case].

Vet. App. R. 10(d) (emphasis added); *see* Mot. of [House] for Access . . . . at 6, 9 (June 26, 2012) ("Motion for Access"). Indeed, neither Ms. Cardona nor the Secretary even cites that provision.

Rather, Ms. Cardona and the Secretary make the extraordinary suggestion that the House should satisfy itself with access to the Record of Proceedings ("ROP"). *See* Sec'y's Resp. to Mot. of [House] for Access . . . . at 6-7 (June 29, 2012) ("Secretary Response"); Appellant's . . . Opp'n to [House]'s Mot. for Access . . . . at 1-3 (July 3, 2012) ("Cardona Opposition"). The ROP consists of (i) the decision of the Board of Veterans' Appeals, (ii) additional RBA materials identified as relevant *by the Secretary*, and (iii) "any document from the [RBA] cited in a brief" (i.e., here, only documents identified *by Ms. Cardona or the Secretary*, as they are the only parties presently with access to the RBA). Vet. App. R. 28.1(a)(1).

In other words, Ms. Cardona and the Secretary propose that, notwithstanding this Court's Rule 10(d) to the contrary, the House should defend the two federal statutes at issue here, not on the basis of the actual record, but on the basis only of those materials selected by the parties *attacking* the constitutionality of those statutes. This is Kafkaesque indeed: The Secretary abandons his constitutional duty to defend two federal statutes, aligns himself with Ms. Cardona in affirmatively attacking those statutes, joins

Ms. Cardona in refusing to provide the House access to the record on which he and she ask this Court to declare unconstitutional two Acts of Congress, and then extends with Ms. Cardona the purported olive branch of allowing the House to view only those documents they have cherry-picked from the RBA to support their *attack* on the statutes' constitutionality. That is not how our justice system operates.

I. The Secretary's Response.

The Secretary argues that (a) the Privacy Act, 5 U.S.C. § 552a, and (b) 38 U.S.C. § 5701 ("Section 5701") excuse his refusal to comply with this Court's Rule 10(d). *See* Sec'y Resp. at 2-7. At the same time, the Secretary concedes that both of these provisions would give way to an order of this Court. *See id.* at 2 ("[I]t is the Secretary's position that, in accordance with both the Privacy Act and [S]ection 5701, disclosure of the RBA to [the House] is permitted only upon direct order of the Court."); *accord id.* at 7. The Secretary's excuses for non-compliance with Rule 10(d) are without merit, but he is correct that an order of this Court would overcome either excuse.

A. The Privacy Act Does Not Excuse the Refusal to Produce the RBA.

The Secretary argues that the Privacy Act bars his disclosure of the RBA, absent a court order, because (1) the House is not "either House of Congress" for purposes of the Privacy Act, 5 U.S.C. § 552a(b)(9), and (2) the "routine use[s]" of the RBA do not include service as the record from which parties draw in litigation before this Court, 5 U.S.C. § 552a(b)(3). *See* Sec'y Resp. at 2-5. To state these arguments is to reject them.

The House is a "House of Congress." It is for the House, and the House alone, to determine how it will appear in litigation. For decades, the House has designated the Bipartisan Legal Advisory Group as its means for doing so. *See* Mot. of [House] for Leave to Intervene at 2 n.2 (May 21, 2012) (noting history); *id.* at 8 & nn.5-6 (same).[1]

[1] This is not extraordinary: Just as any organization might entrust its board of directors or other leadership with authority to engage in litigation on behalf of the

The Group is a creature of the House of Representatives and its Rules; it exists for the purpose of assisting the Speaker in providing direction to the House Office of General Counsel, which Office litigates on behalf of the House. *See* Rule II.8, Rules of the House of Representatives, 112th Cong. (2011) ("The Office of the General Counsel shall function pursuant to the direction of the Speaker, who shall consult with a Bipartisan Legal Advisory Group, which shall include the majority and minority leaderships."), attached as Ex. A; *cf.* 2 U.S.C. § 130f(a). Rule II.8, like the other rules of the House, was adopted pursuant to the Rulemaking Clause of the Constitution, *see* U.S. Const. art. I, § 5, cl. 2, which is a "broad grant of authority," *Consumer's Union of U.S. v. Periodical Correspondent's Ass'n*, 515 F.2d 1341, 1343 (D.C. Cir. 1975), that sits "[a]t the very core of our constitutional separation of powers," *Walker v. Jones*, 733 F.2d 923, 938 (D.C. Cir. 1984) (MacKinnon, J., concurring in part and dissenting in part). The Supreme Court has made perfectly clear that while House Rules may not ignore constitutional restraints or violate fundamental rights, they otherwise are "absolute and beyond the challenge of any other body or tribunal." *United States v. Ballin*, 144 U.S. 1, 5 (1892).

It follows, therefore, that determining how to interpret and apply Rule II.8 is an internal matter for the House, and the House alone. Neither the Secretary nor Ms. Cardona (nor this Court nor any other Court) has the authority to second-guess the House's determination of the means by which it will advocate its institutional interests in litigation.[2] In short, where, as here, the House appears in litigation through the Bipartisan

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organization, so too has the House directed that the Group do so on its behalf.

[2] *See also, e.g.*, *Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1433 (2012) (Sotomayor, J., concurring in part and in judgment) ("Because of the respect due to a coequal and independent department . . . , courts properly resist calls to question the good faith with which another branch attests to the authenticity of its internal acts."); *U.S. v. Munoz-Flores*, 495 U.S. 385, 409-10 (1990) (Scalia, J., concurring in judgment) ("Mutual regard between the coordinate branches, and the interest of certainty, both demand that official representations regarding . . . matters of internal process be accepted at face value.").

Legal Advisory Group, it does not abandon its constitutional or statutory status as a "House of Congress." U.S. Const. art. I, § 1; 5 U.S.C. § 552a(b)(9).

"Routine Use" of the RBA. The Secretary is equally mistaken in arguing that the review of the RBA by parties to litigation before this Court is something other than a "routine use" of that compilation of documents. *See* Sec'y Resp. at 3-5 (misapplying 5 U.S.C. § 552a(b)(3), under which Privacy Act limitations on agency disclosures not applicable to those "for a routine use as defined in subsection (a)(7) of this section and described under subsection (e)(4)(D) of this section"). The Secretary apparently concedes that use of the RBA by the House falls within the Act's broad subsection (a)(7) definition of "routine use": "The term 'routine use' means, with respect to the disclosure of a record, the use of such record for a purpose which is compatible with the purpose for which it was collected." *See* Sec'y Resp. at 3 (quoting 5 U.S.C. § 552a(a)(7)).

The Secretary complains, however, that the Department of Veterans Affairs' publication, pursuant to the Privacy Act's subsection (e)(4)(D) requirement, of a description of the routine uses of its records does not include "disclosures to Congress under these circumstances." Sec'y Resp. at 3. The Secretary is wrong. In fact, the Department's own regulations list as a "*routine use[]*" of its records the following:

> VA, on its on [sic] initiative, *may disclose records in this system of records in legal proceedings before a court or administrative body* after determining that the disclosure of records to the court or administrative body is a use of the information contained in the records that is compatible with the purpose for which VA collected the records.

Privacy Act of 1974, 74 Fed. Reg. 29275, 29281 (June 19, 2009) (emphasis added). One prominent example of this routine use: This Court's Rule 10(d), quoted *supra* p. 1, requiring provision of the RBA to any "party" to the relevant litigation.

B. 38 U.S.C. § 5701 Does Not Excuse the Refusal to Produce the RBA.

The Secretary next argues that Section 5701 excuses his refusal to provide the

RBA, until this Court issues an order so requiring. *See* Sec'y Resp. at 5-7. The Secretary quotes extensively from subpart (a) of that section, but it is subpart (b) that expressly authorizes him, notwithstanding the obligations imposed by subpart (a), to disclose records "in any suit or other judicial proceeding when in the judgment of the Secretary such disclosure is deemed necessary and proper." 38 U.S.C. § 5701(b)(5).[3]

Here, disclosure of the RBA to the House not only is "necessary and proper," *id.*, it is mandated by this Court's rules, *see* Vet. App. R. 10(d) (quoted *supra* p. 1; requiring disclosure of RBA to parties). Without access to the underlying record, the House cannot effectively defend the two federal statutes at issue here—which would leave no one to do so, given the Department's abandonment of its duty to do so. *See*, *e.g.*, Mot. for Access at 4-5 (explaining, as examples only, need for certain documents).

The Secretary argues in response only that the RBA may contain documents "unrelated to the particular claim on appeal." Sec'y Resp. at 6 (attempting to limit disclosure of RBA to "only those records relevant [as determined by the Secretary and Ms. Cardona] to the particular claim on appeal"). That may or may not be, but it decidedly is not the Secretary's (or Ms. Cardona's) prerogative to determine which documents are and are not relevant to the House's defense of the statutes. The House must review those documents to determine which documents support its arguments and, indeed, which arguments to advance. Our system of justice is adversarial for good reason: That is the best method to uncover the strengths and weaknesses of particular claims.[4]

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[3] *See also*, *e.g.*, 38 U.S.C. § 5701(b)(2) (mandating disclosure "[w]hen required by process of a United States court to be produced in any suit or proceeding therein pending"); *id.* § 5701(c)(3) (authorizing disclosure, even to public at large, "if the Secretary determines that the public interest warrants or requires such publication"); *id.* § 5701(d) (authorizing additional disclosures "as a matter of discretion"); *id.* § 5701(e) (same, where disclosure "would serve a useful purpose").

[4] In the midst of his argument regarding Section 5701, the Secretary reveals his fundamental misunderstanding of the role of the House in this litigation: "The Court's

C. The Secretary Is Correct that an Order of this Court Would Overcome Any Issue Under the Privacy Act or 38 U.S.C. § 5701.

While, as discussed above, the Secretary's excuses for not timely producing the RBA are meritless, he is correct that an order of this Court would moot any such concerns. The Privacy Act expressly provides that disclosure always is appropriate "pursuant to the order of a court of competent jurisdiction." 5 U.S.C. § 552a(b)(11); *see also* 38 U.S.C. § 5701(b)(2) (similar for purposes of Section 5701). On this issue, Ms. Cardona parts ways with the Secretary. She is wrong, as explained in the next section.

II. Ms. Cardona's Opposition.

Ms. Cardona's arguments are wrong on the law and, often, entirely irrelevant to her own refusal to produce the RBA.[5]

A. Most of Ms. Cardona's Arguments, in Addition to Being Wrong as a Matter of Law, Have No Relevance to Her Failure to Produce the RBA.

Ms. Cardona advances a number of arguments that are not relevant to *her* refusal to produce the RBA. Most prominently, she expends several pages (i) adopting the Secretary's Privacy Act and Section 5701 arguments and, indeed, (ii) attempting to do him one better by arguing that this Court "is not a 'court a competent jurisdiction' for Privacy Act purposes." Cardona Opp'n at 6-9 (quoting 5 U.S.C. § 552a(b)(11); emphasis omitted).[6] But those statutes, if they apply here at all (which they do not, as discussed

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rules do not require (or even appear to contemplate) service of the RBA upon a third party such as the [House]." Sec'y Resp. at 5. The House is not a "third party," *id.*, but, rather, is a full party to this litigation (in the same way it has served as a full party to every other litigation in which it has sought to intervene). *See* Judge's Stamp Order . . . . (May 23, 2012) (approving unopposed motion for House to participate as "party-appellee" to this action); Mot. for Access at 7-8 (noting role as party rather than *amicus*).

[5] Nor is there any burden on Ms. Cardona in producing the RBA: She acknowledges in her opposition that the RBA consists of fewer than "1500 pages"—i.e., less than half a Bankers Box of documents. *See* Cardona Opp'n at 1.

[6] It is unclear whether Ms. Cardona, unlike the Secretary, argues that this Court is incompetent to issue an order overcoming any Section 5701 prohibition. *Cf.* Cardona Opp'n at 9. Whether or not Ms. Cardona argues that position, it is without merit. *See*,

above), apply only to the *Secretary*. *See* 5 U.S.C. § 552a(b) ("No agency shall disclose . . . unless . . . ."); 38 U.S.C. § 5701(a) (pertaining only to records "in the possession of the Department"). They provide no defense for *Ms. Cardona's* refusal to provide the RBA.

Moreover, insofar as Ms. Cardona's enthusiasm for the Secretary's defenses takes her beyond those defenses to the point of arguing that this Court "is not a 'court a competent jurisdiction' for Privacy Act purposes," Cardona Opp'n at 6 (quoting 5 U.S.C. § 552a(b)(11); emphasis omitted), she cites no relevant authority,[7] *and this Court in fact already has held to the contrary*: "We conclude that th[is] Court is a 'court of competent jurisdiction' under 5 U.S.C. § 552a(b)(11) [i.e., the precise Privacy Act provision at issue here]." *In re Mot. for a Standing Order*, 1 Vet. App. 555, 560 (1990).[8]

Accordingly, nothing supports Ms. Cardona's extraordinary suggestion that,

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e.g., 38 U.S.C. § 5701(b)(2), (3); Vet App. R. 10(d).

[7] Ms. Cardona's cases state only that federal district courts are the proper forum for *affirmative civil claims* for Privacy Act violations, as authorized under 5 U.S.C. § 552a(g), rather than for any *argument* touching on the Privacy Act. *See Parker v. United States*, 280 F. App'x 957, 958 (Fed. Cir. 2008) ("claim" under 5 U.S.C. § 552(g)(1) belongs in federal district court); *Apollo v. Principi*, No. 03-1499, 2003 WL 22438438, at *2 (Ct. Vet. App. Oct. 6, 2003) ("claim" under 5 U.S.C. § 552a(g)(4) might be appropriate in federal district court); *Treece v. United States*, 96 Fed. Cl. 226, 232 (Fed. Cl. 2010) ("claims" under 5 U.S.C. § 552a(g)(1) belong in federal district court); *Addington v. United States*, 94 Fed. Cl. 779, 784 (Fed. Cl. 2010) ("claims" under 5 U.S.C. § 552a(g)(1) belong in federal district court). Here, self-evidently, no party is advancing an affirmative claim for a Privacy Act violation. Ms. Cardona's last citation is not to an opinion of this Court but—without identifying it as such—to a dissent, *see* Cardona Opp'n at 6 (citing to "*Am. Legion v. Nicholson*, 21 Vet. App. 1, 12 (2007)"), and only for the unremarkable proposition that "[t]his Court, like all Federal courts, is a court of limited jurisdiction." *Am. Legion*, 21 Vet. App. at 12 (Schoelen, J., dissenting).

[8] Ms. Cardona was aware of this Court's decision in *Standing Order* at the time she advanced her "not 'a court of competent jurisdiction'" argument—indeed, she even cited it with apparent approval immediately before making that argument. Cardona Opp'n at 6 (quoting 5 U.S.C. § 552a(b)(11); emphasis omitted). The House is at a loss to harmonize Ms. Cardona's advancement of that argument with her knowledge of this Court's decision in *Standing Order*.

should the Secretary prevail in suggesting that the House is not a "House of Congress" (as he should not), and that review of the RBA by the parties to litigation before this Court is not a "routine use" of that compilation of documents (as he also should not), this case would need to be stayed while the House pursued satellite litigation in federal district court to obtain access to the RBA. There is no need for such a wasteful exercise where this Court is perfectly competent to order compliance with its rule requiring disclosure of the RBA to any "party or a representative of a party" to litigation before this Court. Vet. App. R. 10(d). Indeed, the notion that this Court may not determine whether a federal statute, raised as a defense by a party for its failure to comply with this Court's rules, is properly raised is foolish on its face.

Ms. Cardona makes a final argument that is not relevant to *her* refusal to produce the RBA: the Department's HIPAA Privacy Rule ("Rule"), 45 C.F.R. §§ 160.101-552, 164.102-106, 164.500-534 (2012). *See* Cardona Opp'n at 9-10. But, just as with the Privacy Act and Section 5701, the Rule provides no excuse for *Ms. Cardona's* failure to produce the RBA, in that any limitations imposed by the Rule would apply, at most, only to the *Secretary*. *See, e.g.*, 45 C.F.R. § 164.502(a) ("covered entity" obligation, if any); *id.* § 164.500(a) (same); *id.* § 160.103 (defining "covered entity" for relevant subchapter as limited to "health plan[s]," "health care clearinghouse[s]," and certain "health care provider[s]"). And, with good reason, the Secretary himself does not invoke the Rule: "[The Veterans Benefits Administration], with the possible exception of [the] Vocational Rehabilitation and Employment Service [apparently not applicable here], . . . is not subject to the HIPAA Privacy Rule." Dep't Mem. at 5 (Mar. 17, 2003), attached as Ex. B).[9]

[9] Even if the Rule provided the Secretary with any excuse to withhold the RBA (which it does not), that excuse would be obviated by an order of this Court. *See* 45 C.F.R. § 164.512(e) ("A covered entity may disclose protected health information in the course of any . . . proceeding . . . [i]n response to an order of a court or administrative tribunal . . . .").

B. To the Extent Ms. Cardona's Arguments Are Relevant to Her Refusal to Produce the RBA, They Misstate the Law.

Finally, Ms. Cardona argues that the House does not need the RBA because "[t]his Court's jurisdiction is limited to review of 'finding[s] of material fact *adverse to the claimant*.'" Cardona Opp'n at 4 (quoting 38 U.S.C. § 7261(a)(4); brackets and emphasis in original). That is not the law: While the quoted subsection indeed provides for this Court's review of findings of material fact adverse to the claimant, *the immediately preceding subsection provides for this Court's review of all other "findings"*:

> [This Court], to the extent necessary to its decision and when presented, *shall— . . . hold unlawful and set aside decisions, findings (other than those described in clause (4) of this subsection [i.e., findings other than those adverse to the claimant]), [and] conclusions* . . . issued or adopted by . . . the Board of Veterans' Appeals . . . *found to be— . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . .*

38 U.S.C. § 7261(a)(3) (emphasis added); *see also, e.g., Holmes Grp., Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 833 (2002) (plain language of statute controls).

Ms. Cardona cites two authorities, neither of which overcomes the plain statutory language. *Webster v. Derwinski*, 1 Vet. App. 155 (1991), is cited without explanation, and the House cannot discern any relevance of that decision to this Court's power to review factual findings favorable to a claimant. Ms. Cardona also cites *Cantu v. Principi*, 18 Vet. App. 92 (2004), which in turn cites *Roberson v. Principi*, 17 Vet. App. 135 (2003) (per curiam), for the proposition that this Court "is without authority, *under 38 U.S.C. § 7261(a)(4)*, to reverse findings of fact that are beneficial to claimants." 18 Vet. App. at 100 (emphasis added). The *Cantu* Court did not address *subsection (a)(3)* and commented on subsection (a)(4) only in dicta and only in reciting certain findings as to which there was "no dispute" among the parties on appeal. *Id.*[10] Given the plain

[10] *Roberson* likewise discussed only subsection (a)(4), apparently without awareness of subsection (a)(3), which it never acknowledged. *See* 17 Vet. App. at 138-48.

statutory language of subsection (a)(3), neither *Cantu* nor *Roberson* constitute good authority for any limitation on this Court's ability to review, under the appropriate standard, all "findings" of the Board of Veterans' Appeals.

Finally and in any event, this Court is required to satisfy itself as to its subject matter jurisdiction, including Ms. Cardona's standing. *See, e.g.*, *Hyatt v. Peake*, 22 Vet. App. 211, 213 (2008) ("This Court, although an Article I court created by statute, has adopted the jurisdictional restrictions of the Article III case or controversy rubric. To satisfy the irreducible constitutional minimum of standing, a litigant . . . . must have suffered an injury in fact that is both concrete and particularized . . . ." (quotation marks and citation omitted)), *aff'd sub nom. Hyatt v. Shinseki*, 566 F.3d 1364 (Fed. Cir. 2009). Indeed, if anything, courts must take particular care in ensuring that where, as here, a claimant seeks to invalidate multiple federal statutes in her quest for additional benefits, it has jurisdiction to entertain those claims. *See, e.g.*, *Bucklinger v. Brown*, 5 Vet. App. 435, 441 (1993) ("It is 'a fundamental and long-standing principle of judicial restraint that courts avoid reaching constitutional questions in advance of the necessity of deciding them.'" (quoting *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445 (1988); brackets and ellipsis omitted).[11] Accordingly, the House must have access to the RBA to enable it to raise issues, if any, that go to this Court's jurisdiction.

CONCLUSION

For all the foregoing reasons and for all the reasons stated in the Motion for Access, this Court should order Ms. Cardona and/or the Secretary to produce the RBA.

[11] Ms. Cardona's footnote 2 reveals her own misunderstanding of the role of the House in this litigation: "[The House] has intervened on behalf of the Secretary . . . ." Cardona Opp'n. at 4 n.2. The House has *not* intervened on the Secretary's behalf. The Secretary retains each of his preexisting obligations, no matter his abandonment of one of them, namely, the duty to defend federal statutes. The House appears here to defend the federal statutes at issue only as a result of the Executive Branch's extraordinary decision to abandon its duty to do so.

Respectfully submitted,

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July 13, 2012

CERTIFICATE OF SERVICE

I hereby certify that, on July 13, 2012, a copy of the foregoing Reply in Support of Motion of the Bipartisan Legal Advisory Group of the U.S. House of Representatives for Access to the Record Before the Agency was filed electronically via the court's CM/ECF system and served by mail on anyone unable to accept electronic filing. Parties may access this filing through the court's CM/ECF system. Notice of this filing will be sent by e-mail to all parties by operation of the court's electronic filing system and by first-class mail, postage prepaid on the following:

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Exhibit A

RULES

of the

HOUSE OF REPRESENTATIVES

ONE HUNDRED TWELFTH CONGRESS

PREPARED BY

Karen L. Haas

Clerk of the House of Representatives

JANUARY 5, 2011

(Rev. 1–05–11)

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may, in consultation with the Minority Leader—

(1) postpone the time for reconvening within the limits of clause 4, section 5, article I of the Constitution and notify Members accordingly; or

(2) reconvene the House before the time previously appointed solely to declare the House in recess within the limits of clause 4, section 5, article I of the Constitution and notify Members accordingly.

(d) The Speaker may convene the House in a place at the seat of government other than the Hall of the House whenever, in the opinion of the Speaker, the public interest shall warrant it.

RULE II

OTHER OFFICERS AND OFFICIALS

Elections

1. There shall be elected at the commencement of each Congress, to continue in office until their successors are chosen and qualified, a Clerk, a Sergeant-at-Arms, a Chief Administrative Officer, and a Chaplain. Each of these officers shall take an oath to support the Constitution of the United States, and for the true and faithful exercise of the duties of the office to the best of the knowledge and ability of the officer, and to keep the secrets of the House. Each of these officers shall appoint all of the employees of the department concerned provided for by law. The Clerk, Sergeant-at-Arms, and Chief Administrative Officer may be removed by the House or by the Speaker.

Clerk

2. (a) At the commencement of the first session of each Congress, the Clerk shall call the Members, Delegates, and Resident Commissioner to order and proceed to record their presence by States in alphabetical order, either by call of the roll or by use of the electronic voting system. Pending the election of a Speaker or Speaker pro tempore, the Clerk shall preserve order and decorum and decide all questions of order, subject to appeal by a Member, Delegate, or Resident Commissioner.

(b) At the commencement of every regular session of Congress, the Clerk shall make and cause to be delivered to each Member, Delegate, and the Resident Commissioner a list of the reports that any officer or Department is required to make to Congress, citing the law or resolution in which the requirement may be contained and placing under the name of each officer the list of reports required to be made by such officer.

(c) The Clerk shall—

(1) note all questions of order, with the decisions thereon, the record of which shall be appended to the Journal of each session;

(2) enter on the Journal the hour at which the House adjourns;

(3) complete the distribution of the Journal to Members, Delegates, and the Resident Commissioner, together with an accurate and complete index, as soon as possible after the close of a session; and

(4) send a copy of the Journal to the executive of and to each branch of the legislature of every State as may be requested by such State officials.

(d)(1) The Clerk shall attest and affix the seal of the House to all writs, warrants, and subpoenas issued by order of the House and certify the passage of all bills and joint resolutions.

(2) The Clerk shall examine all bills, amendments, and joint resolutions after passage by the House and, in cooperation with the Senate, examine all bills and joint resolutions that have passed both Houses to see that they are correctly enrolled and forthwith present those bills and joint resolutions that originated in the House to the President in person after their signature by the Speaker and the President of the Senate, and report to the House the fact and date of their presentment.

(e) The Clerk shall cause the calendars of the House to be distributed each legislative day.

(f) The Clerk shall—

(1) retain in the library at the Office of the Clerk for the use of the Members, Delegates, Resident Commissioner, and officers of the House, and not to be withdrawn therefrom, two copies of all the books and printed documents deposited there; and

(2) deliver to any Member, Delegate, or the Resident Commissioner an extra copy of each document requested by that Member, Delegate, or Resident Commissioner that has been printed by order of either House of Congress in any Congress in which the Member, Delegate, or Resident Commissioner served.

(g) The Clerk shall provide for the temporary absence or disability of the Clerk by designating an official in the Office of the Clerk to sign all papers that may require the official signature of the Clerk and to perform all other official acts that the Clerk may be required to perform under the rules and practices of the House, except such official acts as are provided for by statute. Official acts performed by the designated official shall be under the name of the Clerk. The designation shall be in writing and shall be laid before the House and entered on the Journal.

(h) The Clerk may receive messages from the President and from the Senate at any time when the House is in recess or adjournment.

(i)(1) The Clerk shall supervise the staff and manage the office of a Member, Delegate, or Resident Commissioner who has died, resigned, or been expelled until a successor is elected. The Clerk shall perform similar duties in the event that a vacancy is declared by the House in any congressional district because of the incapacity of the person representing such district or other reason. When acting as a supervisory authority over such staff, the Clerk shall have authority to terminate employees and, with the approval of the Committee on House Administration, may appoint such staff as is required to operate the office until a successor is elected.

(2) For 60 days following the death of a former Speaker, the Clerk shall maintain on the House payroll, and shall supervise in the same manner, staff appointed under House Resolution 1238, Ninety-first Congress (as enacted into permanent law by chapter VIII of the Supplemental Appropriations Act, 1971) (2 U.S.C. 31b–5).

(j) In addition to any other reports required by the Speaker or the Committee on House Administration, the Clerk shall report to the Committee on House Administration not later than 45 days following the close of each semiannual period ending on June 30 or on December 31 on the financial and operational status of each function under the jurisdiction of the Clerk. Each report shall include financial statements and a description or explanation of current operations, the implementation of new policies and procedures, and future plans for each function.

(k) The Clerk shall fully cooperate with the appropriate offices and persons in the performance of reviews and audits of financial records and administrative operations.

Sergeant-at-Arms

3. (a) The Sergeant-at-Arms shall attend the House during its sittings and maintain order under the direction of the Speaker or other presiding officer. The Sergeant-at-Arms shall execute the commands of the House, and all processes issued by authority thereof, directed to the Sergeant-at-Arms by the Speaker.

(b) The symbol of the Office of the Sergeant-at-Arms shall be the mace, which shall be borne by the Sergeant-at-Arms while enforcing order on the floor.

(c) The Sergeant-at-Arms shall enforce strictly the rules relating to the privileges of the Hall of the House and be responsible to the House for the official conduct of employees of the Office of the Sergeant-at-Arms.

(d) The Sergeant-at-Arms may not allow a person to enter the room over the Hall of the House during its sittings and, from 15 minutes before the hour of the meeting of the House each day until 10 minutes after adjournment, shall see that the floor is cleared of all persons except those privileged to remain.

(e) In addition to any other reports required by the Speaker or the Committee on House Administration, the Sergeant-at-Arms shall report to the Committee on House Administration not later than 45 days following the close of each semiannual period ending on June 30 or on December 31 on the financial and operational status of each function under the jurisdiction of the

Sergeant-at-Arms. Each report shall include financial statements and a description or explanation of current operations, the implementation of new policies and procedures, and future plans for each function.

(f) The Sergeant-at-Arms shall fully cooperate with the appropriate offices and persons in the performance of reviews and audits of financial records and administrative operations.

Chief Administrative Officer

4. (a) The Chief Administrative Officer shall have operational and financial responsibility for functions as assigned by the Committee on House Administration and shall be subject to the oversight of the Committee on House Administration.

(b) In addition to any other reports required by the Committee on House Administration, the Chief Administrative Officer shall report to the Committee on House Administration not later than 45 days following the close of each semiannual period ending on June 30 or December 31 on the financial and operational status of each function under the jurisdiction of the Chief Administrative Officer. Each report shall include financial statements and a description or explanation of current operations, the implementation of new policies and procedures, and future plans for each function.

(c) The Chief Administrative Officer shall fully cooperate with the appropriate offices and persons in the performance of reviews and audits of financial records and administrative operations.

Chaplain

5. The Chaplain shall offer a prayer at the commencement of each day's sitting of the House.

Office of Inspector General

6. (a) There is established an Office of Inspector General.

(b) The Inspector General shall be appointed for a Congress by the Speaker, the Majority Leader, and the Minority Leader, acting jointly.

(c) Subject to the policy direction and oversight of the Committee on House Administration, the Inspector General shall only—

(1) provide audit, investigative, and advisory services to the House and joint entities in a manner consistent with government-wide standards;

(2) inform the officers or other officials who are the subject of an audit of the results of that audit and suggesting appropriate curative actions;

(3) simultaneously notify the Speaker, the Majority Leader, the Minority Leader, and the chair and ranking minority member of the Committee on House Administration in the case of any financial irregularity discovered in the course of carrying out responsibilities under this clause;

(4) simultaneously submit to the Speaker, the Majority Leader, the Minority Leader, and the chair and ranking minority member of the Committee on House Administration a report of each audit conducted under this clause; and

(5) report to the Committee on Ethics information involving possible violations by a Member, Delegate, Resident Commissioner, officer, or employee of the House of any rule of the House or of any law applicable to the performance of official duties or the discharge of official responsibilities that may require referral to the appropriate Federal or State authorities under clause 3(a)(3) of rule XI.

Office of the Historian

7. There is established an Office of the Historian of the House of Representatives. The Speaker shall appoint and set the annual rate of pay for employees of the Office of the Historian.

Office of General Counsel

8. There is established an Office of General Counsel for the purpose of providing legal assistance and representation to the House. Legal assistance and representation shall be provided without regard to political affiliation. The Office of General Counsel shall function pursuant to the direction of the Speaker, who shall consult with a Bipartisan Legal Advisory Group, which shall include the majority and minority leaderships. The Speaker shall appoint and set the annual rate of pay for employees of the Office of General Counsel.

RULE III

THE MEMBERS, DELEGATES, AND RESIDENT COMMISSIONER OF PUERTO RICO

Voting

1. Every Member shall be present within the Hall of the House during its sittings, unless excused or necessarily prevented, and shall vote on each question put, unless having a direct personal or pecuniary interest in the event of such question.

2. (a) A Member may not authorize any other person to cast the vote of such Member or record the presence of such Member in the House or the Committee of the Whole House on the state of the Union.

(b) No other person may cast a Member's vote or record a Member's presence in the House or the Committee of the Whole House on the state of the Union.

Delegates and the Resident Commissioner

3. (a) Each Delegate and the Resident Commissioner shall be elected to serve on standing committees in the same manner as Members and shall possess in such committees the same powers and privileges as the other members of the committee.

(b) The Delegates and the Resident Commissioner may be appointed to any select committee and to any conference committee.

RULE IV

THE HALL OF THE HOUSE

Use and admittance

1. The Hall of the House shall be used only for the legislative business of the House and for caucus and conference meetings of its Members, except when the House agrees to take part in any ceremonies to be observed therein.

2. (a) Only the following persons shall be admitted to the Hall of the House or rooms leading thereto:

(1) Members of Congress, Members-elect, and contestants in election cases during the pendency of their cases on the floor.

(2) The Delegates and the Resident Commissioner.

(3) The President and Vice President of the United States and their private secretaries.

(4) Justices of the Supreme Court.

(5) Elected officers and minority employees nominated as elected officers of the House.

(6) The Parliamentarian.

(7) Staff of committees when business from their committee is under consideration, and staff of the respective party leaderships when so assigned with the approval of the Speaker.

(8) Not more than one person from the staff of a Member, Delegate, or Resident Commissioner when that Member, Delegate, or Resident Commissioner has an amendment under consideration (subject to clause 5).

(9) The Architect of the Capitol.

(10) The Librarian of Congress and the assistant in charge of the Law Library.

(11) The Secretary and Sergeant-at-Arms of the Senate.

(12) Heads of departments.

(13) Foreign ministers.

(14) Governors of States.

(15) Former Members, Delegates, and Resident Commissioners; former Parliamentarians of the House; and former elected officers and minority employees nominated as elected officers of the House (subject to clause 4).

(16) One attorney to accompany a Member, Delegate, or Resident Commissioner who is the respondent in an investigation undertaken by the Committee on Ethics when a recommendation of that committee is under consideration in the House.

(17) Such persons as have, by name, received the thanks of Congress.

(b) The Speaker may not entertain a unanimous consent request or a motion to suspend this clause or clauses 1, 3, 4, or 5.

3. (a) Except as provided in paragraph (b), all persons not entitled to the privilege of the floor during the session shall be excluded at all times from the Hall of the House and the cloakrooms.

(b) Until 15 minutes of the hour of the meeting of the House, persons employed in its service, accredited members of the press entitled to admission to the press gallery, and other persons

Exhibit B

Department of Veterans Affairs

Memorandum

Date: March 17, 2003

VAOPGCADV 3-2003

From: General Counsel (02)

Subj: Health Insurance Portability and Accountability Act Applicability in VBA

To: Director, Compensation and Pension Service (21)

QUESTION: Whether the Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule applies to Veterans Benefits Administration (VBA).

DISCUSSION:

BACKGROUND

1. You asked the Office of General Counsel thirty four questions concerning the application of the privacy provision of the Administrative Simplification subtitle of the Health Insurance Portability and Accountability Act [PUB. L. NO. 104-191, Title II, Subtitle F (§§ 261-64) (1996)], to VBA, particularly the Compensation and Pension (C &P) Service.

2. Section 264(c)(1) of the HIPAA tasked the Department of Health and Human Services (HHS) with promulgating standards to protect the privacy of individually identifiable health information as defined in 42 U.S.C. § 1320d(6). HHS promulgated the standards, with subsequent amendments, in regulations located at 45 C.F.R. Parts 160 and 164, commonly referred to as the Privacy Rule. 65 Fed. Reg. 82462-82829 (2000), as amended by 67 Fed. Reg. 533182-273 (2002).

COVERED ENTITIES

3. In the first paragraph of the 2000 Federal Register notice, HHS stated that the Privacy Rule applies to "health plans, health care clearinghouses, and certain health care providers." See also § 160.102, and §§164.104, 164.106, 164.500. The Privacy Rule refers to these collectively as covered entities. 45 C.F.R. § 160.103. The threshold question then is whether VBA constitutes a covered entity.

4. A health plan provides, or pays the cost, of medical care, as the term medical care is defined in 42 U.S.C. § 300gg–91(a)(2). 42 U.S.C. § 1320d (5). Medical care in the pertinent part of that subsection, refers to diagnosis, cure, mitigation, treatment, or prevention of disease, and the affecting of any structure or function of the body.

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5. A health care clearinghouse is referred to as an entity which translates health information from one format to another and forwards it, (42 U.S.C. § 1320d (2)), and is not relevant for this opinion.

6. A health care provider is defined under 42 U.S.C. § 1320d (3) as:

- a provider of services as defined in 42 U.S.C. § 1395x(u), i.e., hospitals, critical access hospitals, skilled nursing facilities, comprehensive outpatient rehabilitation facilities, home health agencies, and hospice programs;
- a provider of medical or health services as defined in 42 U.S.C. § 1395x(s), e.g., physicians' services, office-type services and supplies furnished incident to a physician's professional service, diagnostic tests, therapy, dressings and casts, durable medical equipment, ambulance service, prosthetic devices, vaccine, nurse anesthetist services, and mammography and other types of screening or
- anyone else who furnishes, bills or is paid for health care in the normal course of business.

7. The Privacy Rule defines health care as care, services, or supplies related to the health of an individual. Health care includes but is not limited to, preventive, diagnostic, therapeutic, rehabilitative, maintenance, or palliative care, and counseling, service, *assessment*, or procedure with respect to the physical or mental condition, or functional status, of an individual or that affects the structure or function or the body, and dispensing of an item in accordance with a prescription. 42 C.F.R. § 160.103; italics supplied. The term "assessment" was added to the definition when the final rule was adopted in December 2000. Explanatory regulatory material published with the change stated "assessments are conducted in the initial step of diagnosis and treatment of a patient. If assessment is not included in the list of services, the services provided by occupational health nurses and employee health information may not be covered." 65 Fed. Reg. 82572 (2000).

8. Given the functions and activities set forth above, it seems clear that certain components of VBA are not covered entities: Education Service, Loan Guaranty Service and Insurance Service.[1] Similarly, most activities of C & P Service are not of the type listed above for covered entities. However, since a C & P examination could arguably fall under the definition of "health care," and thus possibly be deemed an activity of a "health care provider," we will examine this activity in more detail before characterizing C & P Service.

[1] We will consider whether any activities of Vocational Rehabilitation and Employment Service constitute covered entity activities in a subsequent memorandum opinion.

9. As indicated above, under the Privacy Rule definition an entity may be a covered health care provider if it engages in the performance of an "assessment . . . with respect to the physical or mental condition, or functional status, of an individual." C & P examinations are intended to, and do, provide evaluations of the physical or mental status of applicants for VA benefits. However, the quoted language appears to contemplate a meaning and purpose quite different from a C & P type of assessment. The statutory and regulatory definitions of health plan and health care provider include the following terms to describe their health care activities: diagnosis, diagnostic, test, screening, care, treatment, therapeutic, therapy, anesthetist services, vaccine, dressings, supplies, equipment, cure, mitigation, rehabilitative, maintenance, palliative and preventive. The common denominator of these many terms is the focus on active intervention for the purpose of affecting the health status of an individual. Evaluation or "assessment" of the individual's condition in the context of these many terms is clearly for the purpose of selecting a course of action to improve that condition.

10. The December 2000 comment of HHS explaining why "assessment" was added corroborates such an understanding when it identifies "assessment" as an early step in the diagnosis and treatment of a patient. In contrast, while a C & P examination may constitute an "assessment" of the physical or mental condition of a VA beneficiary, it is not for therapeutic intervention. The C & P examination is to assess for the entirely different purpose of compensating an individual monetarily or otherwise for a loss of physical or mental function. Since the purpose of this assessment is not care and treatment, we conclude that the performance of this examination activity does not constitute "health care," and thus falls outside the scope of the activities of covered entities.

11. Accordingly, we conclude that C & P Service is not a covered entity and that the HIPAA Privacy Rule does not apply to VBA C & P examination records. It follows that when a third party entity performing C & P examinations on behalf of VBA, including VHA, creates such records, they are not protected by the Privacy Rule.

PROTECTED HEALTH INFORMATION HELD BY NON-COVERED ENTITIES

12. The Veterans Health Administration (VHA) is designated a health plan as to care provided or paid for under Chapter 17 of title 38, United States Code. 42 U.S.C. § 1320d(5)(J). VHA's treatment activities also satisfy the definition of a covered health care provider. 42 U.S.C. § 1320d(3); 45 C.F.R. § 160.103. Consequently individually identified health information created or maintained by VHA for VHA purposes, (as opposed to VBA purposes as discussed above), is protected from use or disclosure not authorized by the Privacy Rule. On the other hand, since VBA is not a covered entity, the Privacy Rule does not apply to

protected individually identifiable health information once it is received by VBA (with the possible exception of Vocational Rehabilitation and Employment Service). HHS agreed with that conclusion when it determined that it lacks authority under HIPAA to make the Privacy Rule applicable to non-covered entities. HHS summarized this analysis when it said:

> [O]ur jurisdiction under the statute is limited to health plans, health care clearinghouses, and health care providers who transmit any health information electronically in connection with any of the standard financial and administrative transactions in section 1173(a) of the Act [the Social Security Act]. These are the entities referred to in section 1173(a)(1) of the Act and thus listed in 160.103 of the final rule. Consequently, *once protected health information leaves the purview of one of these covered entities, their business associates, or other related entities (such as plan sponsors), the information is no longer afforded protection under this rule.*

65 Fed. Reg. 82567; italics supplied.

A SPECIAL VA EXCEPTION: DISCLOSURE FOR ELIGIBILITY PURPOSES

13. A disclosure of protected health information by a covered entity to another entity is generally not permitted without a prior written authorization or an exception provided by the Privacy Rule. 45 C.F.R. § 164.502. The Privacy Rule provides an exception that *generally* permits VHA to provide protected health information to VBA for claim adjudication and benefits delivery purposes. 42 C.F.R. § 164.512(k)(1)(iii) states:

> A covered entity that is a component of the Department of Veterans Affairs may use and disclose protected health information to components of the Department that determine eligibility for or entitlement to, or that provide, benefits under the laws administered by the Secretary of Veterans Affairs.

Not covered by this exception, however, are psychotherapy notes and any protected health information, which is being disclosed for marketing (generally, communications to encourage the purchase or use of a product or service). 45 C.F.R. § 164.508. Psychotherapy notes will be discussed in detail in a subsequent opinion. Thus, except for psychotherapy notes and marketing efforts, individually identifiable health information may be provided by VHA to VBA to determine eligibility for, or entitlement to, or provide benefits under laws administered by the Secretary of Veterans Affairs without need for a written authorization. Moreover, as stated above, once it becomes VBA information, it is

no longer subject to the protected health information requirements of the HIPAA Privacy Rule.

SUMMARY

14. We have applied the conclusions set out in this opinion to many of your specific questions; see Addendum, attached. It should be recalled, however, the individually identifiable health information once in VBA's possession is not unprotected. As you know, it continues to be protected by Federal statutes, such as the Privacy Act, 5 U.S.C. § 552a, 38 U.S.C. § 7332 where applicable, and 38 U.S.C. § 5701(a). As is currently the rule, VBA may use and disclose individually identifiable health information only as authorized by these statutes. We have not set forth this qualification to the answers that follow to avoid repetition. Nevertheless, these provisions must always be considered in the circumstances presented by your questions.

15. If you have any further questions about the answers provided in this memorandum, please contact Jeff Corzatt at 273-6362.

HELD:

VBA, with the possible exception of Vocational Rehabilitation and Employment Service (which will be considered in a subsequent opinion), is not subject to the HIPAA Privacy Rule.

Except for psychotherapy notes and disclosures for the purpose of marketing, health care information protected by the HIPAA Privacy Rule may be disclosed to VBA by VHA without written authorization if such disclosure is for the purpose of determination of eligibility for or entitlement to benefits or for the administration of benefits. Once it is received by VBA, it is no longer covered by the Privacy Rule. The information may still be protected by the Privacy Act and the VA confidentiality laws (38 U.S.C. §§ 5701(a), 7332), however.

Compensation and Pension examination reports prepared for VBA by VHA or any other entity, such as a contractor, are not covered by the Privacy Rule since that entity is acting as an agent of a noncovered entity in preparing such reports.

Tim S. McClain

Tim S. McClain

ADDENDUM

ANSWERS TO SPECIFIC QUESTIONS ABOUT THE APPLICATION OF THE HIPAA PRIVACY RULE

Set forth immediately below are answers to most of the questions that VBA asked concerning the application of the HIPAA Privacy Rule. These answers apply only to activities of VBA. They do not apply to the Veterans Health Administration. As the remainders of the questions are resolved, we will provide the answers in subsequent memoranda. (An explanation rather than a question was presented under QUESTION 1.)

QUESTION 2: Does protected health information generated elsewhere retain that protection after transfer to VBA?
ANSWER: No.

QUESTION 3: What obligations, if any, does VBA have concerning the notice requirements of the Privacy Rule if it applies to protected health information provided to VBA?
ANSWER: VBA has no obligations concerning the notice requirements of the Privacy Rule.

QUESTION 4: Are there any new obligations if it does not?
ANSWER: No.

QUESTION 5: Does HIPAA impose any added restrictions on access to or disclosure of information in VBA claims files beyond that which already exist under the Privacy Act or under our routine uses?
ANSWER: No.

QUESTION 6: Is a Rating Decision which discusses and documents the veteran's health and claimed disabilities a protected medical record under HIPAA?
ANSWER: No.

QUESTION 7: Is a C&P examination report a protected health record within the meaning of HIPAA? Does the answer depend on whether it is conducted by the Veterans Health Administration or by a private contractor?
ANSWERS: No. Not applicable.

QUESTION 8: Assuming that the answer to question five above is in the affirmative, VBA obtains disability examinations from both VHA and a private vendor who does more than 70,000 examinations per year. Currently that vendor is QTC Corporation and VBA is currently engaged in a rebid of the contract. In

light of that we have the following questions [questions omitted in light of the response].
ANSWER: This question is not applicable, since the answer to question five is "no."

QUESTION 13: Please clarify what constitutes a valid authorization and a defective authorization?
ANSWER: A valid authorization meets all the requirements specified in 45 CFR 164.508. (Attached) A defective authorization does not. VBA will not need a Privacy Rule authorization to disclose health information received from VHA or another covered entity. However, if VBA seeks health care information protected by the Privacy Rule from a covered entity other than VHA, a valid authorization from the VA beneficiary will be required, unless an exception to the Privacy Rule applies.

QUESTION 14: Does information gathered by a VA field examiner on the health of a beneficiary for whom a fiduciary has been appointed constitute a protected health record within the meaning of HIPAA?
ANSWER: No, information created or gathered by a VA field examiner, including information gathered from a covered entity, is not subject to the HIPAA Privacy Rule.

QUESTION 15: Does VA's current policy of recognizing a licensed attorney as a POA if the attorney asserts representation on his/her letterhead meet the requirements of HIPAA for purposes of providing access to protected health information?
ANSWER: Because medical information in the possession of VBA is not protected health information, the HIPAA requirements do not apply to access to such information by a licensed attorney when the information is maintained by VBA.

QUESTION 16: Does a request from a power of attorney (veterans service organization, agent or attorney) under the Privacy Act and/or Freedom of Information Act for records from a claims, vocational rehabilitation or guardianship file require a HIPAA compliant release for VA to release these documents? Or may VA release such documents if the request is made over the POA's own signature and on the individual's or organization's letterhead?
ANSWER: Because VBA is not generally subject to the HIPAA Privacy Rule, a HIPAA-compliant release is not required to release protected health information contained in a veteran's VBA records to the current holder of the veteran's POA. As indicated above, we will address the vocational rehabilitation records in a future opinion.

Director, Compensation and Pension Service (21)

QUESTION 17: Does the provision of information and access to a claims file to a POA constitute a disclosure that must be disclosed to the individual about whom the record relates and/or that must be documented and cataloged on a six year rolling basis as required by 45 CFR 164.528? Please explain the minimum information that must be contained in the notice to the individual and any time limit that may exist about notification. What is the minimum information that must be maintained on the rolling log? Must the rolling log be maintained in the VA folder or as a separate system of records or both?
ANSWER: These questions presume that the VBA claim file contains information protected by the Privacy Rule. Because the Privacy Rule does not apply to the claim file, the HIPAA requirements to account for disclosures do not apply.

QUESTION 18: We understand that HIPAA applies as long as records on an individual exist, even if that individual is deceased. How does this affect the ability of a survivor to file for benefits to include appointing a POA to represent them? Can the POA who is representing the survivor review records of the deceased? If so, under what conditions?
ANSWER: While the Privacy Rule does apply to the protected health information of decedents when maintained by a covered entity, the Privacy Rule does not apply to VBA records.

QUESTION 20: VA provides information to other federal, state and local governmental bodies in the course of business, often without a release from the beneficiary. [Examples deleted] Would these require us to get a new release form?
ANSWER: Since the Privacy Rule does not apply to VBA, it need not obtain a HIPAA-compliant authorization before making disclosures to other governmental entities.

QUESTION 24: 45 CFR 164.512(e)(1)(v)(B) says in part "(B) Requires the return to the covered entity or destruction of the protected health information (including all copies made) at the end of the litigation or proceeding." Please explain the applicability of this provision to the VA claims process? [rest of question deleted.]
ANSWER: Because the HIPAA Privacy Rule does not apply to VBA claim proceedings or records, this HIPAA Privacy Rule provision is inapplicable to the VA claims process.

QUESTION 25: Does the current [VA form] 21-4142 meet the requirements of HIPAA? If not, how should it be modified? Do we need a separate release for psychotherapy records?
ANSWER: In order for VBA to obtain protected health information from a covered entity pursuant to a prior written authorization of the patient, that authorization must meet the requirements of 45 CFR 164.508. Under that section of the Privacy Rule, a separate authorization is required for psychotherapy notes. Thus,

if VBA seeks medical information other than psychotherapy notes and psychotherapy notes from the same private sector covered health care provider, VBA will have to provide the provider with two authorizations. 45 CFR 164.508(b)(3)(ii). (If a more-restrictive state or Federal law applies to the medical information sought, as now, VBA would have to use an authorization that meets the requirements of the applicable law.)

QUESTION 26: Do the current P-22 Appointment of a Power of Attorney and P-22A Appointment of an Agent meet the requirements of HIPAA for purposes of providing access to claims files and guardianship files? If not how should the forms be modified?
ANSWER: The HIPAA Privacy Rule does not apply to the claim and guardianship files.

QUESTION 29: Does HIPAA require us or is it to our advantage to republish our routine uses prior to April 13, 2003?
ANSWER: Because the HIPAA Privacy Rule does not apply to the VBA systems of records subject to the Privacy Act, it does not require VBA to republish its systems of records notices. However, many VBA systems of records have not been republished in some time. For example, it would appear that VBA has not republished its system of records for Compensation and Pension claim file records, VA System of Records 58VA21/22 since 1976. See, e.g., the Federal Register notice at 63 Fed. Reg. 37941 (1998). Under 1999 guidance from the Office of Management and Budget and a Presidential Memorandum for the Heads of Executive Departments and Agencies, Federal agencies are to conduct a review of their systems of records, update them, and republish them where necessary. Accordingly, it would appear appropriate for VBA, regardless of the HIPAA Privacy Rule, to review, and as necessary, update and republish its Privacy Act systems of records notices, including routine uses.

QUESTION 30: We believe that the required compliance date for HIPAA is April 14, 2003. What sanctions, if any, exist for non-compliance with the various provisions of HIPAA and its implementing regulations?
ANSWER: The HIPAA Privacy Rule is inapplicable to VBA claim records.

QUESTION 31: May a veteran waive his HIPAA rights in a manner similar to that whereby a military retiree waives his/her right to retired pay to receive compensation in advance of the final decision on his/her claim?"
ANSWER: There is no authority under the HIPAA statute or Privacy Rule for an individual to waive his/her rights under the Rule. We note that the only "waiver" of rights provision in the Privacy Rule that we can identify is a temporary "suspension" of the right of access to medical information by participants in clinical research if certain conditions are met. 45 CFR § 164.524(a)(2)(iii).

10.

Director, Compensation and Pension Service (21)

QUESTIONS 32-34 presume that the HIPAA Privacy Rule applies to VBA claim records.
ANSWERS: Since the Rule does not apply to these records, there is no need to answer these questions at this time.

disclosures. Except with respect to uses or disclosures that require an authorization under § 164.508(a)(2) and (3), a covered entity may use or disclose protected health information for treatment, payment, or health care operations as set forth in paragraph (c) of this section, provided that such use or disclosure is consistent with other applicable requirements of this subpart.

(b) *Standard: Consent for uses and disclosures permitted.*

(1) A covered entity may obtain consent of the individual to use or disclose protected health information to carry out treatment, payment, or health care operations.

(2) Consent, under paragraph (b) of this section, shall not be effective to permit a use or disclosure of protected health information when an authorization, under § 164.508, is required or when another condition must be met for such use or disclosure to be permissible under this subpart.

(c) *Implementation specifications: Treatment, payment, or health care operations.*

(1) A covered entity may use or disclose protected health information for its own treatment, payment, or health care operations.

(2) A covered entity may disclose protected health information for treatment activities of a health care provider.

(3) A covered entity may disclose protected health information to another covered entity or a health care provider for the payment activities of the entity that receives the information.

(4) A covered entity may disclose protected health information to another covered entity for health care operations activities of the entity that receives the information, if each entity either has or had a relationship with the individual who is the subject of the protected health information being requested, the protected health information pertains to such relationship, and the disclosure is:

(i) For a purpose listed in paragraph (1) or (2) of the definition of health care operations; or

(ii) For the purpose of health care fraud and abuse detection or compliance.

(5) A covered entity that participates in an organized health care arrangement may disclose protected health information about an individual to another covered entity that participates in the organized health care arrangement for any health care operations activities of the organized health care arrangement.

§ 164.508 Uses and disclosures for which an authorization is required.

(a) *Standard: authorizations for uses and disclosures.*

(1) *Authorization required: general rule.* Except as otherwise permitted or required by this subchapter, a covered entity may not use or disclose protected health information without an authorization that is valid under this section. When a covered entity obtains or receives a valid authorization for its use or disclosure of protected health information, such use or disclosure must be consistent with such authorization.

(2) *Authorization required: psychotherapy notes.* Notwithstanding any provision of this subpart, other than the transition provisions in § 164.532, a covered entity must obtain an authorization for any use or disclosure of psychotherapy notes, except:

(i) To carry out the following treatment, payment, or health care operations:

(A) Use by the originator of the psychotherapy notes for treatment;

(B) Use or disclosure by the covered entity for its own training programs in which students, trainees, or practitioners in mental health learn under supervision to practice or improve their skills in group, joint, family, or individual counseling; or

(C) Use or disclosure by the covered entity to defend itself in a legal action or other proceeding brought by the individual; and

(ii) A use or disclosure that is required by § 164.502(a)(2)(ii) or permitted by § 164.512(a); § 164.512(d) with respect to the oversight of the originator of the psychotherapy notes; § 164.512(g)(1); or § 164.512(j)(1)(i).

(3) *Authorization required: Marketing.*

(i) Notwithstanding any provision of this subpart, other than the transition provisions in § 164.532, a covered entity must obtain an authorization for any use or disclosure of protected health information for marketing, except if the communication is in the form of:

(A) A face-to-face communication made by a covered entity to an individual; or

(B) A promotional gift of nominal value provided by the covered entity.

(ii) If the marketing involves direct or indirect remuneration to the covered entity from a third party, the authorization must state that such remuneration is involved.

(b) *Implementation specifications: general requirements.*

(1) *Valid authorizations.*

(i) A valid authorization is a document that meets the requirements in paragraphs (a)(3)(ii), (c)(1), and (c)(2) of this section, as applicable.

(ii) A valid authorization may contain elements or information in addition to the elements required by this section, provided that such additional elements or information are not inconsistent with the elements required by this section.

(2) *Defective authorizations.* An authorization is not valid, if the document submitted has any of the following defects:

(i) The expiration date has passed or the expiration event is known by the covered entity to have occurred;

(ii) The authorization has not been filled out completely, with respect to an element described by paragraph (c) of this section, if applicable;

(iii) The authorization is known by the covered entity to have been revoked;

(iv) The authorization violates paragraph (b)(3) or (4) of this section, if applicable;

(v) Any material information in the authorization is known by the covered entity to be false.

(3) *Compound authorizations.* An authorization for use or disclosure of protected health information may not be combined with any other document to create a compound authorization, except as follows:

(i) An authorization for the use or disclosure of protected health information for a research study may be combined with any other type of written permission for the same research study, including another authorization for the use or disclosure of protected health information for such research or a consent to participate in such research;

(ii) An authorization for a use or disclosure of psychotherapy notes may only be combined with another authorization for a use or disclosure of psychotherapy notes;

(iii) An authorization under this section, other than an authorization for a use or disclosure of psychotherapy notes, may be combined with any other such authorization under this section, except when a covered entity has conditioned the provision of treatment, payment, enrollment in the health plan, or eligibility for benefits under paragraph (b)(4) of this section on the provision of one of the authorizations.

(4) *Prohibition on conditioning of authorizations.* A covered entity may not condition the provision to an individual of treatment, payment, enrollment in the health plan, or eligibility for benefits on the provision of an authorization, except:

(i) A covered health care provider may condition the provision of research-related treatment on provision of an authorization for the use or disclosure of protected health

information for such research under this section;

(iii) A health plan may condition enrollment in the health plan or eligibility for benefits on provision of an authorization requested by the health plan prior to an individual's enrollment in the health plan, if:

(A) The authorization sought is for the health plan's eligibility or enrollment determinations relating to the individual or for its underwriting or risk rating determinations; and

(B) The authorization is not for a use or disclosure of psychotherapy notes under paragraph (a)(2) of this section; and

(iii) A covered entity may condition the provision of health care that is solely for the purpose of creating protected health information for disclosure to a third party on provision of an authorization for the disclosure of the protected health information to such third party.

(5) *Revocation of authorizations.* An individual may revoke an authorization provided under this section at any time, provided that the revocation is in writing, except to the extent that:

(i) The covered entity has taken action in reliance thereon; or

(ii) If the authorization was obtained as a condition of obtaining insurance coverage, other law provides the insurer with the right to contest a claim under the policy or the policy itself.

(6) *Documentation.* A covered entity must document and retain any signed authorization under this section as required by § 164.530(j).

(c) *Implementation specifications: Core elements and requirements.*

(1) *Core elements.* A valid authorization under this section must contain at least the following elements:

(i) A description of the information to be used or disclosed that identifies the information in a specific and meaningful fashion.

(ii) The name or other specific identification of the person(s), or class of persons, authorized to make the requested use or disclosure.

(iii) The name or other specific identification of the person(s), or class of persons, to whom the covered entity may make the requested use or disclosure.

(iv) A description of each purpose of the requested use or disclosure. The statement "at the request of the individual" is a sufficient description of the purpose when an individual initiates the authorization and does not, or elects not to, provide a statement of the purpose.

(v) An expiration date or an expiration event that relates to the individual or the purpose of the use or disclosure. The statement "end of the research study," "none," or similar language is sufficient if the authorization is for a use or disclosure of protected health information for research, including for the creation and maintenance of a research database or research repository.

(vi) Signature of the individual and date. If the authorization is signed by a personal representative of the individual, a description of such representative's authority to act for the individual must also be provided.

(2) *Required statements.* In addition to the core elements, the authorization must contain statements adequate to place the individual on notice of all of the following:

(i) The individual's right to revoke the authorization in writing, and either:

(A) The exceptions to the right to revoke and a description of how the individual may revoke the authorization; or

(B) To the extent that the information in paragraph (c)(2)(i)(A) of this section is included in the notice required by § 164.520, a reference to the covered entity's notice.

(ii) The ability or inability to condition treatment, payment, enrollment or eligibility for benefits on the authorization, by stating either:

(A) The covered entity may not condition treatment, payment, enrollment or eligibility for benefits on whether the individual signs the authorization when the prohibition on conditioning of authorizations in paragraph (b)(4) of this section applies; or

(B) The consequences to the individual of a refusal to sign the authorization when, in accordance with paragraph (b)(4) of this section, the covered entity can condition treatment, enrollment in the health plan, or eligibility for benefits on failure to obtain such authorization.

(iii) The potential for information disclosed pursuant to the authorization to be subject to redisclosure by the recipient and no longer be protected by this subpart.

(3) *Plain language requirement.* The authorization must be written in plain language.

(4) *Copy to the individual.* If a covered entity seeks an authorization from an individual for a use or disclosure of protected health information, the covered entity must provide the individual with a copy of the signed authorization.

§ 164.510 Uses and disclosures requiring an opportunity for the individual to agree or to object.

A covered entity may use or disclose protected health information, provided that the individual is informed in advance of the use or disclosure and has the opportunity to agree to or prohibit or restrict the use or disclosure, in accordance with the applicable requirements of this section. The covered entity may orally inform the individual of and obtain the individual's oral agreement or objection to a use or disclosure permitted by this section.

(a) *Standard: use and disclosure for facility directories.*

(1) *Permitted uses and disclosure.* Except when an objection is expressed in accordance with paragraphs (a)(2) or (3) of this section, a covered health care provider may:

(i) Use the following protected health information to maintain a directory of individuals in its facility:

(A) The individual's name;

(B) The individual's location in the covered health care provider's facility;

(C) The individual's condition described in general terms that does not communicate specific medical information about the individual; and

(D) The individual's religious affiliation; and

(ii) Disclose for directory purposes such information:

(A) To members of the clergy; or

(B) Except for religious affiliation, to other persons who ask for the individual by name.

(2) *Opportunity to object.* A covered health care provider must inform an individual of the protected health information that it may include in a directory and the persons to whom it may disclose such information (including disclosures to clergy of information regarding religious affiliation) and provide the individual with the opportunity to restrict or prohibit some or all of the uses or disclosures permitted by paragraph (a)(1) of this section.

(3) *Emergency circumstances.*

(i) If the opportunity to object to uses or disclosures required by paragraph (a)(2) of this section cannot practicably be provided because of the individual's incapacity or an emergency treatment circumstance, a covered health care provider may use or disclose some or all of the protected health information permitted by paragraph (a)(1) of this section for the facility's directory, if such disclosure is:

(A) Consistent with a prior expressed preference of the individual, if any, that is known to the covered health care provider;