PRIVACY OF MEDICAL RECORDS: ENFORCEMENT OF HAWAII'S NEW LAW

JEAN KADOOKA MARDFIN
Researcher

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Legislative Reference Bureau
State Capitol
Honolulu, Hawaii

Internet: *www.state.hi.us/lrb/*

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FOREWORD

The Legislative Reference Bureau wishes to thank Moya Gray, Director, Office of Information Practices, and the following individuals in the Department of Commerce and Consumer Affairs: Kathryn S. Matayoshi, Director; Gilbert S. Coloma-Agaran, Deputy Director; Jo Ann M. Uchida, Complaints and Enforcement Officer; Terry Higa, Administrative Services Officer; Rod Maile, Senior Hearings Officer, Office of Administrative Hearings; and Wayne Metcalf, Insurance Commissioner.

Wendell K. Kimura
Acting Director

January 2000

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FACT SHEET

Privacy of Medical Records Enforcement of Hawaii's New Law

I. Highlights

Act 87, Session Laws of Hawaii 1999, established a new law, chapter 323C, Hawaii Revised Statutes, on the Privacy of Health Care Information. The Act is to become effective on July 1, 2000. Section 7 of that Act requires the Legislative Reference Bureau to identify the most appropriate method by which to enforce and implement the new medical records confidentiality law.

1. The OIP is the single agency in state government having the greatest amount of subject matter expertise with respect to privacy issues involving records. OIP also wants the responsibility for the new law. However, the OIP could not implement the new law without a substantial increase in staffing and funding. The agency estimated that its present staff of seven and budget of just under $333,000 would have to be increased by an additional ten positions. The added cost of those new positions would likely be at least $350,000 to $400,000 a year in general fund appropriations. OIP is attached to the Office of the Lieutenant Governor for administrative purposes, and could not reasonably expect to draw much in the way of support or assistance from that office or other attached agencies.

2. The DCCA does not favor being given the responsibility for the new law, but already has a well integrated mechanism in place to handle the intake and investigation of complaints and prosecution of cases at least through the administrative hearing stage. DCCA attorneys also take a narrow range of cases to Circuit Court, and a formal working relationship is in place for the Attorney General's Office to do so in other cases.

3. DCCA is the licensing and regulatory authority for a number of entities subject to regulation under the new law (either through the Insurance or Professional and Vocational Licensing Divisions), and all businesses register with the Department's Business Registration Division. This enables the Department to fund operations under the new law through assessments on the regulated entities. If the Department is authorized to assess other entities subject to the new law, it appears to be in a better position to implement such a scheme than any other state agency. If OIP were directed to implement a similar funding scheme, it would need additional staff just to implement it, and would have to build its entire database of agencies to assess from ground zero, and would probably need to search the data at DCCA.

4. If the Legislature is willing to appropriate the funds, presumably general funds needed for OIP to implement the medical records confidentiality law, then OIP, the agency with the greatest subject matter expertise, should be designated as the implementing agency.

5. If the Legislature would prefer to fund implementation of the new law through assessments on regulated entities, then DCCA should be designated as the implementing agency.

6. If the Legislature does not assign OIP responsibility for the new law, the Legislature should reconsider the issue at a later date if, as advocated by OIP's Director, the Legislature decides to broaden OIP's mission to encompass the commercial handling and use of personal information.

II. Anticipated Questions

1. Section 7 of Act 87 which directed this study specifically asked the Bureau to review RICO, the Insurance Division, and OIP. Why does the study instead compare DCCA and OIP?

   Answer: RICO and the Insurance Division are both divisions within the DCCA. There is no reason to assume that any single division (or branch or other unit of organization) within a department has to implement a law or program entirely on its own. Simply reviewing each of those divisions as stand alone entities would give an incomplete picture of DCCA's abilities, as the Department integrates to a great degree the functions and operations of a diverse collection of organic and attached agencies.

2. Does the report consider any agencies other than OIP and DCCA as possible candidates?

   Answer: No. Aside from the fact that the Legislature was primarily concerned with those agencies as candidates, the Bureau believed that the Legislature had already selected well. Other possible candidates could have included the Department of Health (which regulates health care facilities) and the Department of Labor and Industrial Relations (which regulates all employers in a number of ways although it does not actually "license" them or otherwise permit them to operate as businesses). However, practically speaking, no other state agency appeared to have either the subject matter expertise of OIP, or the integrated operations of DCCA ranging from registration of the business entities themselves, to receiving and

investigating complaints, and prosecuting and hearing administrative cases on a department-wide basis.

3. Why does the study discuss things like the investigation of complaints and handling of administrative hearings? The new law (chapter 323C, Hawaii Revised Statutes) only specifically mentions civil actions by individuals, cease and desist orders, and civil penalties (section 323C-53) and criminal penalties (section 323C-51).

   Answer: The study considers them solely because they appear to be reasonable and practical elements in an implementation or enforcement scheme. If nothing else, with court proceedings clearly and specifically provided for (and absolutely required in the case of the criminal penalties), some form of investigation of complaints is necessary. It would not be a very good use of resources to bring cases to court (particularly those involving the class C felony liability under section 323C-51) based solely upon allegation of a complainant. Consequently, investigation of complaints would be appropriate even if administrative hearings were specifically precluded. Practically speaking, however, aside from the fact that both DCCA and OIP personnel assumed or at least contemplated their use, some form of administrative hearing process would be appropriate for handling smaller, more routine cases.

4. Does the study make any findings as to whether OIP's mission should be broadened to include the commercial handling and use of personal information?

   Answer: No. That would be an entire study in itself and beyond the scope of this one.

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TABLE OF CONTENTS

Page

Chart

Appendix

Chapter 1

ADMINISTRATION OF HEALTH CARE RECORDS

Introduction

Act 87, Session Laws of Hawaii 1999, established a new law, chapter 323C, Hawaii Revised Statutes, on the Privacy of Health Care Information. The Act is to become effective on July 1, 2000. Section 7 of that Act requires the Legislative Reference Bureau (Bureau) to identify the most appropriate agency to enforce and implement the new state law that protects the privacy of health care information under certain conditions.

Chapter 323C regulates health care information use and disclosure by balancing the patient's right to privacy of medical information and society's need for reasonable access to medical information for the patient's treatment, insurance payment, research, and other purposes. More specific provisions in this chapter provide for:

(1) Definitions for the terms used in the protection of privacy of health care information activity;

(2) An individual's rights to health care information;

(3) Restrictions on use and disclosure of this kind of information;

(4) Excepted uses and disclosures for which sanctions would not apply; and

(5) Sanctions upon the unauthorized use or disclosure of health care information.

Privacy and Confidentiality Defined

For purposes of this report, the terms "privacy" and "confidentiality" are used as described in the 1999 report of the United States General Accounting Office entitled "Medical Records Privacy":

> Privacy refers to the specific right of an individual to control the collection, use, and disclosure of personal information. Confidentiality is a tool for protecting privacy. Confidentiality is implemented through specific controls on personal data, limiting access and disclosure.[1]

[1] United States, General Accounting Office, Medical Records Privacy, February 1999, p. 4.

Regulation Generally

Many governmental policies are implemented through regulatory processes. Regulation has been defined as ". . . any attempt by the government to control the behavior of citizens, corporations, or subgovernments."[2] Regulation is a continuous, adaptive process and includes first, the legislation (in this case, the Privacy of Health Care Information Act), then rulemaking, implementation, enforcement, and dispute resolution.[3]

In the instant situation, the regulatory goal is to insure that health care information is maintained, used, shared, and so on, only to the extent that serves the limited purpose for which health care information is collected.

The issue of privacy of health care information is of growing concern for a number of reasons, including:

(1) Access to medical information beyond merely the patient's primary doctor and the patient's insurer;

(2) The widespread use of electronic media to store and access medical records; and

(3) Use of medical information by drug manufacturers for direct sales, and other uses.

The Legislature was aware of and addressed these concerns in chapter 323C.

A. What is the Nature of Health Care Information that Requires Government Regulation?

For purposes of this discussion, it is useful to focus upon two very broad categories of medical health information: (1) health care information; and (2) public health data. The first type of data, health care information, is collected specifically to allow a health care provider to treat a patient and is collected, held, and used by private concerns such as the physician, pharmacist, hospital, insurance companies, universities, and the like.

The second type of data, public health data, includes information collected to identify health risks that could impact the society at large. Thus, government public health entities maintain information about communicable diseases, behavioral risk factors such as drug use; birth defects, immunization registries, and so on. Public health data is important because identifying areas with a high incidence of certain health problems or the sudden appearance of a public health hazard can mobilize government bodies to take action.[4]

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[2] Congressional Quarterly, Inc., Federal Regulatory Directory, Ninth ed., Mary Burke Marshall, ed., p. 2.

[3] *Ibid.*

[4] At least one other author, Amitai Etzioni, in his The Limits of Privacy (Basic Books, 1999, chapter 5, "Medical Records"), has suggested a layering of access to personal medical records which is slightly different from the "health care information" and "public health data" dichotomy as a way of addressing access or disclosure issues. These layers are the inner circle of people who should have ready access to the patient's records such as the health care personnel, doctors, nurses, physical therapists, etc. The next layer is the intermediary circle such as health

By its very content, a person's health care records contain personal, sensitive, and private information. Health care providers require complete, honest, and current information about a patient's physical condition in order to prescribe appropriate treatment.

Enactment of Act 87 is intended to give the state government a way to influence the behavior of those entities that deal with, or have access to a person's medical or health care information in order to protect the privacy of the individual.

B. Why is this Kind of Government Regulation Necessary?

Health care information describes the patient's illnesses, both mental and physical, the treatment of the illnesses, the outcomes, prognosis, and so on. Some of the information in the person's health care record if inappropriately released, for example, to the press, or to the patient's employer, could harm, among other things, the patient's social reputation or jeopardize his job. While some medical information might be merely embarrassing, other bits of health information may encourage a bank to call in the patient's mortgage if the bank thought the patient had a terminal illness; or a patient may be denied life insurance. For another patient who might be a candidate for office, inadvertent release from medical records of drug prescriptions for mental illness might influence voters not to vote for the candidate. Very few citizens would be willing to have their entire medical history file displayed to the general public.

Traditionally, a person's medical history and treatment may have been collected and stored on paper files in that person's doctor's office. Today, medical insurance often pays for part of that patient's hospitalization or prescription drugs and the insurer receives a copy of that medical history in order to institute reimbursement. If laboratory tests were conducted prior to treatment, that laboratory would have the patient's name, lab results, and other related information. If the patient is hospitalized, a health care institution will also collect medical care information about that patient. If a specialist is consulted for the medical emergency, another copy of the patient's medical history may be created and filed in the specialist's files. Computers may be used to store that same patient's medical information and out lying sources can access that record if necessary for payment reimbursement and so on.

If the patient is eligible for Medicare, medicaid, or other public assistance, there are government records created on that same individual. Further, if the illness is a communicable disease (for example, tuberculosis, or HIV) for which a report is required to the public health agency, this information may be transmitted to such an agency. At each of these points where medical information is collected, used, and so on, there is a valid reason for protecting the confidentiality of the person's medical care information because inappropriate, unauthorized release of that sensitive information might wreak havoc in that person's life.

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insurers and managed care corporations, and finally the outer circle whom with legal access, use the patient's medical information for financial gain. The members of the outer circle are entities such as pharmaceutical companies, employers, marketers, and life insurers.

Provisions of Chapter 323C

This section provides a summary of the main provisions of chapter 323C, Hawaii Revised Statutes.[5]

Chapter 323C has the following legislative objectives:

(1) Protecting a person's constitutional right to privacy of medical information;

(2) Protecting persons against the deleterious effects of unauthorized release of medical information;

(3) Establishing methods to protect persons against unauthorized and inappropriate use of medical information;

(4) Continuing to allow exchange of protected medical information in a confidential manner without adversely affecting treatment and provision of good health care;

(5) Promoting research and public health monitoring by allowing transfer of personal health information into nonidentifiable health information;

(6) Establishing procedures whereby lawsuits are less likely to occur by providing courts with information about the proper handling of medical information; and

(7) Providing for criminal and civil penalties for violations.

A. What Kind of Information Does a Patient Have a Right to Have Protected Under Chapter 323C?

When a health record has personal identifiers such as a patient's name or social security number, the following kinds of information is protected:

(1) The patient's medical or mental condition;

(2) The patient's tissue and genetic information;

(3) Health care treatments given to the patient; and

(4) Payment for health care.

Section 323C-11 gives the patient the right to inspect and copy the medical record within thirty days after an entity such as a doctor, insurer, or hospital, receives the request. An entity that denies the patient's request must inform the patient in writing within thirty days why access

[5] Adapted from Openline written by Carlotta Dias, Staff Attorney, Office of Information Practices, OIP, supplement to August 1999.

cannot be granted, how to obtain a review of the denial, and the patient's right to file a statement for inspection and copying of that patient's medical record.

Section 323C-11 further allows an entity such as a doctor, hospital, and so on to deny a patient access to the patient's medical record for certain reasons such as:

(1) The disclosure could harm the patient's mental or physical life;

(2) The information could identify another person who provided the information under promise of confidentiality;

(3) The information is protected from discovery because the information is in the proceedings or records of a peer review committee; or

(4) The information was collected for or during a clinical trial monitored by an institutional review board, the clinical trial is not complete, and the researcher reasonably believes access would harm the conduct of the clinical trial.

B. How is Health Care Information Protected Under Chapter 323C?

Section 323C-21 allows a health care entity to use or disclose a patient's health care information within that entity only after giving proper notice to a patient. With proper notice, that entity can use that information for treatment and certain other health care operations. All other uses of that patient's health care information require specific consent, except for uses for specific public policy reasons.

If a patient wishes not to have the patient's health information released to a third party payor, for example, an insurer, then the patient must pay for the medical treatment or hospitalization directly. This is an "opt-out" right that protects that patient's health care information unless proper consent is given by the patient.

An entity such as a doctor or hospital or health care plan must notify patients of that entity's confidentiality practices. Section 323C-22 specifies the language that must be used in that notice. This notice is given in one of two different ways depending upon the type of entity involved. Health plans, for example, Kaiser or HMSA, must give each person in the plan a notice upon enrollment, annually, and whenever confidentiality practices are substantially amended. Other entities must post their confidentiality practices notice in a conspicuous place.

C. What Other Kinds of Consent is Required of a Patient?

Other disclosures must be authorized (consented to) separately and in writing (see section 323-23). Each consent form must be dated and signed and can be revoked at any time. Other information that the consent form must contain are:

(1) The identity of the person who is authorized to disclose the protected health care information;

(2) The identity of the patient;

(3) A description of the nature of and time span of the protected health care information to be disclosed;

(4) The identity of the person, entity, and so on, to whom the information will be disclosed;

(5) A description of the purpose of the disclosure;

(6) A statement that consent is subject to revocation by the patient; and

(7) The date that the consent to disclose will end.

Under certain conditions, consent is not required before protected health information is disclosed (see sections 323C-32 to 323C-43). For example, consent is not required for disclosure to a coroner or medical examiner, to assist in the identification of a deceased, or the safe handling of a deceased. Similarly, disclosure is allowed without consent for emergency treatment when the patient is unable to give consent, but a relative is able to do so for the patient, and for public health reasons, or for law enforcement purposes.

D. What Penalties Exist for Release of Protected Health Information Under Chapter 323C?

Criminal penalties: (1) five years for knowing or intentional disclosure (class C felony); (2) ten years for knowing or intentional sale, transfer, or use for commercial advantage, personal gain, or malicious harm (class B felony).

Civil penalties including injunctive relief, equitable relief, compensatory damages, punitive damages, costs of the action, attorney fees, and other relief a court finds appropriate are available to a patient whose rights are violated. A court may also serve a cease and desist order and impose fines.

Other Confidentiality Statutes in Hawaii

Chapter 323C, Hawaii Revised Statutes, places a duty on entities such as health care plans, insurers, hospitals, researchers, and doctors to protect the confidentiality of a patient's health care information. Concerns about the privacy of this information are due to the numerous holders of this kind of data, the speed of transmission and ease of access through computer networks, and the amount of personal damage that could occur if the information is released, sold, or used inappropriately. The protection provided in chapter 323C is not the only law covering this subject.

Other state statutes contain various other provisions regarding the proper handling of medical records. For example, section 432D-21, Hawaii Revised Statutes (health maintenance organization; confidentiality of medical information), provides that "Any data or information pertaining to the diagnosis, treatment, or health of any enrollee or applicant obtained from such person or from any provider by any health maintenance organization shall be held in confidence and shall not be disclosed to any person except to the extent that it may be necessary to carry out the purposes of this chapter . . . ." This law, however, applies only to health maintenance organizations.

Section 622-57, Hawaii Revised Statutes (availability of medical records), provides that "If a patient of a health care provider . . . requests copies of his or her medical records, the copies shall be made available to the patient unless in the opinion of the health care provider it would be detrimental to the health of the patient . . . ."

There are other sections of the law pertaining to public health data when personal medical information is collected by government agencies for public health purposes. For example, section 321-43, Hawaii Revised Statutes (department of health statistical activities), authorizes the ". . . department of health to collect information on the morbidity and mortality of cancer in Hawaii. The mortality data is collected from death certificates and analyzed by the staff of the department to determine the significance of cancer in the State by race, sex, age, occupation, site in the body and any other way found desirable for the purpose of determining the areas where greatest emphasis should be laid in the statewide cancer control program. The data is used in determining the prognosis and chance of cure, direction of tumor research, etc. All statistical material collected under this section shall be considered confidential as to the names of persons or physicians concerned, except that researchers may use the names of such persons when requesting additional information for research studies . . . ."

The collection of medical records information for public health data applies in Hawaii law to such diverse topics as:

(1) AIDS testing. Sections 325-16 and 325-101, Hawaii Revised Statutes, require that records indicating a person has HIV or AIDS which are held by any state agency, health care provider, et. al., be strictly confidential. Release is permitted under certain circumstances. Section 325-102 imposes a civil penalty for willful violation of the HIV/AIDS information restrictions;

(2) Blood banks. Section 325-4, Hawaii Revised Statutes, allows the exchange of patients' names between the Department of Health and the blood bank of who may have a disease transmittable by blood or blood products;

(3) Mental illness and retardation. Sections 334-5 and 324-12, Hawaii Revised Statutes, protect the confidentiality of records identifying a person who is being treated for mental illness or mental retardation, except under special circumstances;

(4) Health surveillance program. Section 324-31, Hawaii Revised Statutes, protects the identity of persons whose health problems, demographic, socioeconomic,

environmental, and other factors may aid in the evaluation of the delivery of health or medical care;

(5) Investigation of physicians and osteopathic physicians. Sections 460-20 and 453-17, Hawaii Revised Statutes, require that patient identifiers be expunged from records when these records are produced for review by a peer review committee pursuant to subpoena during an investigation in a tort action under section 663-1.7;

(6) Maternal and perinatal studies. Sections 324-1 to 324-4, Hawaii Revised Statutes, allow for the collection of data but protect the identification of persons studied for maternal and perinatal mortality;

(7) Public assistance recipients. Section 346-40, Hawaii Revised Statutes, protects the identity of recipients of medicaid and requires the maintenance of information such as treatment received and services or supplies provided, only for the purposes of reimbursement and to protect the program from fraud and abuse;

(8) Syphilis testing. Section 325-54, Hawaii Revised Statutes, permits only certain professionals to obtain the results of lab tests for syphilis for public health protection;

(9) Tuberculosis testing. Section 325-73, Hawaii Revised Statutes, provides protections similar to those for syphilis testing, except for tuberculosis results;

(10) Child abuse cases. Section 587-87, Hawaii Revised Statutes, protects medical treatment information concerning foster children;

(11) Child death reviews. Section 321-345, Hawaii Revised Statutes, provides protections similar to those for the identity of child abuse cases. Information on child death review cases is collected for research and prevention studies but identification of the individual is protected;

(12) Driving under the influence of alcohol. Section 286-162, Hawaii Revised Statutes, requires the results of the collection of blood or breath sample when a driver is involved in an accident resulting in injury or death to be collected by the Director of Transportation without revealing the identity of any individual tested; and

(13) Peer review (among medical professionals). Section 624-25.5, Hawaii Revised Statutes, protects the records reviewed by a peer review committee.

In chapter 323C, the collection and use of public health data are cited in "excepted uses and disclosures" (sections 323C-31 to 323C-43 and 323C-55). Chapter 323C does not directly address whether inappropriate disclosure of confidential information is a violation but it may be grounds for disciplinary action and the complaint, if made against a licensed or regulated entity.

By adopting chapter 323C, Hawaii has joined only a few states that have a law recognizing the sensitive nature of a patient's medical information if inappropriately released.

The Uniform Health-Care Information Act

Montana and Washington each have adopted their own versions of the Uniform Health-Care Information Act, but Hawaii's chapter 323C does not track the Uniform Act in the same manner. Nevertheless, some similarities between the Uniform Act and Hawaii's chapter 323C can be found. For example, in both the Uniform Act and chapter 323C, the health care provider must post a notice describing the patient's right to his own medical records information and explaining how a patient may look at, correct, and give consent to release of information therein. In other words, both Acts require alerting patients about their right to know what is in their medical records files and to consent to the release of information for specific purposes. The Uniform Health-Care Information Act allows individual states to take the initiative to address the issue of confidentiality of medical records (and with a level of uniformity not likely to occur if each state acted entirely on its own) instead of waiting for federal action on this issue.

On the other hand, some proponents of a federal law argue that because patients may move from state to state, obtain medical treatment in different states, or consult out-of-state physicians, a national law would be more practical and have uniform applicability.

Federal Action on Privacy and Confidentiality of Medical Information

At the federal level, the 1996 Health Insurance Portability and Accountability Act (HIPAA)[6] has provided that Congress must adopt a medical records privacy act[7] by 21 August 1999 or defer to regulations developed by Secretary of Health and Human Services. As no medical records privacy act was adopted by September 1, 1999, the Secretary of Health and Human Services on November 3, 1999, issued proposed rules on this issue for public comment, with final rules to be issued by February 21, 2000.[8]

The regulations proposed by the Department of Health and Human Services pertain only to electronically maintained medical information and to paper records derived from the computer generated data. Personal medical information, for which only a paper medium was ever created, would still remain under the aegis of individual states' laws. The reality is that fewer and fewer

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[6] P.L. 104-191, sections 261 to 264, August 21, 1996.

[7] According to the GAO report, there are at least seven bills introduced in the 105th and 106th congresses dealing with privacy of medical information: S.2609, 105th Cong. 1998, S.1921, 105th Cong. 1998; S1368, 105th Cong. 1997; H.R. 1815, 105th Cong. 1997; H.R. 52, 105th Cong. 1997; S. 300, 106th Cong. 1999; and S. 326, 106th Cong. 1999. From footnote 3, GAO Medical Records Privacy.

It is also possible that the issue of privacy of medical records is taking a back seat to the current debate in Congress about a patient's right to sue HMOs. Telephone interview with Moya Gray, Director, Office of Information Practices, 9 October 1999.

[8] Federal Register, November 3, 1999, vol. 64, no. 212, Proposed Rules, pages 59917 to 59966. Department of Health and Human Services, Office of the Secretary, 45 C.F.R. Parts 160 through 164.

paper-only records are being created, but for the moment, these records do not fall within the provisions of the regulations of the Secretary and would be regulated by state laws such as chapter 323C if they existed.

Preemption

When a state law and a federal law both address a policy area such as privacy of medical records, a question might be raised whether the federal law supersedes or preempts the state law. Section 264 of P.L. 104-91 (HIPAA) provides that provisions of a state's law that are more stringent than the federal standards, requirements, or implementation specifications will not be preempted by federal law. Nor are the regulations intended to supersede any of the state's laws affecting health surveillance, public health investigation or intervention (i.e., public health data).

The Hawaii Office of Information Practices (OIP) reports that OIP will seek an exemption from the (proposed) federal regulations so that preemption will not become an issue.[9] Furthermore, according to OIP Director Moya Gray, Hawaii's law provides more privacy protections and includes broader coverage, for example, by including paper-only medical records. In fact, much of the proposed federal regulations used Hawaii's Act 87 as a basis for its considerations.[10] The proposed federal regulations are posted on the internet at wais.access.gpo.gov (from the Federal Register Online via GPO Access).

The proposed federal regulations exempt state laws relating to the privacy of individually identifiable health information.[11] The issue of preemption is covered in detail in the proposed rules.[12]

Having described the major provisions of chapter 323C, this report now turns to a discussion of the capability of three state agencies to administer the law.

[9] Telephone Interview with John Cole in the Office of Information Practices, 4 October 1999.

[10] Telephone Interview with Moya Gray, Director, Office of Information Practices, 17 November 1999.

[11] P.L. 104-91 (HIPAA), section 264(c).

[12] See Federal Register, November 3, 1999, volume 64, no. 212, Proposed Rules, Section II.I.1 (Provisions of the Proposed rules: relationship to other laws and state laws.), pp. 59995 to 59999.

Chapter 2

MOST APPROPRIATE AGENCY TO IMPLEMENT THE MEDICAL RECORDS CONFIDENTIALITY LAW

Confidentiality Law

Act 87 (SLH 1999) specifically directs the Bureau to review three state agencies -- the Office of the Insurance Commissioner and the Regulated Industries Complaints Office of the Department of Commerce and Consumer Affairs and the Office of Information Practices -- to determine each agency's resources, level of expertise, level of neutrality, and amount of cooperative work with other entities.

Duties of Administering Agency

Briefly stated, the agency that is chosen to administer the medical records confidentiality law, chapter 323C, HRS, would appear to have responsibilities in several areas, none of them particularly unconventional. These responsibilities would include:

(1) Providing information on the law and receiving complaints filed by concerned individuals and entities, and adopting administrative rules to implement the law;

(2) Investigating, and, where possible, resolving complaints informally;

(3) "Prosecuting" (administratively) violations of the law;

(4) Conducting administrative hearings to resolve complaints that cannot be resolved informally; and

(5) Either conducting criminal prosecutions for violations of certain portions of the law, or coordinating with another agency to do so.

Breaches of a patient's confidential medical record information could take many forms: inaccurate or inappropriate posting of notices; release of a patient's condition, diagnosis, treatment, or prognosis; release of the name of prescription drugs being taken by the patient; and so on. In a typical case, a complaint likely would be filed by the patient, but in fact could also be made in some cases by the next of kin upon the death of the patient, who may have been harmed, embarrassed, or otherwise hurt by release of that information. Possible scenarios are endless.

In response to a typical complaint, the administering agency would need to identify the entity that released the information, the nature of that release (e.g., appropriate or inappropriate, intentional or accidental), and the harm complained of. Assuming there is a basis for the

complaint after investigation, and the complaint cannot be resolved informally, a hearing may need to be held to determine the culpability of the offending entity and some kind of sanction.

The administering agency may also find it necessary to litigate in court to enforce the criminal penalties under section 323C-51, and to seek cease and desist orders and civil penalties under section 323C-53.

On its face, chapter 323C does not specifically provide either for investigations or administrative hearings. Unless the Legislature believes that implied authority exists for both, they should be provided for. With civil and criminal court proceedings clearly and specifically authorized, some form of investigation of complaints is necessary. It would not be a good use of resources to bring cases to court based solely upon allegations by a complainant. Further, with the class C felony criminal penalty available under section 323C-51, investigations would be all the more critical given the need to prove guilt beyond a reasonable doubt.

Rather than limit enforcement solely to the judicial system, administrative hearings offer a simpler, less formal means of handling cases, particularly those of a routine nature. Having the ability to enforce the law administratively would be not only a valuable adjunct to the court proceedings specifically provided for, but could also reduce the number of cases that have to go to court.

Entities Subject to Regulation

The medical records confidentiality law protects the confidentiality of patients' health care information held by "entities". Under the general definitions in section 323C-1, "entity" is defined to mean "a health care provider, health care data organization, health plan, health oversight agency, public health authority, employer, insurer, health researcher, law enforcement official, or educational institution, except as otherwise defined for purposes of a particular section only". Some of these terms, such as "health care provider", and "health care data organization" are further defined in greater specificity. More commonly, in lay terms, a patient's doctors, health insurers including public programs such as medicaid, and treatment facilities are covered. Additionally, researchers would be covered if that patient's medical file is used for research purposes, and government health agencies conducting public health surveillance would also be "entities".

Although the language of chapter 323C is not entirely clear, the Insurance Commissioner and the Regulated Industries' Complaint Office believe that even a government agency could be an entity if that agency looks at or refers that patient's file to other experts for purposes of investigating and responding to a complaint, whether from the patient or other person, like a nurse, pharmacist, or home health care aide. For the moment, life insurers, disability income insurers, long-term care insurers, and property and casualty insurers are omitted from any of the obligations of being included as an "entity".[1] There is no requirement in chapter 323C that entities register with any government agency for the specific purposes of the new law.

[1] See section 6, Act 87, Session Laws of Hawaii 1999.

Department of Commerce and Consumer Affairs

While Act 87, section 7, specifically directs the Bureau to review the Insurance Division and the Regulated Industries Complaints Office (RICO) of the Department of Commerce and Consumer Affairs (DCCA), the Bureau finds that limiting the inquiry to those specific agencies would be overly narrow to the point of being misleading. Given the Legislature's specific interest and direction, the Bureau reviewed the Insurance Division and RICO more extensively. The fact remains, however, that as much as either of those entities might or might not appear to be the best candidate to administer chapter 323C, it would be a mistake to view them as separate candidates having no relation to a larger whole. In reality, both the Insurance Division and RICO, especially the latter, are part of a single department (DCCA) that handles a variety of diverse functions in an integrated manner.

Established under section 26-9, HRS, the DCCA is responsible to "set standards and enforce all laws and rules governing the licensing and operation of, and register and supervise the conduct of, trades, businesses, and professions, including banks, insurance companies, brokerage firms, and other financial institutions."[2] In addition, approximately twenty-five boards and commissions established to regulate a variety of professions and occupations are attached to the department for administrative purposes[3] and staffed by departmental personnel.

Business Registration Division

The Business Registration Division of the DCCA is established to implement the mandate in section 26-9(b), HRS, that the department "register . . . businesses". All businesses in the State, whether sole proprietorships, partnerships, or corporations (both for-profit and nonprofit) register with the department.

Entities subject to regulation under chapter 323C are not required to register with the administering agency. At present, no single state agency regulates all entities subject to chapter 323C. Many health care providers (e.g., doctors, dentists, pharmacists, and optometrists) are already regulated by the DCCA. Many health care facilities (e.g., hospitals, clinics, nursing homes, and adult residential care homes) are regulated by the Department of Health. Perhaps the single largest group of entities (or at least prospective entities) under chapter 323C are "employers", who, to the extent they are subject to regulation at all, are subject to regulation through the occupational safety and health, wage and hour, unemployment compensation, and workers' compensation programs of the Department of Labor and Industrial Relations.

Be that as it may, no state agency is likely to have contact with all business entities as a whole to the degree maintained by the Business Registration Division of DCCA. To the extent the Division's records are computerized, the DCCA will have ready access to at least certain

[2] Hawaii Rev. Stat., section 26-9(b).

[3] Hawaii Rev. Stat., section 26-9(c).

basic information, such as the name and business address of every entity subject to regulation under chapter 323C.

Professional and Vocational Licensing Division

The Professional and Vocational Licensing Division (PVL) of the DCCA is the Division assigned to oversee and staff the licensing and regulatory activities of all of the professional and occupational regulatory boards and commissions attached to the Department for administrative purposes. All of the boards and commissions are staffed by DCCA employees assigned to PVL.

Additionally, there are presently twenty-one other professions, vocations, and occupations for which the regulatory authority is not a board or commission, but the Director of Commerce and Consumer Affairs. These include collection agencies (chapter 443B, HRS), cemetery and funeral trusts (chapter 441, HRS), and nursing home administrators (chapter 457B, HRS) to name a few. In these cases, most of the staffing duties are similarly handled by the PVL employees, albeit on behalf of the Director rather than an attached board or commission.

With respect to the medical records confidentiality law, a fair number of licensees and practitioners presently regulated through PVL will undoubtedly become regulated entities because of their access to patients' medical records. These could well include acupuncture practitioners (chapter 436E), chiropractors (chapter 442), dental hygienists (chapter 447), dentists (chapter 448), massage therapists (chapter 452), doctors (chapter 453), naturopaths (chapter 455), nurses (chapter 457), nurse aids (chapter 457A), nursing home administrators (chapter 457B), occupational therapists (chapter 457G), opticians (chapter 458), optometrists (chapter 459), osteopaths (chapter 460), pharmacists (chapter 461), physical therapists (chapter 461J), psychologists (chapter 465), and social workers (467E).

In staffing the independent boards and commissions, the PVL staff, among other things, prepare agendas and other materials for the board and commission members. Perhaps more importantly, they generally do the "legwork" and provide continuity in regulatory programs overseen by volunteer boards that rarely meet more than once or twice a month. By centralizing support services to a number of disparate independent boards and commissions plus other regulatory programs within PVL, the DCCA is able to take advantage of certain economies of scale, while providing a more consistent level of service across the range. Other than the Real Estate Commission, which has a full-time staff that includes several attorneys (although technically classified as "specialists" rather than "attorneys"), other PVL personnel generally staff more than one board or commission. For example, the same individual serves as Executive Officer for the Board of Acupuncture, the Board of Pharmacy, and the Board of Physical Therapy.

Insurance Division

The Insurance Division is established under chapter 431, Article 2, HRS. The Division is responsible for overseeing the insurance industry in the State, including insurance companies, insurance agents, self-insurers, and captive insurance companies. It ensures that consumers are

provided with insurance services that meet acceptable standards of quality, equity, and dependability at fair rates by establishing and enforcing appropriate service standards. The division administers the insurance laws codified in chapters 431, 431K, 431M, 432, 432D, 435C, and 435E, HRS, which provide for the licensing, supervision and regulation of all insurance transactions in the State. Chapter 431, Article 2, parts II and III, give the Insurance Division broad powers to enforce matters under its jurisdiction, including the power to adopt rules, conduct investigations and examinations, issue subpoenas, and hold hearings.

Funding Resources

The Insurance Division operates in a self-funding manner and requires no general fund appropriations for its operations. The operations of the division are paid for through assessments upon the industry. Until this year, assessments of insurers were being deposited into the following funds, among others:

(1) The insurance examiners revolving fund, authorized by section 431:2-307, HRS. Each insurer was required to pay $550 each year, which is deposited into the fund. Proceeds of the fund were used to hire staff examiners and independent contractor examiners. These fees were separate from and in addition to fees paid by persons actually examined pursuant to section 431:2-306, some of which were deposited into the state general fund, and others into the revolving fund;

(2) The motor vehicle insurance administration revolving fund, authorized by section 431:10C-115.5, HRS. Each motor vehicle insurer and self-insurer paid into the fund an amount specified by the Commissioner each year. Proceeds in the fund were used to pay the expenses of the Division in administering the motor vehicle insurance law; and

(3) The workers' compensation insurance administration special fund established by Act 234, Session Laws of Hawaii 1995, section 21. All insurers transacting workers' compensation insurance in the State were required to pay assessments into the fund totaling $150,000 each fiscal year to be used by the Commissioner "to pay the costs incurred in administering workers' compensation insurance".

Act 163, Session Laws of Hawaii 1999, repealed the three foregoing funds and transferred all amounts remaining in those funds into a newly created insurance regulation fund. The insurance regulation fund, created by section 7 of that same Act, "shall be used to defray any administrative costs, including personnel costs, associated with the programs of the division, and costs incurred by supporting offices and divisions . . . . [T]he commissioner may use the moneys in the fund to employ, without regard to chapters 76 and 77, hearings, officers, attorneys, investigators, accountants, examiners, and other necessary professional, technical, and support personnel to implement and carry out the purposes of title 24 [the State's insurance laws]."

Regulated Industries Complaints Office

Section 26-9(h), HRS, authorizes the Director of Commerce and Consumer Affairs to appoint "a complaints and enforcement officer . . . who shall facilitate the receipt, arbitration, investigation, prosecution, and hearing of complaints regarding any person who furnishes commodities, servicies, or real estate for which a license, registration, or certificate is required from the department or any board, commission, or regulatory program thereunder." The entity established to handle these functions is the Regulated Industries Complaints Office (RICO), which enforces the laws and programs administered by the DCCA.

This office mediates and resolves consumer complaints, prosecutes disciplinary actions against licensees, and pursues Circuit Court injunctions and fines against unlicensed persons.[4] RICO enforces the licensing laws that are administered by the DCCA, including the programs headed by twenty-five independent boards and commissions and twenty-one programs operated directly by the Department, regulating such professions, vocations, and activities, as nursing home administrators, travel agencies, and time sharing. Enforcement is brought either against persons holding licenses, or against unlicensed individuals engaged in activities that require licenses. Actions against licensees are typically brought in the context of administrative hearings pursuant to chapter 91, HRS (Administrative Procedure Act), while actions for unlicensed activity are brought in the circuit courts.[5]

Given the broad language of section 26-9(h), HRS, RICO is in an excellent position to receive complaints and prosecute violations across a very broad range. The centralized support services provided by PVL cover a wide range of independent boards, commissions, and other regulatory programs assigned to that Division. While the bulk of RICO's work involves the programs staffed and monitored by PVL, RICO's jurisdiction is not limited to supporting a particular division, but is department wide. Therefore, if the Insurance Division or Financial Services Division of DCCA needed extra assistance in investigating complaints or handling administrative hearings to prosecute violations, these functions could be handled by RICO.

RICO is funded totally through the compliance resolution fund established under section 26-9(o), HRS, and receives no general funds. Revenues in the compliance resolution fund are derived from assessments upon regulated persons and entities, typically, through license, permit, certificate, and registration fees, as well as through recovered fines and penalties. The Director of Commerce and Consumer Affairs has specific authority under section 26-9(o) to increase these fees by rule when necessary.

Cooperation with the Attorney General

As a part of implementing its licensing programs, DCCA and RICO have developed a specific cooperative working relationship with the Attorney General's Office. This cooperative working relationship is completely different from the typical attorney-client relationship that

[4] Claire Marumoto, "Guide to Government in Hawaii", 11th ed., 1996 Legislative Reference Bureau, p. 49.

[5] Jo Ann M. Uchida, Complaints and Enforcement Officer, RICO memo to writer, October 4, 1999.

most agencies maintain with the Attorney General. In many cases that involve administrative hearings, RICO investigates and prosecutes the case through the administrative hearing. If the respondent appeals the final decision of the decision making authority (be it DCCA or one of the attached boards or commissions) to the Circuit Court, the Attorney General usually represents the State in the court proceedings. This arrangement for sharing the workload appears to have worked well for a number of years.

Office of Administrative Hearings

Section 26-9(f), HRS, authorizes the Director of Commerce and Consumer Affairs to appoint "a hearings officer or officers…to hear and decide any case or controversy regarding licenses and the application and enforcement of rules involving any of the boards, commissions, or regulatory programs within the department . . . . The hearings officer or officers shall have power to issue subpoenas, administer oaths, hear testimony, find facts, and make conclusions of law and a recommended decision; provided that the conclusions and decisions shall be subject to review and redetermination by the office, board, or commission which would have heard the case in the first instance in the absence of a hearings officer."

The Office of Administrative Hearings hears the following kinds of cases: "(1) disciplinary proceedings against licensees of the various boards and commissions, (2) contested case hearings to have determinations made by the various divisions formally reviewed via the contested case procedures, (3) declaratory rulings regarding the applicability of rules and/or statutes to particular situations or circumstances, (4) denials of no-fault benefits under $5,000, and (5) procurement code hearings for all state and county agencies."[6]

The Office of Administrative Hearings may be one of the best examples in which the DCCA has streamlined the operations of disparate agencies by centralizing a function, standardizing procedures, and promoting specialization, thereby making the best use of the economies of scale. The Department, its respective divisions, and the twenty-five independent attached boards and commissions are administering a wide range of laws, and under those laws, could operate as separate and distinct authorities for the purpose of holding hearings and making decisions.

Having each program, division, or agency attempting to "gin up" its own administrative hearings on a periodic basis is cumbersome, inefficient, and quite likely to produce very inconsistent results. This could be particularly difficult in cases involving the regulatory boards and commissions. Volunteer, non-attorney board members would have to provide appropriate notices to respondents, hear testimony, rule on objections and evidentiary questions, and develop findings of fact and conclusions of law.

Rather than have each little entity within the Department attempt to do these things on its own, the Hearings Office maintains a staff of hearings officers who hear administrative cases on a variety of subjects on a full-time basis. After making findings of fact and conclusions of law,

[6] Claire Marumoto, "Guide to Government in Hawaii", 11th ed., 1996 Legislative Reference Bureau, p. 45.

the Office sends a proposed decision to the regulatory authority (i.e., the agency seeking to take the particular action) who is then free to affirm, reverse, or modify the decision of the hearing officer.

Staff Resources and Workloads

At present, the DCCA has a total of just over 400 employees. Of these:

(1) Seven are hearings officers in the Office of Administrative Hearings;

(2) Fifty are investigators (six in the Business Registration Division, five in the Insurance Division, seven in the Office of Consumer Protection, and thirty-two (although only twenty-one positions are filled) in RICO); and

(3) Twenty-five are attorneys who are in positions specifically designated for attorneys (five in the Business Registration Division, one in the Cable Television Division, three in the Insurance Division, three in the Office of Consumer Protection, and thirteen (although only ten positions are filled) in RICO).

This total of twenty-five does not include the seven attorneys in paragraph (1) who are officially classified as hearings officers, five attorneys on the staff of the Real Estate Commission who are officially classified as "specialists", and at least nine departmental administrators (including, for example, the Director, the Commissioner of Financial Institutions, the Executive Director of the Office of Consumer Protection, the Commissioner of Securities, and the Consumer Advocate)[7], all of whom are licensed attorneys at this time.

Specifically within the Insurance Division, the Compliance and Enforcement Branch, one of four branches in the Division, has three investigators who investigate any complaints filed with the Insurance Division "to assure compliance with applicable statutes and rules. During 1997, the Division received 1,647 complaints and requests for assistance on a variety of insurance matters, of which twenty-two cases were still pending at the end of the reporting year.[8] Cases are closed or referred to the appropriate agency for resolution. Where appropriate, cases may be referred for formal resolution by administrative hearing.

Appropriate disciplinary action is taken by the Branch when necessary. If a case warrants prosecution, it is referred to the Office of the Attorney General for prosecution by the State.[9]

RICO's investigators have four hundred thirty-four current cases in the field. RICO's attorneys have 1,040 current legal cases. In the fiscal year July 1, 1998 to June 30, 1999, RICO

[7] Telephone interviews with Mr. Terry Higa, Administrative Services Officer, Department of Commerce and Consumer Affairs, December 16, 1999, and Mr. Pat Chen, Personnel Office, Department of Commerce and Consumer Affairs, December 17, 1999.

[8] Report of the Insurance Commissioner of Hawaii 1998, summary of Insurance business for the year 1997, p. 12 (Complaint investigation).

[9] Claire Marumoto, "Guide to Government in Hawaii", 11th ed., 1996 Legislative Reference Bureau, p. 48.

opened 1,903 cases. Approximately 1,900 other complaints were received but resolved by the intake section without the creation of a case. Cases are now averaging a little less than a year (358 days) from start to finish.[10]

In the Office of Administrative Hearings, the workload for fiscal year 1997-1998 can serve as representative of a typical year. In 1997-1998, the Office handled two hundred twenty-four hearings, fifty-nine motions, four hundred five prehearing or status conferences and nine oral arguments. This workload is handled by seven hearing officers, two of whom are temporary officers who handle only no-fault cases. In addition, during this period, one hundred thirty hearings were conducted by the Medical Claims Conciliation Panel (MCCP), which was under the direction of the Senior Hearings Officer.

As of November 23, 1998, the total number of cases pending action at one stage or another was 3,459 cases. Out of the 3,459 cases, five hundred two cases were pending hearing and 1,002 were cases pending scheduling of status conference or prehearing conference, and 1,678 cases were no-fault cases pending assignment to the hearing officers. With regard to the no-fault cases only, this case load has decreased with the special attention given to it by the hiring of the temporary hearing officers.

The Office of Administrative Hearings handles about eight types of cases, not including the MCCP. These cases are paid for out of the compliance resolution fund, license fees, business registration fees, and so on, except for procurement cases and cases for declaratory relief which do not have specific funding sources. For example, a case involving denial of a license, a citation case for unlicensed activity for a profession or vocation normally licensed by the DCCA, and a RICO disciplinary case are three types of cases paid out of the compliance resolution fund or license fees and originate in RICO. The Securities Enforcement Unit's cease and desist cases and tradename or trademark cases are paid for out of the Business Registration Division and originate there. No-fault cases on the other hand originate in the Insurance Division. Hearings officers, therefore, are paid out of the respective fund and will thus work on the same kind of cases. In other words, except for procurement cases or a case for declaratory relief, a hearing officer will not be assigned a few no-fault cases, then some RICO disciplinary cases, and later cease and desist cases from the securities enforcement unit. In general, the typical case that enters the Office of Administrative Hearings takes from six to nine months to reach completion or resolution.[11]

Administrator's Perspective

DCCA administrators generally were of the belief that the Department could handle the work of administering the new law, but do not favor the Department being given the responsibility to enforce that law. They were understandably concerned about the adequacy of resources and the impact the added responsibilities would have upon existing workloads. The

[10] Jo Ann M. Uchida, Complaints and Enforcement Officer, RICO memo to writer, November 24, 1999.

[11] Telephone interview with Rod Maile, Senior Hearings Officer, Office of Administrative Hearings, December 27, 1999.

Director of Commerce and Consumer Affairs[12] recognized that the Department has a full enforcement mechanism already in place to investigate complaints and handle administrative proceedings. Her primary concerns were that:

(1) The Department does not do much work regarding the confidentiality of records;

(2) The Department does not regulate hospitals, nursing homes, and other care facilities; and

(3) A high volume of complaints could make implementation of the new law very "resource intensive".

In the Director's view, it would be important for the Department to be given at least some means of assessing fees from the entities subject to regulation under the law. She also noted that departmental efforts in administering the program would be lessened significantly if the law were primarily self-enforcing. Under this scenario, the law would not be actively enforced by the administering agency except for a few criminal prosecutions in egregious cases. In most cases, complainants would have to enforce the law themselves through private civil actions in court. The Director recognized that this approach would probably fall far short of public expectations, as the average complainant.

The Department would be reluctant to have to take on added responsibilities to enforce the new law without appropriate funding, funding sources, and staffing. Most of the Department's operations that are most likely to be affected are special funded, and the Insurance Division is concerned about having to increase assessments upon the industry.

The Insurance Commissioner told the Bureau that the Division would be willing to do whatever it is asked to do regarding the medical records confidentiality law, such as levy fines, if required to do so by statute. If it is assigned a bigger role in assessing the proper handling of medical records, the Division would require more attorneys and these attorneys would have to develop skills and knowledge in the records management area. The Commissioner did not know the number of attorneys and other support staff that would be needed by the Insurance Division to administer the new law. In the opinion of the Insurance Commissioner, the Division can remain objective and impartial. Additional funding may be required beyond the current amounts collected as part of its regulatory duties.

The Commissioner indicated quite clearly, however, that he would really rather not have the responsibility to administer the medical records confidentiality law despite the fact that his Division is perfectly capable of doing so.

The Commissioner[13] indicated a general feeling on his part that the Office of Information Practices (OIP) is better equipped to administer the law because, among other things, the OIP is

[12] Telephone interview with Kathryn S. Matayoshi, Director of Commerce and Consumer Affairs, by Ken H. Takayama, Assistant Director for Research, Legislative Reference Bureau, December 20, 1999; and email message from Gilbert S. Coloma-Agaran, Deputy Director of Commerce and Consumer Affairs to Ken H. Takayama, Assistant Director for Research, Legislative Reference Bureau, December 28, 1999.

already making evaluations to determine the privacy interests of individuals regarding public records. In the view of the Insurance Commissioner, the OIP has had more experience in determining where to balance a person's privacy interests with that of other interests, and is better equipped to make the conceptual leap from government/public records to medical records even if medical records are usually not created as part of a government function. The leap for OIP should be even simpler with respect to a number of medical records maintained by community hospitals, formerly part of the Department of Health and only recently privatized as the Hawaii Health Systems Corporation. Thus, in terms of experience, expertise, and past history of independence or neutrality, the Insurance Commissioner views the OIP as being already "up to speed" whereas the Insurance Division does not have the experience in analyzing the privacy issues inherent in medical records.

The Insurance Commissioner surmised that given the Division's industry connections, it may be difficult for the Insurance Division to maintain the impression of neutrality despite its ability to remain objective. For example, one concern expressed by the Insurance Commissioner was that the issue of partiality may be raised if no sanction is assessed against an insurer upon a complaint of, for example, the unauthorized release of a person's medical records, simply because the Insurance Division deals solely with insurers and is supported by assessments of members of the industry.

It is difficult to believe that the Commissioner is really serious about this argument. If he is, then it would similarly be difficult for <u>any</u> government agency or program funded by user fees--including most of DCCA and all of the core functions of the Insurance Division itself--to "maintain the impression of neutrality". The Insurance Division is funded entirely by assessments upon the regulated insurers. In the face of consumer complaints about an insurer with respect to premiums, refunds, or other issues, the exact same concerns or appearances would be involved if the Division did not sanction the insurer.

RICO has extensive experience in conducting enforcement activities because its primary function is the enforcement of licensing laws. It also has had experience working with health provider organizations on matters related to the profession, but not regulated entities that are primarily regulated by other departments.[14] RICO indicated that "what RICO does not have is experience or expertise in prosecuting matters that are not (1) administrative hearings or (2) suits alleging that an individual was operating without a license."[15]

Furthermore, "RICO's experience with health care privacy issues has come primarily in the context of its need to receive health care records during the course of enforcement actions." In the view of RICO, the effect of chapter 323C on its operations will be beneficial. "The Act (Act 87) will greatly assist RICO by setting forth a concise standard and procedure for the turn over of records without the necessity of protracted discovery proceedings. As a "user" of health care records, as an agency whose ability to access health records is to a certain extent delineated and limited by chapter 323C and as an agency that maintains health records as part of its

[13] Interview with Wayne Metcalf, Insurance Commissioner, August 9, 1999.

[14] Jo Ann M. Uchida, Complaints and Enforcement Officer, RICO memo to writer, October 4, 1999.

[15] *Ibid.*

complaints files, appropriate safeguards would have to be established if RICO were to enforce chapter 323C, in order to avoid possible conflicts of interest."[16]

According to RICO, the typical scenario which could develop into a conflict of interest problem might be as follows: RICO investigates a complaint made by a patient against a hospital. In the course of its investigation, RICO will request that patient's hospital medical records, which must be examined to determine whether or not there is any basis for the complaint. Experts from outside the hospital involved may be consulted which means that the case file or copy of it may be transmitted to that consulting entity. For purposes of chapter 323C, RICO would be considered a "regulated entity" because it will have under its jurisdiction a patient's medical records.

This is an excellent point--albeit one not unique to RICO--that may require an appropriate amendment to chapter 323C. The foregoing problem could conceivably apply to RICO in two different contexts: the first would be if RICO, as an administrator or enforcer of chapter 323C were dealing with the enforcement of that law; the second would be if RICO ran into a medical records issue as part of its regular (i.e., current) duties, for example, a complaint about a violation of the dental licensing law.

To the extent RICO would have a problem under the first scenario, it would appear to be the same problem that would be faced by whichever government agency is designated to administer or enforce chapter 323C. To the extent that RICO would have a problem under the second scenario, it would appear to be the same problem that would be faced by any government agency that has to deal with medical records as part of its normal functions. In other words, to the extent that RICO has pointed out a legitimate concern for government agencies under chapter 323C, there does not appear to be anything inherently different, difficult, or unusual as applied to RICO.

Another issue raised by RICO head Jo Ann Uchida: "Due to recent cutbacks, existing staff carry significant caseloads. The agency's ability to expeditiously investigate and bring enforcement matters to a resolution has been severely challenged. If enforcement responsibility for chapter 323C were to be placed with RICO, the agency would require some funding mechanism, including authorization for an appropriate increase in staff. Alternate funding sources include an assessment upon regulated entities, revenues from penalties, fines and attorneys' fees, and general fund revenues."[17]

Department of Commerce and Consumer Affairs; Summary

The DCCA would be an excellent candidate to administer chapter 323C, the medical records confidentiality law. If the responsibility is to be placed with this Department, however, the responsibility should be placed with the Department as a whole, and not a particular agency

[16] *Ibid.*; and email message from Gilbert S. Coloma-Agaran, Deputy Director of Commerce and Consumer Affairs to Ken H. Takayama, Assistant Director for Research, Legislative Reference Bureau, December 28, 1999.

[17] Jo Ann M. Uchida, Complaints and Enforcement Officer, RICO memo to writer, October 4, 1999.

or division within the Department. A number of statutes accomplish this by simply designating the Director of Commerce and Consumer Affairs as the responsible official. Giving responsibility to the Department as a whole will give the Department the needed flexibility to implement the new law in the most efficient manner by dividing the responsibilities among its different components.

The Department is very well suited to handle the different functions required of the administering agency. All businesses register with the Department's Business Registration Division, a "choke point" that can be used to identify the entities under chapter 323C subject to that law. RICO is set up to receive, conciliate, investigate, and prosecute (at least through the administrative hearing stage) complaints that are filed pursuant to any of the laws and programs administered by the Department or any of its attached agencies. The Office of Administrative Hearings is set up to conduct administrative hearings concerning any of the programs and laws administered by any agency whether organic or attached to the Department.

The PVL and Insurance Divisions (and the licensing boards staffed by PVL) are the actual licensing and regulatory authorities for many of the entities subject to chapter 323C. This could be very important if the Legislature decides to add more "teeth" to the enforcement of chapter 323C by allowing license revocation for serious or repeated violations (a possibility that is not very far-fetched given that the Legislature has already done so for purposes of child support enforcement). Under this scenario DCCA would be a key player in making the license revocations a reality whoever was administering chapter 323C. Having DCCA administer chapter 323C would appear to minimize coordination problems.

DCCA's method of financing many of its programs through fee assessments rather than general fund appropriations gives the Legislature greater flexibility in deciding how to fund the administration and enforcement of the new law. While DCCA administrators did not have estimates of the cost or number of new positions required, it is clear that implementation of chapter 323C will not be "for free". The cost, whatever that may be, will either be paid in terms of additional staff, or by added workloads for existing staff thereby slowing down existing response times. The flexibility provided by DCCA's fee assessment system and ongoing function and program structure is that general fund balance concerns aside, the fee increases, which are usually handled through rulemaking, can be calibrated to meet increasing needs.

Office of Information Practices

The Office of Information Practices (OIP), established under section 92F-41, HRS, is placed in the Office of the Lieutenant Governor for administrative purposes. This office implements and administers the Uniform Information Practices Act (Modified) (UIPA), chapter 92F, HRS. The UIPA is a public records law that is intended to promote open government while protecting the individual's constitutional right to privacy. All state and county government agencies are subject to the UIPA.

Under section 92F-42, HRS, OIP administers the UIPA by, among other things, receiving complaints, conducting inquiries and investigations on state and county agency compliance, and otherwise assisting agencies to comply. OIP provides advisory opinions concerning the public's right to inspect and copy government records, or an agency's duty to permit members of the public to inspect and copy government records. Its jurisdiction covers not only state, but county government records. This office maintains a website, at www.state.hi.us/oip/.

The OIP is also responsible to:

(1) Act as an appeals agency to mediate any disputes over access to government records;

(2) Adopt rules to implement the UIPA;

(3) Educate the public and government agencies about the UIPA; and

(4) Develop a uniform public records report describing each set of records every government agency routinely uses or maintains, and coordinate completion by all government agencies.[18]

Staff Resources and Workload

The core functions under chapter 92F, HRS, for the OIP are being handled by a seven-member staff including three[19] attorneys and the Director. In early 1999, OIP formally adopted rules for procedures that government agencies must follow, and fees they can charge in processing requests for government records.[20] Still pending review by the Attorney General are rules pertaining to the collection of information. Rules regulating the filing of administrative appeals with OIP are pending action following public comment.[21] OIP monitors UIPA cases and on occasion may be requested to intervene in a court case. The most recent example of OIP involvement in a court case was the request approximately five years ago by the student chapter of the Society of Professional Journalists for the release of the name of a police officer who had been disciplined.[22]

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[18] Claire Marumoto, Guide to Government in Hawaii, 11th ed., 1996 Legislative Reference Bureau, p. 31.

[19] As of October 18, 1999, one attorney position was vacant.

[20] Chapter 2-71, Hawaii Administrative Rules.

[21] Telephone interview with Moya Gray, Director, Office of Information Practices, October 18, 1999.

[22] See SHOPO v. Society of Professional Journalists, UH chapter, 83 H. 378, 927 P.2d 386, 1996, and Act 242, SLH 1995. "Now the public cannot find out if an officer has been disciplined until and unless he has exhausted his appeals and is fired by the police department." in: "Walls of secrecy", *The Honolulu Advertiser*, February 14, 1999, and other articles in the series by Sandra S. Oshiro.

The OIP has been criticized for taking too long in issuing opinions. It has been reported that it takes up to four years to obtain a legal opinion from the OIP.[23] A series of *The Honolulu Advertiser* articles in early 1999 pointed out that the number of pending requests was estimated around 240 as of February 1999.[24] A more recent newsclip pointed to other difficulties in the agency including the ". . . agency's inability to clear a backlog of cases dating from 1989 . . ." and that ". . . OIP has already stopped issuing advisory opinions for the public, which had offered an alternative to going to court to resolve disputes, and is cutting back on direct support previously offered to agencies. Rules for appeals of agency decisions denying access to records remain unfinished, another victim of staff turnover and limited resources."[25] In another article, OIP reported that in the 1999 legislative session it ". . . monitored 294 pieces of legislation and in the past fiscal year, 1998-1999, fielded over 700 calls for legal assistance about open government, 46 percent of those from individual citizens."[26]

In fact, some cynics view requests by public agencies for formal opinions from OIP as a means of effectively delaying--sometimes for years--a response to a citizen's request for information. At times such a delay can be so long that all relevant data will have been destroyed and affected personnel retired or departed.[27]

Based on the OIP website, the number of formal opinions issued by year are as follows:

Year	Opinions Issued
1989	17
1990	40
1991	33
1992	27
1993	23
1994	30
1995	24
1996	4
1997	9
1998	5
1999 (to 6/18/99)	3

[23] "Information Office Proposes Appeals Procedure", *The Honolulu Advertiser*, June 30, 1999.

[24] Sandra S. Oshiro, "Bureaucratic maze enveloped couple", *The Honolulu Advertiser*, February 15, 1999.

[25] "State info agency gambles for its life", *Honolulu Star Bulletin*, October 28, 1999.

[26] "OIP advocates for openness in government", Viewpoint by Moya T.D. Gray, *Honolulu Star Bulletin*, November 13, 1999.

[27] See: Sandra S. Oshiro, "State stalls on releasing hospital data", *The Honolulu Advertiser*, February 17, 1999, and "Walls of Secrecy", February 14, 1999, and other articles in the series.

As of June 30, 1999, there were a total of 255 requests outstanding including such items as requests for assistance (78), opinions (177), complaints and investigations (8), and civil cases monitored (5).

Beginning about 1997, OIP stopped issuing advisory opinions in the same manner as before. Recognizing the effect of delays in responding to requests for opinions, and to reduce response time, OIP now divides what were formerly known as "opinions" into two groups: (1) requests for "assistance" and (2) requests for "opinions". Assistance is a request that is less formal than an opinion and can be provided more quickly. Formal opinions would continue to be issued in written form and require considerable research and legal analysis.

The OIP has made some estimates about its staffing and budget needs if it is required to implement and administer chapter 323C. The office estimates that it would need: two additional staff attorneys; two hearing officers; and two investigators, one of whom would also be a legal assistant; a secretary; and a person who handles publications, the website, and computer support. In addition, OIP would assign a receptionist-clerk typist and a legislative monitor/archivist/librarian to help administer chapter 323C. This is a total of ten new positions, with some positions serving multi-task functions. At this point, the total annual cost of expanding the responsibility of OIP to medical records confidentiality issues is unknown.[28] However, given the fact that the OIP is presently operating with a staff of seven, it is probably safe to say that OIP's budget would have to increase to at least double its present level of $332,858[29] (having been reduced from 1994's budget of $827,537). To date, all funding for OIP has been through general funds.

Experience and Expertise

In terms of pure agency knowledge of the relevant subject area, OIP in all probability, is the single most knowledgeable state agency in the area of records privacy. This stems not only from the performance of the agency's regular functions, but from assignments made by the Legislature in Act 87 itself.

By the time the 2000 Regular Session of the Legislature is convened, the OIP will already have had direct experience with the implementation of certain aspects of the medical records confidentiality law. While not deciding which agency to implement the law, the Legislature, through Act 87, Session Laws of Hawaii 1999, has already directed the OIP to handle two functions that would normally be associated with the implementing agency. Specifically:

[28] Telephone interview with Moya Gray, Director, Office of Information Practices, October 9, 1999.

[29] "State Info agency gambles for its life", *Honolulu Star Bulletin*, October 28, 1999.

(1) Section 323C-41, HRS, requires OIP to adopt rules to establish standards for disclosing, authorizing, and authenticating protected health information in electronic form; and

(2) Section 5 of Act 87 requires OIP to submit a status report to the Legislature concerning the rules described in paragraph (1), as well as "existing licensure, certification, and regulatory mechanisms for the imposition of sanctions or penalties for the wrongful disclosure of protected health information."

The Bureau does not assume that the Legislature actually intended to try to "tip the balance" toward OIP by assigning it these functions before this study was even begun. However, the fact of the matter is that whichever agency is selected by the Legislature to implement this law will be operating on OIP's rules. OIP would undoubtedly be more familiar and better able (at least initially) to operate under rules of its own creation than anyone else.

Any information and expertise developed by OIP in carrying out the foregoing functions will be separate from and in addition to the expertise OIP has developed over the years through its regular operations. The OIP already works with many government agencies and the public when it prepares and issues advisory opinions regarding a question of access to a public record. Hence, the OIP would be involved with privacy or confidentiality issues regarding public health data collected and maintained by a government agency such as the Department of Health. In the case of chapter 323C, the records affected would be those created in the health care or treatment of a patient, and, on occasion, medical information collected for research purposes.

In carrying out its present functions, the OIP has developed considerable knowledge in the subject area of privacy and confidentiality as they pertain to government records. Applying some of the same principles of analysis to patient health records maintained by nongovernmental agencies such as private health care providers should not be particularly difficult for OIP--probably an easier conceptual "jump" for OIP than for any other agency.

An example of an OIP opinion that might be of particular interest to the Legislature addressed the issue of a person's privacy and the area of medical information. The 1994 opinion concerned a former legislator receiving workers' compensation benefits. The issue was whether under chapter 92F, HRS (the UIPA), the Chief Clerk of the State House of Representatives had to make available for public inspection and copying the written notices (including the completed forms) concerning the legislator's work injury that resulted in the legislator receiving workers' compensation benefits.

The opinion concluded that in this particular case, the legislator had already identified herself and the workers' compensation benefits she was receiving in an interview with a news reporter so she had a "diminished privacy interest" over disclosure of her injury and benefits received. But the opinion went on to point out that the legislator's privacy interest still continued

with regard to her social security number, date of birth, martial (sic) status, home address, and home phone number." In its analysis, OIP referred to a Maryland case[30] where a patient diagnosed with AIDS maintained an action against a hospital for breach of confidentiality of patient medical records when the patient had given interviews to the press but did not identify himself by name. In fact, the interview had been given under promise of anonymity. The court found that the patient had not waived his right to confidentiality of his identity.

This OIP opinion presents an interesting intersection of both a person's right to privacy of medical information and the public's interest in disclosure that would reveal an agency's or public official's actions and decisions.

If chapter 323C had been in existence in 1984, this question could presumably have presented itself as an issue under the medical records confidentiality law as well as the UIPA. In this example, because a public official (the Chief Clerk of the House of Representatives) requested the opinion as to whether or not to release the records, the UIPA would more likely than not have been the proper law under which to examine this question. On the other hand, if the request had been made by a private hospital (an "entity" under chapter 323C) in response to a news reporter's follow-up of a lead about injuries suffered by a legislator, would the public interest be better served by revealing that person's personal medical treatment records? The particular opinion is used here to indicate the kind of analysis with which OIP has had experience that could touch on the privacy interests of a person's medical history, the unauthorized release of which could have deleterious effects beyond the actual physical injuries to the person.

Regardless of which agency administers the medical records confidentiality law, conflicts are bound to arise in areas where government agencies subject to the UIPA have possession or custody of records protected by the medical records law. While most records that would be protected from disclosure under the medical records confidentiality law would presumably be exempt from disclosure under the UIPA as clearly unwarranted invasions of personal privacy, there may be instances where the boundaries of the respective laws are unclear.

The Legislature should consider addressing this issue before problems arise. Assuming the Legislature intends to provide the maximum protection of privacy available under both laws, the Legislature could clarify this point by amending the UIPA to make it clear that disclosure of any government records, the disclosure of which would be prohibited under the medical records confidentiality law, would constitute a clearly unwarranted invasion of personal privacy. However the lines are ultimately drawn between the UIPA and chapter 323C, OIP will undoubtedly have knowledge and expertise that is applicable in both areas.

[30] Doe v. Shady Grove Adventist Hospital, 598 A.2d, 507 (Md, App. Ct. 1991).

OIP's experience to date has not included many investigations of complaints that required resolution by administrative hearing or other means. It does, however have the authority to investigate and rule on questions of law under section 92F-42(1), HRS, which provides: ". . . the OIP shall, upon request, review and rule on an agency denial of access to information or records, or an agency's granting of access; provided that any review . . . shall not be a contested case under chapter 91 and shall be optional and without prejudice to rights of judicial enforcement . . . ."

In terms of functions and operations, OIP's experience runs more to the advisory than the regulatory. On a daily basis, the overwhelming majority of the work done by the OIP involves handling questions and complaints from the public, and advising state and county government agencies on how to comply with the law it administers. The UIPA applies to records held and maintained by government agencies, not private entities, and is intended to ensure that the public has reasonable access to those government records. To the extent that OIP needs to make someone comply with something, strong odds are that it is a matter of getting another government agency to comply with the statute's requirements. However challenging or difficult this task may be for OIP (or would be for any other agency in its place), the fact remains that the majority of state government officials in Hawaii report to the Governor, the same individual who appoints the Director of the OIP. This is a very different proposition from regulating and enforcing the law upon private individuals and entities who have no connection to government whatsoever.

Administrator's Perspective

OIP is willing and perhaps eager to assume responsibility for chapter 323C because its future may become more secure with the additional responsibility.[31] In a recent *Honolulu Star Bulletin* article, the rationale for OIP taking on the medical records confidentiality issue is given as a move to ". . . attract enough new support to reverse a five-year downward spiral of budget and staff cuts that have eroded the agency's effectiveness and sapped its public support." In that same article, the OIP is also looking towards the issue of ". . . commercial handling and use of personal information." By assuming greater responsibility, the OIP's future may be more secure, but without the needed staff, the result could be a law of empty promises.

In this regard, assumption of responsibility for the medical records confidentiality law could become the first significant step toward the transition of OIP away from its current mission of solely administering a government records law to a much broader mission involving a wider range of privacy issues and record systems. As meritorious and visionary as this goal may be, however, they are far beyond the scope of this study. But they remain highly relevant considerations for the long run.

[31] "State Info agency gambles for its life", *Honolulu Star Bulletin*, October 28, 1999.

If such a desire for a change in OIP's mission is to be used as a rationale for assigning responsibility over chapter 323C, then the Bureau believes that the Legislature should first determine the role it wants OIP to play and assign its functions accordingly. The process should not be accomplished in reverse.

OIP Summary

In summary, there is little doubt that OIP has substantial knowledge in handling privacy issues regarding public records and could make the leap to medical records confidentiality with relative ease. Its abilities, experience, and expertise in this area are not questioned. There have been complaints of inordinate delays in the agency issuing opinions and finalizing its administrative rules. It has suffered from severe budgetary and staffing cutbacks since 1994.

By comparison, OIP's functional experience has been much more advisory than regulatory. The office has had comparatively little direct experience in investigating complaints and conducting hearings. Its experience is limited to government agencies; it has virtually no experienced dealing with private entities (which are called for under chapter 232C). It has been hindered from exercising this authority because of the large number of requests for assistance, including writing formal opinions, with a reduced staff.

Because it has had a problem in the past fulfilling its original UIPA mandate in a timely manner, there are naturally concerns whether taking on another substantive area without adequate staff will cause the entire mission to suffer. This problem could carry over into the medical records confidentiality area if it is not granted the necessary financial or staffing resources.

Comparison of DCCA and OIP: Analysis

At a very superficial level, determining the most appropriate agency to administer chapter 323C appears to be very simple. According to the administrators of the respective agencies, OIP wants the job, while DCCA administrators, though believing their department capable and qualified, would be perfectly happy not to have it. With all due respect to the administrators' desires, the Bureau does not believe that this should be the relevant basis for decision. The Legislature is the policy making body for the government of the State of Hawaii. The Bureau firmly believes that the Legislature's considerations should be the basis for policy, not executive agency desires.

The chart below highlights the points of comparison between DCCA and OIP. A point might be raised at this juncture that it is "unfair" to compare an entire department against a single

small agency for purposes of determining appropriateness. The Bureau believes that the most important consideration for the Legislature, and by extension the people of this State, is "which of the agencies is more capable of doing the job, and why?"

However "unfair" or "lopsided" the comparison may be, the Bureau believes that it accurately reflects the reality of the situation. Viewing DCCA's Insurance Division or Regulated Industries Complaints Office in isolation would not give the Legislature a picture that was accurate, much less complete. Each of those divisions is very much a part of a larger whole in a department whose divisional functions are integrated to a higher than average degree. By comparison, the OIP is, for all practical purposes, a "stand alone" agency. The Bureau does not believe that the Office of the Lieutenant Governor (to which the OIP is attached for administrative purposes), or any of the other attached agencies--the Office of Elections, the Campaign Spending Commission, or the Commission on the Status of Women--would be particularly appropriate agencies to administer portions of chapter 323C in conjunction with OIP.

Chart 1

Comparison of DCCA and OIP

	DCCA	OIP	Advantage
Subject matter Expertise re Records Privacy	Issues occasionally arise. No specific programs	Administers UIPA under which privacy issues arise regularly. Rules and reports under Act 87	OIP
Staff			
Total Employees	400+	7	DCCA
Hearing Officers	7	None	DCCA
Investigators	50 (not all filled)	None	DCCA
Attorneys (positions)	25 (not all filled) Plus: 5 attorneys in real estate "specialist" positions & at least 9 attorneys in administrator positions	3 staff attorneys plus Director who is also an attorney	DCCA
Information available on entities under chapter 323C	All businesses register with Bus. Regis. Div.	None	DCCA

	DCCA	OIP	Advantage
Existing regulatory authority over "entities" likely to be subject to chapter 323C	Licenses and regulates many entities including all health insurers, doctors, dentists, pharmacists, and many other medical providers. Also, any other DCCA licensee of any kind who is an "employer"	None. Not a regulatory agency	DCCA
Staff/budget increases needed?	Yes, but no estimates	Probably would need 10 new staff positions. If work not generated by new law, they can do UIPA work.	Depends on Perspective
Source of funding	Primarily through assessments of user fees deposited into various special and revolving funds	All general funds	Depends on Perspective
Complaint systems	RICO receives and conciliates thousands of complaints each year 1,903 cases opened in FY 1998-1999	Routinely handles about 1,100 UIPA complaints and inquiries on a regular basis	Equal
Investigations	System in place through RICO 434 current cases or about 27 cases per investigator (statewide)	8 complaints and investigations outstanding (as of 6/30/99)	DCCA
Administrative Hearings	Hearings office has been hearing cases over 20 years In FY 1997-1998 total case activity = 697 of which 224 were hearings, 59 were motions, 405 were prehearing/status conferences, 9 were oral arguments As of 11/23/98, 502 cases were pending hearing	None	DCCA

	DCCA	OIP	Advantage
Judicial Hearings	Regularly for unlicensed activity cases	Have gone occasionally for UIPA cases	DCCA
Working relationships with other agencies	Formal working relationship with Attorney General on cases that must be pursued beyond the administrative level	None	DCCA

OIP comes out ahead in terms of subject matter knowledge. The Legislature has already given OIP certain rulemaking functions for chapter 323C, and OIP's regular work administering the UIPA routinely involves privacy issues in a context of records. DCCA's experience with privacy issues is much more occasional. Additionally, there are bound to be any number of instances where the medical records confidentiality law overlaps with the UIPA. To the extent this is the case, it could be advantageous to have a single agency that is responsible for implementing and interpreting them both.

By comparison, DCCA appears to be in a far stronger and much more experienced position for purposes of implementing a regulatory law. DCCA fields large numbers of complaints on a regular basis. DCCA has a well established, smoothly functioning system for handling investigations, "prosecutions" of regulated entities, handling administrative hearings, and taking cases (albeit civil rather than criminal) to court. OIP simply has not had the personnel to undertake these functions on any kind of regular basis. Further, OIP's experience has been largely advisory within government. It is not regulatory and not with private entities. DCCA routinely enforces laws against individuals and entities outside of government. And for purposes of locating entities subject to regulation under chapter 323C, DCCA has an added advantage given that all business entities register with the Department's Business Registration Division.

In terms of staffing, OIP's needs are stark. The office estimates that the existing staff of seven would need to be increased by an additional ten positions to more than double its existing size. This would presumably more than double OIP's present budget of $332,858--all of it in general fund appropriations. In light of its estimated needs, it is somewhere between difficult and impossible to imagine OIP being able to administer the new law if it had to do so with no increase in resources.

One way that OIP might be able to keep costs a bit lower would be to hire contract hearing officers rather than bring them on as full-time employees. One department that does this on a regular basis is the Department of Human Services. The Department of Human Services currently hires contract hearing officers through the procurement process and pays for services based on the kind of case (single issue, Medicaid, complex, etc.) The Department has an

approval and a waiver from the Governor to allow the Department of Human Services to hire hearing officers via the procurement process because the Attorney General is statutorily required to provide legal services to the department. Hearings are scheduled efficiently so that there are two hearings per hour and the officer must wait fifteen minutes for the respondent to show up at a scheduled hearing. According to Susan M.U. Wong, Appeals Administrator of the Department of Human Services, it would not be unreasonable for example to expect to pay about $250 for a hearing that had a single issue that rested on facts, not interpretation of the law, and only required determination of whether there was a violation and an intent to violate.[32] Of course, the Department of Human Services has had a track record upon which to identify the parameters for each type of case while it is impossible at this time to identify the same kind of factors for a case that might appear under chapter 323C, contracting for hearing officers could offer an alternative for OIP or for DCCA while the program is still in its infancy and the volume of cases requiring the involvement of a hearing officer is still unknown.

DCCA's administrators did not have specific estimates on the number of positions that would be required to administer the new law. If DCCA had to absorb the added workload without additional staff, it could only do so at the expense of slowing down response times in its existing programs. Given that most of DCCA's programs are funded through assessments made upon the regulated entities, there could be a funding imbalance (at least in the short run) unless the Department was authorized to assess all regulated entities, including those not otherwise already regulated by the Department. If such an authorization were not granted and no general fund appropriations made, it would mean that the entities currently regulated by DCCA would be paying the cost for a program applicable to entities other than themselves who were not paying any assessments. That said, DCCA appears to have the ability to fund the regulatory program through assessments should that be authorized. By comparison, OIP would appear to require additional staff simply for the purpose of setting up a system of assessments because the agency presently does not have any system to assess and collect those fees.

Another potential advantage of DCCA that the Legislature should not overlook is the possibility of adding license suspensions and revocations as additional or alternative disciplinary sanctions for violations of the medical records confidentiality law. DCCA already regulates a number of entities subject to chapter 323C, including many health care professionals and health insurers. If license suspension or revocation were added to the mix of sanctions, DCCA is in a particularly good position to be able to apply those sanctions upon a number of entities (under chapter 323C) that the Department already regulates through its other programs. The possibility of adding license suspensions and revocations in this context is not at all far-fetched. The Legislature recently added those sanctions to the range of penalties that can be imposed upon noncustodial parents who are delinquent in their child support obligations. Violations of the medical records confidentiality law would appear to be no less germane to the sanction imposed.

[32] Telephone interview with Susan M.U. Wong, Appeals Administrator, Department of Human Services, December 27, 1999.

Another option available to the Legislature would be to divide responsibilities under the law: for example, giving OIP the responsibility to administer the law and the authority to use DCCA's resources to carry out those functions. One hypothetical scenario could have OIP setting policy in the area and taking in questions and complaints, while using DCCA's investigators, attorneys, and hearing officers. In a best case scenario, this could combine OIP's subject matter knowledge of records and privacy issues with DCCA's enforcement mechanism. However well intended, the reality could be quite different.

The Bureau does not consider it advisable to make an agency responsible for processes and outcomes that it does not or cannot control. If OIP is to be given real operational control over DCCA personnel for purposes of carrying out the new law, then those personnel should either be transferred to OIP, or OIP given funding to hire the necessary staff. On the other hand, if OIP is not given control of those personnel, then those DCCA personnel cannot be expected to give another agency's mission priority over their own, especially when resources are tight, and OIP cannot fairly be expected to achieve results through staff over which it has no authority.

Chapter 3

RECOMMENDATIONS

Based on the foregoing analysis, the Bureau does not believe that there is any single, simple answer to determining the agency best suited to implement the medical records confidentiality law. Both the Department of Commerce and Consumer Affairs and the Office of Information Practices have their advantages and disadvantages.

1. If the Legislature is willing to appropriate at least $350,000 to $400,000 or more annually in general fund appropriations to add at least another ten positions to the Office of Information Practices, then the OIP would be the most appropriate agency to implement the new law. OIP is the single agency in state government having the greatest amount of subject matter expertise with respect to privacy issues involving records. The added positions, which would more than double the existing staff, would enable the agency to handle investigations, administrative hearings and court litigation, which will also improve OIP's abilities to handle its core functions, administering the Uniform Information Practices Act.

2. If the Legislature is not willing to allow any additional funds to be raised to implement the new law, then the job of implementing chapter 323C would have to go to DCCA virtually by default. It does not appear to be feasible to expect a small agency such as OIP to be able to absorb a new program of this magnitude without additional resources, particularly when it has been having difficulties carrying out its core functions in the face of staff and funding reductions. A department such as DCCA might be able to absorb the new program without added resources--but only at the cost of slower response times in its existing programs. This alternative of giving an agency a program such as this without providing any resources at all is not recommended.

3. If the Legislature is unwilling to appropriate general funds, but is willing to allow the assigned agency to raise the necessary funds through assessments of regulated individuals and entities, then DCCA would be the agency best able to undertake the assignment. DCCA has a system in place to collect assessments to fund its operations, as most of the Department's programs are run in this manner. OIP has no such mechanism in place, and would probably need general fund appropriations to hire the staff necessary to set up such a mechanism.

4. If the Legislature does not assign OIP responsibility for chapter 323C, then the Legislature should reconsider the issue at a later date if, as advocated by OIP's

Director, the Legislature elects to broaden OIP's mission to encompass the commercial handling and use of personal information.

5. Whichever agency is designated to implement the new law, chapter 323C should be amended to give the agency specific powers to investigate complaints and hold administrative hearings.

6. Chapter 323C should be clarified to:

    a. Ensure that the agency responsible for implementing the law does not itself become a regulated entity solely by having records reviewed by outside experts and other persons as part of its enforcement actions; and

    b. Determine whether government records that are protected from disclosure under the medical records confidentiality law are similarly exempt from disclosure under the Uniform Information Practices Act.

Appendix A

Section 7 of Act 87, Session Laws of Hawaii 1999

SECTION 7. The legislative reference bureau shall conduct a study to determine the most appropriate method by which this Act may be implemented and enforced. The legislative reference bureau shall consider, but not limit its consideration of agencies to the insurance division and the regulated industries complaints office of the department of commerce and consumer affairs, and the office of information practices, and shall also propose and evaluate cooperative arrangements between agencies. The factors to be considered by the legislative reference bureau in conducting its study shall include but not be limited to:

(1) Experience and expertise in the area to be regulated;
(2) Ability to work cooperatively with regulated entities, and to educate entities as to the requirements under this Act;
(3) Independence and neutrality of the agency with regard to its relationship with regulated entities;
(4) Existing agency resources; and
(5) Experience and expertise of the agency in conducting enforcement activities.

The legislative reference bureau shall submit a report of its findings and recommendations to the legislature no later than twenty days prior to the convening of the 2000 regular session.