



October 19, 2010

Via Facsimile and Email

David Maxwell-Jolly
Director
California Department of Health Care Services
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RE: Release of Confidential Information of HIV-Positive Medi-Cal Patients

Dear Dr. Maxwell-Jolly,

We write in response to your letter of October 4, as well as the Department's letter of September 16, which were, respectively, responses to our letter of September 9 and our request under California's Public Records Act, also of September 9.

We initially wrote you to express our grave concern and to seek more information about the disclosure by the Department of Health Care Services (DHCS) of the HIV status and confidential identifying information of approximately 5,000 HIV-positive Medi-Cal recipients.

In your letter, you admit that DHCS provided a third-party private contractor, AIDS Healthcare Foundation (AHF), with detailed identifying information for approximately 5,000 HIV-positive Medi-Cal recipients – including their names, residence address, mailing address, primary phone number, alternate phone number #1, and alternate phone number #2. Nevertheless, you claim that the disclosures made by DHCS under its Disease Management Pilot Program (DMPP) “were done in compliance with all legal requirements, including federal and state laws.” You go on to say that DHCS entered into the contract at issue pursuant to Welfare & Institutions Code § 14132.27(f), and that participation in the DMPP itself was “opt-in” or

“voluntary” and that DHCS did not disclose confidential health information about the HIV-positive individuals to AHF unless those individuals enrolled in the program.

These explanations, however, in no way excuse the serious privacy violations described in our September 9 letter. First, although DHCS does have the authority to enter into contracts with third-parties under & Institutions Code § 14132.27(f), that statute does not operate as an implied repeal of other laws – particularly a repeal of a law as significant as Health & Safety Code § 120980, which protects privacy around HIV, let alone constitutional privacy safeguards. The content of the contracts that DHCS enters into is necessarily limited by both California statutory law and the federal and state constitutions, and a contract between DHCS and AHF – even one that purports to respect Medi-Cal recipients’ privacy rights, as it simultaneously violates them – cannot conceivably alter the constitutional and statutory rights of third parties to the contract. Thus, for example, DHCS could not enter into a contract to sell the organs of Medi-Cal recipients.

Second, as we set out in that letter, DHCS apparently did not seek – and therefore did not obtain – authorization from the approximately 5,000 HIV-positive Medi-Cal recipients prior to releasing their names and contact information to AHF. On its own, the release of information identifying an individual as HIV-positive without his or her consent is a direct violation of California Health & Safety Code § 120980, as well as a violation of the individual’s right to privacy under the federal and state constitutions. By the time that a Medi-Cal recipient was asked to “opt-in” to the DMPP, the privacy violation had already occurred. That these individuals were not then forced by DHCS to accept particular services offered by AHF – that their participation in the actual DMPP was “voluntary – does not lessen the privacy violation here. Naturally, DHCS could not require HIV-positive Medi-Cal recipients to accept any particular service, so their participation in the DMPP is necessarily voluntary. Nor is DHCS’s violation retroactively cured by a Medi-Cal recipient’s subsequent enrollment in the DMPP, which, in any event, was an option entered into by fewer than ten percent of the approximately 5,000 people AHF attempted to contact.

Lastly, your letters states that “DHCS did not provide AHF [the third-party contractor] with lists of beneficiaries who had tested positive for HIV, nor did it provide any claim information to the contractor in the potential member files.” Instead, the letter claims, DHCS simply “provided AHF with contact information for approximately 5,000 beneficiaries who were potentially eligible for the DMPP.” Yet, according to the contract between DHCS and AHF, to be a “potential member” of the DMPP, an individual had to have a “primary or secondary diagnosis of HIV/AIDS.”¹ And you state later in your letter that AHF complained that the information DHCS provided was “over-inclusive, as some individuals were not HIV-positive” – thereby demonstrating the intent of DHCS to provide AHF with a list of HIV-positive Medi-Cal recipients.

¹ Agreement between AIDS Healthcare Foundation & DHCS, Agreement No. 07-65584, Ex. A, Attachment I, Section G (dated Oct. 12, 2007).

To the extent that you now claim DHCS did not provide AHF with “lists of beneficiaries who had tested positive for HIV” based on a purported distinction between Medi-Cal recipients who *tested* positive for HIV and a list of Medi-Cal recipients who *are* HIV-positive, it is worth repeating that a DHCS representative has already admitted that “[g]iving someone a list of people whose HIV status is positive is tantamount to disclosing the results of the test.” Furthermore, it is absurd to contend that with respect to the 5,000 individuals identified as HIV-positive, each one’s serostatus was known without any of them having taken an HIV test and/or having disclosed the results of such a test to his or her health care provider in order to receive medical care.

In sum, the explanation provided in your October 4 letter further confirms the key facts that prompted our alarm, and given your stated view of California law as permitting such a release of confidential patient information, we are now even more acutely concerned that DHCS will continue to violate the privacy rights of HIV-positive Medi-Cal recipients. If DHCS does not immediately notify us that it is planning on taking the steps listed in our September 9 letter, we will need to take additional steps to ensure that DHCS protects Medi-Cal patient privacy in compliance with state law.

We further ask DHCS to provide us immediately with a time frame for responding to our September 9 Public Records Act request. On September 17, DHCS sent us a letter invoking Government Code § 6253(c), in order to extend the time to respond to our request. Despite the explicit provisions of that Section, however, the letter did not provide a time frame in which DHCS would respond to our request. And as it has now been more than 14 days since DHCS’s initial response was due, DHCS is now in violation of the Section and California’s Public Records Act.

Sincerely,

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