



ILLINOIS

Pat Quinn, Governor

DEPARTMENT OF CENTRAL MANAGEMENT SERVICES

Malcolm Weems, Acting Director

January 25, 2012

Steve Silverman
Assistant Attorney General
Public Access Bureau

RE: 2011 PAC 17922 Request for Review
Craig Mijares FOIA Request

Dear Mr. Silverman:

Please accept this as a response to the Request for Review for 2011 PAC 17922, in which you requested a summary for the Illinois Department of Central Management Services' (CMS) assertion of Sections 7(1)(a) and 7(1)(s) of the Illinois Freedom of Information Act (5 ILCS 140) ("FOIA").

On December 20, 2011, Craig Mijares requested an electronic copy of the following information:

"Roger Eddy's Healthcare insurance. If he participates, amount of premium he pays, amount of premium the state of Illinois pays, who is covered, plan details of coverage."

CMS responded to this FOIA request by providing general information regarding the State of Illinois' ("State") group insurance program. This information included links to both the Benefits Handbook and Benefits Choice Booklet, which provide details regarding plan design and the amount of premiums paid by members. However, with respect to information specific to Roger Eddy, CMS denied release due to the following exemptions:

- 1) "Information specifically prohibited from disclosure by federal or State law or rules and regulations implementing federal or State law." 5 ILCS 140/7(1)(a). Specifically, CMS denied the request under this section pursuant to the prohibition of release for protected health information ("PHI") as defined in the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"). 45 C.F.R. §160.103; 45 C.F.R. §164.502(a).
- 2) "Any and all proprietary information and records related to the operation of an intergovernmental risk management association or self insurance pool or jointly self-administered health and accident cooperative or pool. Insurance or self-insurance (including any intergovernmental risk management association or self-insurance pool) claims, loss or risk management information, records, data, advice or communications." 5 ILCS 140/7(1)(s).

Due to the nature of the request, CMS also wishes to assert additional exemptions for private information and personal information pursuant to FOIA Sections 7(1)(b) and 7(1)(c). FOIA

defines "private information" that is exempt from disclosure under Section 7(1)(b) to specifically include a person's medical records. In addition, Section 7(1)(c) exempts the "disclosure of information that is highly personal or objectionable to a reasonable person and in which the subject's right to privacy outweighs any legitimate public interest in obtaining the information." Information relating to health insurance, especially regarding health insurance claims and/or information that may be related to minor children or other dependents, which would reveal a person's medical condition, injuries, and medical costs, would be highly personal to a reasonable person, and the person's right to privacy regarding such information would clearly outweigh any public interest in obtaining the information.

Mr. Mijares requested a review by the Illinois Office of the Attorney General, Public Access Counselor ("PAC") on December 28, 2011. CMS received the PAC further inquiry request on January 13, 2012.

Background

CMS, through its Bureau of Benefits ("Bureau"), is responsible for the administration of the group health insurance programs offered by the State to its employees, retirees, and their dependents through the State Employees Group Insurance Act (5 ILCS 375). These programs provide and pay the cost of medical care for members, and as such, the Bureau qualifies as a health plan (defined as "an individual or group plan that provides, or pays the cost of, medical care") pursuant to 45 C.F.R. §160.103. While the definition of health plan excludes a plan or program to the extent that it provides or pays the cost of excepted benefits (as identified in 42 U.S.C. §300gg-91(c)(1)), no such excepted benefits are at issue in this matter.

The HIPAA Privacy Rule expressly applies to three types of entities. 45 C.F.R. §160.502. A health plan is included among the entities covered by the rule. *Id.* Accordingly, the Bureau is a covered entity subject to the regulations of HIPAA. As an example of its status as a covered entity, CMS is enclosing a "Notice of Privacy Practices," which is prepared by the Bureau and distributed to plan enrollees in accordance with HIPAA requirements. The State also contracts with several health plan administrators and carriers to assist in providing certain services related to the plan. Therefore, CMS is also subject to HIPAA regulations as a business associate of the respective plan administrators and carriers. As both a covered entity and business associate, CMS is prohibited from disclosing protected health information ("PHI"). The HIPAA Privacy Rule defines PHI as "all individually identifiable health information held or transmitted by a covered entity or its business associate, in any form or media, whether electronic, paper, or oral." 45 C.F.R. §160.103.

Individually identifiable health information includes "information that is a subset of health information, including demographic information collected from an individual, and:

- 1) Is created or received by a health care provider, health plan, employer, or health care clearinghouse; and
- 2) Relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present or future payment for the provision of health care to an individual; and
 - a. That identifies the individual; or

- b. With respect to which there is a reasonable basis to believe the information can be used to identify the individual." 45 C.F.R. §160.103.

Analysis

As noted above, the FOIA request submitted by Mr. Mijares seeks health information specific to Roger Eddy, including "if he participates" and "who is covered." Therefore, Mr. Mijares is seeking to obtain enrollment information of not only Mr. Eddy, but also the names and enrollment status of Mr. Eddy's spouse (if any), dependent children (if any), and any other dependents he may have. The United States Department of Health and Human Services ("HHS"), in regulations relating to the HIPAA Privacy Rule, has specifically defined such enrollment information to be PHI. In its Final Rule on "Standards for Privacy of Individually Identifiable Health Information" (67 FR 53182), HHS stated:

"Enrollment and disenrollment information fall under the statutory definition of 'individually identifiable health information,' since it is received or created by a health plan, identifies an individual, and relates to the past, present, or future payment for the provision of health care to an individual. As such...there is no statutory basis to exclude such information from the definition of 'protected health information.'" Id. at 53208.

Because the enrollment information is PHI, CMS is prohibited from disclosing the requested information to Mr. Mijares. The only exception to the prohibition on the disclosure of enrollment information is that a health plan may disclose such information to a plan sponsor. 45 CFR 164.504(f)(1)(iii). Mr. Mijares is not a plan sponsor of any plan administered by CMS. Therefore, this exception is inapplicable, and disclosure of the information is prohibited by HIPAA. A violation of HIPAA through the release of the requested information could expose CMS and the State to substantial Federal and State penalties, including civil financial penalties of up to \$50,000.

Further, because the first sentence of Mr. Mijares' request seeks only "Roger Eddy's healthcare insurance," this request, when viewed broadly, could be read as a request for any and all information regarding Mr. Eddy's health insurance, including claims for any medical treatment rendered to Mr. Eddy. While Mr. Mijares may not have intended for his request to be viewed so broadly, such information, if it is indeed sought, would clearly also be prohibited from disclosure as PHI pursuant to HIPAA.

In addition to HIPAA's prohibition on disclosure, to the extent Mr. Mijares' request seeks information relating to any specific health insurance claims made by Mr. Eddy, CMS believes the information would also be exempt from disclosure pursuant to Section 7(1)(s) of FOIA. Such information would fall within the category of insurance or self insurance claims information and/or records as defined by 7(1)(s).

As noted above, CMS has previously provided general information regarding plan design and the amount of premiums paid by members. CMS is also enclosing a rate chart identifying the amount of premiums paid by the State for each of the various carriers offered by the plan, which may be released to Mr. Mijares. CMS believes that such information is the only information that may be

disclosed to Mr. Mijares. In sum, CMS asserts all applicable federal law prohibitions and Illinois FOIA exemptions listed above, and requests that the PAC sustain CMS' denial of release for any health insurance information specific to Mr. Roger Eddy.

Should you have any further questions regarding this issue, please feel free to contact me at (217) 557-0600.

Sincerely,



Tyson J. Rothermich
Benefits Counsel
Illinois Department of Central Management Services

Enclosures