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Ms. Carter and Mr. Rooker:

This Office received two related requests for opinions and those requests have been consolidated into this single opinion. Ms. Carter's request asked the Office to address whether or not medical records filed as exhibits in court proceedings are protected by the Health Insurance Portability and Accountability Act of 1996 (hereinafter "HIPAA"), thus requiring the Clerks to remove any medical records contained in a file prior to making the file available for public inspection and/or copying. Mr. Rooker's request asked the Office to address a very similar question regarding medical records and to further opine on a Clerk's responsibility to redact or remove any juvenile records or student educational records filed as exhibits in a proceeding prior to making a file available for public inspection and/or copying. Additionally, this request asked whether the clerk can require a party, upon filing records that are confidential or contain confidential information, to disclose such, and whether this disclosure will alleviate the clerk's responsibility to review the records for confidential information.

1. Analysis

The Tennessee Public Records Act (hereinafter "TPRA") requires:

all state, county and municipal records shall, at all times during business hours, which for public hospitals shall be during the business hours of their administrative offices, be open for personal inspection by any citizen of this state, and those in charge of the records shall not refuse such right of inspection to any citizen, unless otherwise provided by state law.

Tenn. Code Ann. Section 10-7-503(a)(2)(A).

The Tennessee Supreme Court in *State v. Cawood*, 134 S.W. 3d 159 (Tenn. 2004) and the Tennessee Court of Appeals in *Kersey v. Bratcher*, 253 S.W. 3d 625 (Tenn. Ct. App. 2007) opined as to the applicability of the Tennessee Public Records Act to court records. In both cases, the courts found that court files and exhibits are public records, unless placed under seal or protective order and court clerks, as the custodians of those records have a duty to provide public access to the records pursuant to the TPRA. *Cawood*, 134 S.W. 3d at 165; *Bratcher*, 253 S.W. 3d at 629.

However, while there is a requirement that court files and exhibits be available for access by the public, Tennessee courts have also recognized that there are a number of provisions that create exceptions to the TPRA. These exceptions are found “not only in statutes, but also the Constitution of Tennessee, the common law, the rules of court, and administrative rules and regulations because each of these has the force and effect of law in Tennessee.” *Swift v. Campbell*, 159 S.W. 3d 565, 571-572 (Tenn. Ct. App. 2004). These exceptions make records or information that would otherwise be public, confidential. The Tennessee Court of Appeals in *Eldridge v. Putnam County* found that when there is confidential information within a record, the record custodian is responsible for redacting any information within the record that is confidential pursuant to state law prior to making the record available for public inspection and/or copying. *Eldridge v. Putnam County*, 86 S.W. 3d 572 (Tenn. Ct. App. 2001).

The HIPAA Privacy Rule creates such an exception to the TPRA. HIPAA was enacted by Congress in an effort to make health care more efficient through the standardization of electronic health care transactions, as well as protect and secure certain health information. The health information that HIPAA seeks to protect is called “individually identifiable health information” which is defined as:

any information, including demographic information collected from an individual, that —
(A) is created or received by a health care provider, health plan, employer, or health care clearinghouse; and
(B) 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 —
(i) identifies the individual; or
(ii) with respect to which there is a reasonable basis to believe that the information can be used to identify the individual.

45 C.F.R. Section 160.103.

Only a “covered entity” is required to maintain the confidentiality of individually identifiable health information. A “covered entity” is “[a] health care provider who transmits any health information in electronic form in connection with a transaction covered by this subchapter.” *Id.* “Transaction” is defined as “the transmission of information between two parties to carry out financial or administrative activities related to health care.” *Id.* While a governmental entity that is not engaged in health care may be subject to the HIPAA provisions due to the type of insurance plan that the entity has in place for its employees and the manner in which insurance claims are processed, the mere fact that a governmental entity maintains records that contain individually identifiable health information does not make that entity subject to the HIPAA Privacy Rule.

Based upon the above, it is the opinion of this Office that the Clerk's Office, in its capacity as the custodian for records filed as exhibits in court proceedings is not a "covered entity" and as such any medical records filed as exhibits are not protected by HIPAA.

While HIPAA may not require that medical records filed as exhibits be maintained as confidential, other provisions of law may provide for confidentiality. Several provisions within Tennessee Code Annotated require that certain types of medical records be maintained as confidential. Those provisions include but are not limited to:

1. Tenn. Code Ann. Section 10-7-504(a)(1) requires that the medical records of patients treated at state, county, and municipal hospitals or medical facilities be maintained as confidential, as well as the records of any patients receiving treatment, in whole or in part, at the expense of the state, county, or municipality. This provision also requires the records containing the source of body parts for transplantation or information related to individuals donating body parts for transplantation remain confidential.
2. Tenn. Code Ann. Section 33-3-103 says that all applications, certificates, records, reports, legal documents, and pleadings made and all information provided or received in connection with services applied for, provided under, or regulated by the Department of Mental Health and Developmental Disabilities that directly or indirectly identifies a service recipient or former service recipient shall be kept confidential.
3. Tenn. Code Ann. Section 39-15-203 requires that the records and reports of any doctor performing abortions remain confidential.
4. Tenn. Code Ann. Section 63-2-101 provides that the patient records of a health care provider are confidential.
5. Tenn. Code Ann. Section 68-11-304 requires that hospital records be maintained as confidential.
6. Tenn. Code Ann. Section 68-10-113 says that information related to known or suspected cases of STDs is confidential.
7. Tenn. Code Ann. Section 68-11-1503 requires the name, address, and identifying information about patients in health care facilities to be maintained as confidential.
8. Tenn. Code Ann. Section 37-1-612 provides that all records concerning reports of child sexual abuse and all records generated as a result of the reports are confidential.

Any record maintained by a Clerk that contains any information that is made confidential by one of the above-cited provisions is required to be redacted prior to the record being made available for public inspection or copying.

Tenn. Code Ann. Section 37-1-153 provides for very limited access to juvenile court records. The provision says in part:

- (a) Except in cases arising under § 37-1-146, all files and records of the court in a proceeding under this part are open to inspection only by:
 - (1) The judge, officers and professional staff of the court;
 - (2) The parties to the proceeding and their counsel and representatives;

- (3) A public or private agency or institution providing supervision or having custody of the child under order of the court;
 - (4) A court and its probation and other officials or professional staff and the attorney for the defendant for use in preparing a presentence report in a criminal case in which the defendant is convicted and who prior thereto had been a party to the proceeding in juvenile court; and
 - (5) With permission of the court, any other person or agency or institution having a legitimate interest in the proceeding or in the work of the court.
- (b) Notwithstanding the provisions of subsection (a), petitions and orders of the court in a delinquency proceeding under this part shall be opened to public inspection and their content subject to disclosure to the public if:
- (1) The juvenile is fourteen (14) or more years of age at the time of the alleged act; and
 - (2) The conduct constituting the delinquent act, if committed by an adult, would constitute first degree murder, second degree murder, rape, aggravated rape, rape of a child, aggravated rape of a child, aggravated robbery, especially aggravated robbery, kidnapping, aggravated kidnapping or especially aggravated kidnapping.
- (c) Notwithstanding the provisions of this section, if a court file or record contains any documents other than petitions and orders, including, but not limited to, a medical report, psychological evaluation or any other document, such document or record shall remain confidential.
- (d)(1) Except as otherwise permitted in this section, it is an offense for a person to intentionally disclose or disseminate to the public the files and records of the juvenile court, including the child's name and address.

Based upon the above, if the exhibits that are being filed are juvenile court records that involve a traffic violation that comes under the jurisdiction of the juvenile court judge, the records are public records. Additionally, if the exhibits filed are petitions and/or orders from a delinquency proceeding involving a juvenile who was at least fourteen (14) years old at the time the alleged offense was committed, and the offense is one of the offense enumerated in the provision, then those records are also public records. If however, the exhibits filed are any other type of juvenile court record, they are confidential and would have to be removed or redacted prior to inspection and/or copying by the public. With the exception of the juvenile court records discussed above, this Office is unaware of any other provision for any other court that that starts with a presumption of confidentiality for records involving juveniles.

Finally, Tenn. Code Ann. Section 10-7-504(a)(4)(A), says in part:

The records of students in public education institutions shall be treated as confidential. Information in such records relating to academic performance, financial status of a student or the student's parent or guardian, medical or psychological treatment or testing shall not be made available to unauthorized personnel of the institution or to the public . . . except as otherwise provided by law or regulation pursuant thereto, and except in consequence of due legal process or in cases when the safety of persons or property is involved. . . . Statistical information not identified with a particular student may be released to any person, agency, or the public; and information relating only to an individual student's name, age, address, dates of attendance, grade levels completed, class placement and academic degrees awarded may likewise be disclosed.

Therefore, if student educational records are are filed as exhibits and the records contain the type of information that is not permitted to be disclosed, then the records are required to be redacted before being made available for public inspection and/or copying.

Based upon the above cited case law and statutory provisions, it is the opinion of this Office that a court clerk is responsible for redacting or removing information or records from a file or exhibit that is confidential pursuant to state law, prior to the file or exhibit being made available for public inspection and/or copying. Even if a court rule is adopted that requires a party filing records to identify any record that either contains confidential information or is entirely confidential, it is this Office's opinion that a court clerk will still be responsible for reviewing the records filed to ensure that confidential information is removed or redacted prior to public inspection.

Please feel free to call either myself or Ann Butterworth at (615) 401-7891 if you have any further questions.

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