

Chicago-Kent College of Law

## Scholarly Commons @ IIT Chicago-Kent College of Law

---

All Faculty Scholarship

Faculty Scholarship

---

2-1-2007

### Newsgathering in Light of HIPAA

Alexander A. Boni-Saenz

*IIT Chicago-Kent College of Law*, abonisae@kentlaw.iit.edu

Follow this and additional works at: [https://scholarship.kentlaw.iit.edu/fac\\_schol](https://scholarship.kentlaw.iit.edu/fac_schol)



Part of the [First Amendment Commons](#), [Health Law and Policy Commons](#), and the [Privacy Law Commons](#)

---

#### Recommended Citation

Alexander A. Boni-Saenz, *Newsgathering in Light of HIPAA*, 120 Harv. L. Rev. 1055 (2007).

Available at: [https://scholarship.kentlaw.iit.edu/fac\\_schol/811](https://scholarship.kentlaw.iit.edu/fac_schol/811)

This Article is brought to you for free and open access by the Faculty Scholarship at Scholarly Commons @ IIT Chicago-Kent College of Law. It has been accepted for inclusion in All Faculty Scholarship by an authorized administrator of Scholarly Commons @ IIT Chicago-Kent College of Law. For more information, please contact [jwenger@kentlaw.iit.edu](mailto:jwenger@kentlaw.iit.edu), [ebarney@kentlaw.iit.edu](mailto:ebarney@kentlaw.iit.edu).

---

---

DEVELOPMENTS IN THE LAW  
THE LAW OF MEDIA

---

*“[T]he only effective restraint upon executive policy and power in the areas of national defense and international affairs may lie in an enlightened citizenry . . . . For this reason, it is perhaps here that a press that is alert, aware, and free most vitally serves the basic purpose of the First Amendment.”*

New York Times Co. v. United States,  
403 U.S. 713, 728 (1971) (Stewart, J., concurring).

*“Only by uninhibited publication can the flow of information be secured and the people informed concerning men, measures, and the conduct of government. . . . Only by freedom of speech, of the press, and of association can people build and assert political power, including the power to change the men who govern them.”*

Archibald Cox, *The Supreme Court, 1979 Term—Foreword: Freedom of Expression in the Burger Court*, 94 HARV. L. REV. 1, 3 (1980).

*“Our liberty depends on the freedom of the press, and that cannot be limited without being lost.”*

Letter from Thomas Jefferson to James Currie (Jan. 28, 1786),  
reprinted in 9 THE PAPERS OF THOMAS JEFFERSON 239, 239  
(Julian P. Boyd ed., 1954)

*“[T]he price of freedom of religion or of speech or of the press is that we must put up with, and even pay for, a good deal of rubbish.”*

United States v. Ballard,  
322 U.S. 78, 95 (1944) (Jackson, J., dissenting)

## TABLE OF CONTENTS

I. INTRODUCTION: NEW MEDIA, NEW SECRECY, NEW QUESTIONS .....	993
II. PROTECTING THE NEW MEDIA: APPLICATION OF THE JOURNALIST'S PRIVILEGE TO BLOGGERS.....	996
A. <i>The Constitutional Privilege</i> .....	998
1. Precedential Basis for the Privilege .....	998
2. Scope of the Privilege .....	999
B. <i>Journalist's Shield Statutes</i> .....	1000
C. <i>Prospects for Bloggers' Protection Under Shield Laws</i> .....	1004
III. PROSECUTING THE PRESS: CRIMINAL LIABILITY FOR THE ACT OF PUBLISHING .....	1007
A. <i>Pentagon Papers' Unanswered Question</i> .....	1008
B. <i>Liability for Publishing When a Journalist's Prepublication Activity Was     Legal</i> .....	1010
C. <i>Liability for Publishing When a Journalist's Prepublication Activity Was     Illegal</i> .....	1012
D. <i>Journalists' Defense After Rosen</i> .....	1014
1. Statutory Interpretation.....	1014
2. "Or of the Press".....	1016
3. Selective Prosecution.....	1017
E. <i>Conclusion</i> .....	1018
IV. VIEWPOINT DISCRIMINATION AND MEDIA ACCESS TO GOVERNMENT OFFICIALS .....	1019
A. <i>Public Forum Analysis: Sanctioning Viewpoint Discrimination</i> .....	1021
B. <i>Problems of Sanctioning Viewpoint Discrimination</i> .....	1026
C. <i>Are There Legal Solutions?</i> .....	1029
V. INTERNET JURISDICTION: A COMPARATIVE ANALYSIS .....	1031
A. <i>The Current Jurisdictional Landscape</i> .....	1032
1. Internet Jurisdiction in the United States.....	1032
2. Internet Jurisdiction in Commonwealth Countries. ....	1033
B. <i>Viewing the Jurisdictional Divide as an Outgrowth of Substantive     Differences</i> .....	1034
1. Substantive Media Law in the United States.....	1035
2. Substantive Media Law in Commonwealth Countries. ....	1037
C. <i>The Future of Jurisdictional Tests</i> .....	1040
D. <i>Conclusion</i> .....	1043
VI. MEDIA LIABILITY FOR REPORTING SUSPECTS' IDENTITIES: A COMPARATIVE ANALYSIS .....	1043
A. <i>American Developments</i> .....	1044
B. <i>British Developments</i> .....	1046
C. <i>Australian Developments</i> .....	1050
D. <i>Comparisons: Toward Convergence?</i> .....	1053
VII. NEWSGATHERING IN LIGHT OF HIPAA .....	1055
A. <i>Newsgathering, FOIA, and State FOI Laws</i> .....	1056
B. <i>Medical Privacy and HIPAA</i> .....	1059

C. *Recent Cases* ..... 1060

    1. Louisiana ..... 1060

    2. Ohio ..... 1061

    3. Texas ..... 1062

D. *Analysis* ..... 1064

E. *Conclusion* ..... 1066

courts also might be unwilling to enforce a foreign judgment if the foreign court lacked jurisdiction.<sup>79</sup> Because U.S. courts are not following the trend in the United Kingdom and Australia toward increased jurisdiction over foreign media defendants, they may be unwilling in many cases to enforce foreign judgments against media defendants.

Even if U.S. courts fail to enforce the judgments, however, media organizations should keep abreast of these foreign developments if they have assets abroad. With other countries increasingly claiming jurisdiction over the media, greater potential for foreign liability makes their substantive laws more pertinent.

## VII. NEWSGATHERING IN LIGHT OF HIPAA

The media is society's watchdog, exposing government corruption and disseminating information to which citizens do not readily have access. Recently, media advocates have noted with concern the passage and implementation of the Health Insurance Portability and Accountability Act<sup>1</sup> (HIPAA), which they claim puts the media watchdog on too short a leash.<sup>2</sup> HIPAA serves as a new source of authority for restricting public disclosure of certain medical information — information that could form the basis of important news stories about health or other topics. These restrictions are at odds with state freedom of information (FOI) laws, which the media has historically used to obtain information about the government's workings. This Part examines the conflict between HIPAA and these state laws as it has emerged in state court cases over the last fifteen months.<sup>3</sup>

Part A reviews newsgathering, the federal Freedom of Information Act<sup>4</sup> (FOIA), and state FOI laws. Part B examines HIPAA and its defined terms. Part C describes the facts and reasoning of recent cases considering the interaction of HIPAA and state FOI laws in Louisiana,

---

<sup>79</sup> UNIF. FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT § 4(b)(2) (2005).

<sup>1</sup> Pub. L. No. 104-191, 110 Stat. 1936 (1996) (codified in scattered sections of 26, 29, and 42 U.S.C.).

<sup>2</sup> HIPAA has, for example, impeded journalists' attempts to access patient information from hospitals. See, e.g., Associated Press, *New Patient-Privacy Rules Will Hamper Some Newsgathering*, FIRST AMENDMENT CTR. NEWS, April 14, 2003, <http://www.firstamendmentcenter.org/news.aspx?id=11336>; Associated Press, *Privacy Law Frustrates a Daughter — and Journalists*, FIRST AMENDMENT CTR. NEWS, Mar. 16, 2006, <http://www.firstamendmentcenter.org/news.aspx?id=16645>.

<sup>3</sup> Litigation concerning release of information, even health information, predates HIPAA. See, e.g., *S. Illinoisan v. Ill. Dep't of Pub. Health*, 844 N.E.2d 1 (Ill. 2006) (requiring the disclosure of a cancer registry without any discussion of HIPAA as the initial request for information occurred before the promulgation of the HIPAA regulations). However, state agencies are now able to invoke HIPAA as well as other privacy laws.

<sup>4</sup> 5 U.S.C. § 552 (2000 & Supp. IV 2004).

Ohio, and Texas. Finally, Part D offers a framework for the resolution of the conflict between HIPAA and state FOI laws.

*A. Newsgathering, FOIA, and State FOI Laws*

Newsgathering is essential to the production of news.<sup>5</sup> However, whereas the right to publish information has received significant constitutional protection,<sup>6</sup> the right to newsgathering or access has been denied similar recognition.<sup>7</sup> Even Justice Stewart, although sympathetic to the functions of newsgathering, did not believe that there was a “constitutional right to have access to particular government information, or to require openness from the bureaucracy.”<sup>8</sup>

While the Supreme Court has not granted these rights constitutional status, Congress and state legislatures have provided them in statutory form. In 1966, Congress passed the Freedom of Information Act, which enables individuals or the media to obtain information from the federal government upon request, subject to nine exemptions. Exemptions Three and Six are the most relevant to the application of FOIA in the medical privacy context. Respectively, they allow an agency to withhold information when it is “specifically exempted from disclosure by statute” or when “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy” are at stake.<sup>9</sup>

---

<sup>5</sup> See *Branzburg v. Hayes*, 408 U.S. 665, 728 (1972) (Stewart, J., dissenting) (“No less important to the news dissemination process is the gathering of information. News must not be unnecessarily cut off at its source, for without freedom to acquire information the right to publish would be impermissibly compromised. Accordingly, a right to gather news, of some dimensions, must exist.”).

<sup>6</sup> See, e.g., *N.Y. Times Co. v. United States*, 403 U.S. 713, 717 (1971) (Black, J., concurring) (“Both the history and language of the First Amendment support the view that the press must be left free to publish news, whatever the source, without censorship, injunctions, or prior restraints.”).

<sup>7</sup> See *Zemel v. Rusk*, 381 U.S. 1, 17 (1965) (“The right to speak and publish does not carry with it the unrestrained right to gather information.”); see also *Pell v. Procunier*, 417 U.S. 817, 834 (1974) (“[N]ewsmen have no constitutional right of access to prisons or their inmates beyond that afforded the general public.”); Timothy B. Dyk, *Newsgathering, Press Access, and the First Amendment*, 44 STAN. L. REV. 927, 928 (1992) (“While the press has not always been successful in asserting claims for special treatment, . . . the Supreme Court [has been willing] to interpret the First Amendment as affording the press a broad range of freedom from restraints on publication. Notably, however, . . . the Court has yet to explicitly afford special protections to the newsgathering process.” (footnotes omitted)).

<sup>8</sup> Potter Stewart, “*Or of the Press*,” 26 HASTINGS L.J. 631, 636 (1975) (citing *Pell*, 417 U.S. 817, and *Saxbe v. Wash. Post Co.*, 417 U.S. 843 (1974), both opinions of Justice Stewart).

<sup>9</sup> 5 U.S.C. § 552(b)(3), (6). The language of subsection (b)(6) implies a balancing test. See *Dep’t of the Air Force v. Rose*, 425 U.S. 352, 372 (1976) (“Congress sought to construct an exemption that would require a balancing of the individual’s right of privacy against the preservation of the basic purpose of the Freedom of Information Act ‘to open agency action to the light of public scrutiny.’ The device adopted to achieve that balance was the limited exemption, where privacy

All states have adopted freedom of information laws,<sup>10</sup> but these laws vary considerably. Most state FOI laws retain a presumption of open access, either through statutory language<sup>11</sup> or case law,<sup>12</sup> whereas others contain more ambivalent policy statements recognizing competing privacy interests.<sup>13</sup> Exemptions analogous to those in FOIA constitute perhaps the most concrete way of expressing commitment to other legislative priorities, such as privacy, and state laws differ in the degree to which these exemptions are discretionary or mandatory.<sup>14</sup>

State versions of FOIA's Exemptions Three and Six diverge in ways particularly relevant to state FOI laws' interactions with HIPAA. Exemption Three analogues sometimes create a specific exemption for

---

ened, for 'clearly unwarranted' invasions of personal privacy." (quoting *Rose v. Dep't of the Air Force*, 495 F.2d 261, 263 (2d Cir. 1976); 5 U.S.C. § 552(b)(6)).

Normally, exemptions under FOIA are discretionary. However, the Privacy Act of 1974, 5 U.S.C. § 552a (2000 & Supp. IV 2004), applicable to federal agencies, prohibits the disclosure of personal information that is maintained in a "system of records," defined as a "group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual." *Id.* § 552a(a)(5). Federal courts have strongly suggested that Exemption Six is mandatory for this type of information. See *U.S. Dep't of Def. v. Fed. Labor Relations Auth.*, 964 F.2d 26, 30 n.6 (D.C. Cir. 1992); *Cochran v. United States*, 770 F.2d 949, 955 (11th Cir. 1985). Even if the exemption is mandatory, the balancing test in Exemption Six injects some element of discretion into the process.

<sup>10</sup> See Roger A. Nowadzky, *A Comparative Analysis of Public Records Statutes*, 28 URB. LAW. 65, 65 (1996).

<sup>11</sup> See, e.g., TEX. GOV'T CODE ANN. § 552.001 (Vernon 2004) ("[I]t is the policy of this state that each person is entitled, unless otherwise expressly provided by law, at all times to complete information about the affairs of government and the official acts of public officials and employees. . . . The provisions of this chapter shall be liberally construed to implement this policy."). Some states put an even greater emphasis on open access, requiring exemptions to be reauthorized every five years or expire. See, e.g., FLA. STAT. ANN. § 119.15 (West Supp. 2006).

<sup>12</sup> See, e.g., *State ex rel. Miami Student v. Miami Univ.*, 680 N.E.2d 956, 958 (Ohio 1997) ("The Ohio Public Records Act is intended to be liberally construed 'to ensure that governmental records be open and made available to the public . . . subject to only a few very limited and narrow exceptions.'" (omission in original) (quoting *State ex rel. Williams v. City of Cleveland*, 597 N.E.2d 147, 151 (Ohio 1992))). See generally Thomas J. Moyer, *Interpreting Ohio's Sunshine Laws: A Judicial Perspective*, 59 N.Y.U. ANN. SURV. AM. L. 247 (2003) (providing an account from the Chief Justice of the Ohio Supreme Court of courts' interpretation of the state's FOI law).

<sup>13</sup> See, e.g., R.I. GEN. LAWS § 38-2-1 (Supp. 2005) ("The public's right to access to public records and the individual's right to dignity and privacy are both recognized to be principles of the utmost importance in a free society."); VT. STAT. ANN. tit. 1, § 315 (2003) ("It is the policy of this subchapter to provide for free and open examination of records . . . . All people, however, have a right to privacy . . . which ought to be protected unless specific information is needed to review the action of a governmental officer.").

<sup>14</sup> Most states follow FOIA and make exemptions discretionary. See, e.g., IOWA CODE ANN. § 22.7 (West Supp. 2006); NEB. REV. STAT. ANN. § 84-712.05 (LexisNexis Supp. 2006). However, others include mandatory exemptions as well. See, e.g., MD. CODE ANN., STATE GOV'T §§ 10-615, 10-618 (LexisNexis 2004 & Supp. 2006); WYO. STAT. ANN. § 16-4-203 (Supp. 2006). Separate state privacy laws may also make discretionary exemptions in the state FOI law mandatory, just as the Privacy Act of 1974 does for FOIA's Exemption Six.

other laws, as in the Ohio Public Records Act,<sup>15</sup> or they may place the exemption in the provision dealing with the right to examine records, as in the Louisiana Public Records Law.<sup>16</sup> In an effort to consolidate information, California compiles within the statute itself all state laws that provide an exemption to California's FOI law.<sup>17</sup>

Analogues to Exemption Six occasionally mimic FOIA's language nearly exactly,<sup>18</sup> preserving the balancing test implicit in it. However, some states have broadened the language to cover "information"<sup>19</sup> rather than "files," required only an "invasion of privacy"<sup>20</sup> rather than the more subjective "clearly unwarranted invasion of privacy" for the exemption to apply, or stated that a public interest must be demonstrated by "clear and convincing evidence" before an invasion of privacy would be warranted.<sup>21</sup> The Ohio Public Records Act contains an exemption simply for medical records,<sup>22</sup> thus effectively eliminating a balancing test and replacing it with a determination of whether something qualifies under the definition of a medical record. The Louisiana Exemption Six analogue is derived from a confidentiality law identified in the Exemption Three analogue,<sup>23</sup> while Texas has created a separate confidentiality exemption that covers "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."<sup>24</sup> Finally, Utah has integrated protected health information as defined by HIPAA into its FOI law exemptions directly,<sup>25</sup> eliminating the need to consider the conflict between the two statutes.

---

<sup>15</sup> OHIO REV. CODE ANN. § 149.43 (West 2002). The Exemption Three analogue exempts "[r]ecords the release of which is prohibited by state or federal law." *Id.* § 149.43(A)(1)(v).

<sup>16</sup> LA. REV. STAT. ANN. § 44:31 (Supp. 2006).

<sup>17</sup> See CAL. GOV'T CODE § 6276.02-.48 (Deering 2002 & Supp. 2006).

<sup>18</sup> See, e.g., *id.* § 6254(c).

<sup>19</sup> See, e.g., ILL. COMP. STAT. ANN. 5/140-7(b) (West Supp. 2006); MICH. COMP. LAWS ANN. § 15.243(a) (West 2004).

<sup>20</sup> See, e.g., DEL. CODE ANN. tit. 29, § 10,002(d)(1) (1997); GA. CODE ANN. § 50-18-72(2) (West Supp. 2002).

<sup>21</sup> See, e.g., OR. REV. STAT. § 192.502(2) (2005); W. VA. CODE ANN. § 29B-1-4(2) (LexisNexis Supp. 2006).

<sup>22</sup> OHIO REV. CODE ANN. § 149.43(A)(1)(a) (West 2002). Medical records are defined as "any document or combination of documents, except births, deaths, and the fact of admission to or discharge from a hospital, that pertains to the medical history, diagnosis, prognosis, or medical condition of a patient and that is generated and maintained in the process of medical treatment." *Id.* § 149.43(A)(3).

<sup>23</sup> See, e.g., LA. REV. STAT. ANN. § 44:4.1(B)(5) (Supp. 2006) (citing LA. REV. STAT. ANN. § 13:3734 (2006)).

<sup>24</sup> TEX. GOV'T CODE ANN. § 552.101 (Vernon 2004).

<sup>25</sup> See UTAH CODE ANN. § 63-2-107 (2004).



### B. Medical Privacy and HIPAA

In 1996, Congress enacted HIPAA, which, among other things, set standards for disclosure of health information.<sup>26</sup> Although many states have general or medical privacy laws, HIPAA was intended to preempt them to the extent that it is more stringent.<sup>27</sup> HIPAA was conceptualized as setting a floor of medical privacy protection for American citizens to replace the patchwork protections that states and healthcare providers had provided in the past.<sup>28</sup>

Determining whether information is covered by HIPAA is a multi-step process. For information to be protected it must be “individually identifiable.”<sup>29</sup> The entity that controls the information must also be considered a “covered entity.”<sup>30</sup> HIPAA allows covered entities to disclose protected health information without the written authorization of an individual if the “use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law.”<sup>31</sup>

<sup>26</sup> The HIPAA statute itself was somewhat vague in establishing disclosure standards, but in 2001 the Department of Health and Human Services (HHS) issued detailed regulations interpreting the statute, which took effect for most covered entities on April 14, 2003. See 45 C.F.R. §§ 160, 164 (2005).

<sup>27</sup> *Id.* § 160.203.

<sup>28</sup> Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 82,462, 82,464 (Dec. 28, 2000). For commentary on HIPAA's effects, see Lawrence O. Gostin & James G. Hodge, Jr., *Personal Privacy and Common Goods: A Framework for Balancing Under the National Health Information Privacy Rule*, 86 MINN. L. REV. 1439 (2002), and Peter D. Jacobson, *Medical Records and HIPAA: Is It Too Late To Protect Privacy?*, 86 MINN. L. REV. 1497 (2002). There has been little scholarly commentary about the interaction of HIPAA and the First Amendment. For an exception, see David R. Morantz, Comment, *HIPAA's Headaches: A Call for a First Amendment Exception to the Newly Enacted Health Care Privacy Rules*, 53 U. KAN. L. REV. 479 (2005).

<sup>29</sup> 45 C.F.R. § 160.103. The relevant regulation provides:

*Individually identifiable health information* is 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
  - (i) That identifies the individual; or
  - (ii) With respect to which there is a reasonable basis to believe the information can be used to identify the individual.

*Id.*

<sup>30</sup> *Id.* “Covered entity” is defined as:

- (1) A health plan.
- (2) A health care clearinghouse.
- (3) A health care provider who transmits any health information in electronic form in connection with a transaction covered by this subchapter.

*Id.* As the definition demonstrates, not all state or federal agencies are covered entities under HIPAA.

<sup>31</sup> *Id.* § 164.512(a).

*C. Recent Cases*

Three state courts have recently resolved controversies surrounding state FOI laws and HIPAA. These cases all involved journalists who requested information using FOI laws but were rebuffed by the government agencies that controlled the information. These agencies stated that the information was protected either by HIPAA or by exemptions within the state FOI law. The courts diverged in their opinions on disclosure, but this divergence may be explained in part by the courts' consideration of separate information requests under different state statutory schemes.

1. *Louisiana*. — In *Hill v. East Baton Rouge Parish Department of Emergency Medical Services*,<sup>32</sup> the First Circuit Court of Appeal of Louisiana ruled that 911 tapes controlled by the Louisiana Department of Emergency Medical Services were exempted from public inspection by provisions of both HIPAA and the Louisiana Public Records Law.<sup>33</sup> On February 21, 2005, Gannett newspaper correspondent John Hill requested 911 tapes of the call made on behalf of Louisiana Secretary of State Fox McKeithen, who had been transported from his home to the hospital.<sup>34</sup> The trial court, reviewing the tapes in camera, concluded that they contained protected health care information as defined by HIPAA and thus were not disclosable.<sup>35</sup>

Affirming, the Court of Appeals analyzed the issues under both the Louisiana Public Records Law and HIPAA, holding that the 911 call was not disclosable under either statutory scheme.<sup>36</sup> The court highlighted an Exemption Three analogue in the state FOI law that required disclosure “[e]xcept . . . as otherwise specifically provided by law.”<sup>37</sup> The majority then noted that a law protecting the confidentiality of privileged communications between a health care provider and patient applied to the 911 call, preventing disclosure.<sup>38</sup> Turning to HIPAA, the court found that the relevant division of the Department of Emergency Medical Services met the definition of a health care

<sup>32</sup> 925 So. 2d 17 (La. Ct. App. 2005).

<sup>33</sup> *Id.* at 23. The Supreme Court of Louisiana denied certiorari. *Hill v. E. Baton Rouge Parish Dep't of Emergency Med. Servs.*, 927 So. 2d 311 (La. 2006) (mem.). Some states have explicitly protected 911 calls from disclosure. *See, e.g.*, R.I. GEN. LAWS § 39-21.1-17 (1997).

<sup>34</sup> *Hill*, 925 So. 2d at 19.

<sup>35</sup> *Id.* at 19–20.

<sup>36</sup> *Id.* at 22.

<sup>37</sup> *Id.* at 20 (emphasis omitted) (quoting LA. REV. STAT. ANN. § 44:31(B) (Supp. 2006)).

<sup>38</sup> *Id.* at 19–20 (citing LA. REV. STAT. ANN. § 13:3734 (2006)). Since the confidentiality law points to the Louisiana Evidence Code for definitions of when such privileges apply, the court also consulted the Code to arrive at its judgment. *Id.* (citing LA. CODE EVID. ANN. art. 510(B) (2006)).

provider and thus was a covered entity under HIPAA.<sup>39</sup> The 911 calls received by the division contained health information protected under HIPAA, so tapes of the calls were also not disclosable under federal law.<sup>40</sup>

Judge Guidry dissented, arguing that the relationship between a 911 caller and an operator did not rise to the level of a confidential communication and that the calls only served the purpose of arranging for transportation to a hospital.<sup>41</sup> He then stressed the fundamental right of freedom of access to public records contained in both the Louisiana Constitution and the Public Records Law.<sup>42</sup> Further, he opined that HIPAA was inapplicable because the division that took the call did not fit the definition of a covered entity under the HIPAA regulations.<sup>43</sup>

2. *Ohio*. — In *State ex rel. Cincinnati Enquirer v. Daniels*,<sup>44</sup> the Supreme Court of Ohio held that the state's Public Records Act required disclosure of notices and assessment reports regarding lead contamination maintained by the Cincinnati Health Department.<sup>45</sup> On January 16, 2004, *Cincinnati Enquirer* reporter Sharon Coolidge requested lead citation reports, issued between 1994 and 2004, that indicated that children living at certain residences had elevated levels of lead in their blood.<sup>46</sup> According to the Health Department, providing the unredacted reports would make it too easy to discover the identities of the children whose health information the reports contained.<sup>47</sup> The Hamilton County Court of Appeals upheld the agency's decision not to disclose.<sup>48</sup>

The Ohio Supreme Court reversed and granted a writ of mandamus. It analyzed the potential conflict between the state FOI law and HIPAA. First, the court reviewed the relevant records to determine whether they contained health information protected under HIPAA.<sup>49</sup>

---

<sup>39</sup> *Id.* at 22–23. This finding was supported by the fact that the respondents at the division were, at the very least, required to have EMT training and were trained to dispense medical advice if necessary. *Id.* at 22.

<sup>40</sup> *Id.* at 23.

<sup>41</sup> *Id.* at 24 (Guidry, J., dissenting).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 25.

<sup>44</sup> 844 N.E.2d 1181 (Ohio 2006).

<sup>45</sup> *See id.* at 1184.

<sup>46</sup> *Id.* at 1183–84. The Department of Health obtained this medical information about blood lead levels through its administration of blood tests to children in the state. *See* Brief of Respondents-Appellees Judith Daniels & the City of Cincinnati Health Dep't at 1, *Daniels*, 844 N.E.2d 1181 (No. 05-0068), 2005 WL 2402040.

<sup>47</sup> *See Daniels*, 844 N.E.2d at 1184. The Health Department released 170 unredacted lead citations for multiple-family residences, but it still refused to provide unredacted copies of 173 other reports from single-family residential properties. *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 1185–86.

Because the only sentence in the reports the court found relevant to its inquiry — “[t]his unit has been reported to our department as the residence of a child whose blood test indicates an elevated lead level” — was a mere “nondescript reference,” the court concluded that HIPAA did not protect the records.<sup>50</sup>

The court proceeded to consider whether HIPAA would preempt the state FOI law if HIPAA did protect the health information contained in the reports. It noted that the regulations interpreting HIPAA contained “a ‘required by law’ exception” and that the Ohio Public Records Act contained an exemption for disclosure that is prohibited by federal law, creating a problem of “circular reference.”<sup>51</sup> Consulting the Health and Human Services (HHS) Secretary’s commentary accompanying HIPAA, the court determined that the Secretary did not intend for HIPAA to override all state and federal laws requiring disclosure, including FOIA.<sup>52</sup> Drawing an analogy to FOIA, which the Secretary indicated came within HIPAA’s “required by law” exception, the court concluded that the Ohio Public Records Act was not preempted by HIPAA.<sup>53</sup> Thus, disclosure was required.<sup>54</sup>

3. *Texas*. — In *Abbott v. Texas Department of Mental Health & Mental Retardation*,<sup>55</sup> the Third District Court of Appeals of Texas held that statistical information does not constitute protected health information under HIPAA, and even if it did, this information is disclosable under Texas’s FOI law.<sup>56</sup> In this case, a reporter made a request to the Texas Department of Mental Health and Mental Retardation for “statistical information regarding allegations of abuse and subsequent investigations of abuse in state facilities” as well as the names of said facilities.<sup>57</sup> The Department, concerned that HIPAA

---

<sup>50</sup> *Id.* at 1185. The court likely arrived at the wrong conclusion as to whether at least some of the reports contained information that was not sufficiently de-identified. A covered entity would have a “reasonable basis to believe” that the presence of an address for a single-family home could identify the person from whom the information came, at least for the more recent records, and thus the information would qualify as “individually identifiable health information” under HIPAA. Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 82,462, 82,542–43 (Dec. 28, 2000).

<sup>51</sup> *Daniels*, 844 N.E.2d at 1186 (citing OHIO REV. CODE ANN. § 149.43(A)(1)(v) (West 2002)).

<sup>52</sup> *Id.* at 1187 (citing Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. at 82,667–68).

<sup>53</sup> *Id.* (citing Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. at 82,482).

<sup>54</sup> *Id.* at 1188. The circularity problem may not be so easily solved. Although federal legislators may not have intended to preempt state freedom of information laws, it is not clear that the authors of the state-level legislation intended to override privacy laws like HIPAA either. Because the exemptions in this case mirror each other, there may be no way to ensure a principled statutory interpretation. See *infra* note 72.

<sup>55</sup> No. 03-04-00743-CV, 2006 Tex. App. LEXIS 7655 (Tex. App. Aug. 30, 2006).

<sup>56</sup> See *id.* at \*39–40.

<sup>57</sup> *Id.* at \*1.

protected the information, requested an opinion on the matter from the Attorney General of the state.<sup>58</sup> The Attorney General issued an opinion stating that the information had to be disclosed pursuant to the Texas Public Information Act,<sup>59</sup> as the Act fell within the exception to HIPAA requiring compliance with laws that compel disclosure.<sup>60</sup> The Department disagreed and filed suit.<sup>61</sup> The trial court declared the information confidential and thus not subject to disclosure under state law, avoiding the HIPAA preemption issue.<sup>62</sup>

The Court of Appeals reversed, finding that the information requested did not “relate to issues regarding health or condition in general and certainly [did] not relate to the health or condition of an individual” and therefore was not protected health information under HIPAA.<sup>63</sup> However, the court still considered the issue assuming that the information was protected, as neither party contested that point in their briefs.<sup>64</sup> The *Abbott* court first found that the Public Information Act fell within the exception stated in the HIPAA regulations.<sup>65</sup> The court then reasoned that an exemption preventing disclosure of “confidential” information within the Texas Public Information Act<sup>66</sup> did not apply under usual state law considerations. Further, drawing support from Ohio’s *Daniels* decision, the court pointed out that it would be circular for information to be “confidential” and thus exempted under state law merely because it might be considered protected health information under HIPAA, given the applicability of the HIPAA “required by law” exception.<sup>67</sup> The court therefore concluded that “disclosure of the information requested [would] comply with all relevant requirements of the Public Information Act, HIPAA, and the [HIPAA regulations].”<sup>68</sup>

---

<sup>58</sup> *Id.* The Texas FOI law is peculiar in that it places the burden of enforcement on the Texas Attorney General rather than on the requester of the information. The agency that receives the request must either release the records or request an opinion from the Attorney General’s office. See TEX. GOV’T CODE ANN. § 552.301 (Vernon 2004). If the agency does not request an opinion, then the information “is presumed to be subject to required public disclosure and must be released unless there is a compelling reason to withhold the information.” *Id.* § 552.302.

<sup>59</sup> TEX. GOV’T CODE ANN. §§ 552.001–.353.

<sup>60</sup> *Abbott*, 2006 Tex. App. LEXIS 7655, at \*4–5.

<sup>61</sup> *Id.* at \*6.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at \*14–15.

<sup>64</sup> See *id.* at \*18.

<sup>65</sup> See *id.* at \*32–34.

<sup>66</sup> See TEX. GOV’T CODE ANN. § 552.101 (Vernon 2004).

<sup>67</sup> See *Abbott*, 2006 Tex. App. LEXIS 7655, at \*34–39.

<sup>68</sup> *Id.* at \*40.

*D. Analysis*

The courts in these cases struggled to interpret HIPAA and their own state FOI laws to strike the proper balance between medical privacy and the media's right to gather information. The Secretary of HHS anticipated these controversies and included the "required by law" exception to nondisclosure in the HIPAA regulations to address them.<sup>69</sup> FOIA was intended to fall within this exception.<sup>70</sup> The Secretary further suggested that "generally a disclosure of protected health information [as defined by HIPAA], when requested under FOIA, would come within FOIA Exemption Six."<sup>71</sup> As Exemption Six is the statutory provision in FOIA that addresses privacy, this is a reasonable proposition. The federal agency in this scheme would determine through a balancing test whether the requested information fell within Exemption Six, and all the normal FOIA analyses would apply. The Secretary wisely avoided trying to resolve directly through statutory interpretation the circularity problem posed by the interaction of Exemption Three with the "required by law" exception in HIPAA.<sup>72</sup>

Because of the structural similarities between FOIA and state FOI laws, state agencies and courts would do well to apply the framework outlined by the Secretary, using the relevant Exemption Six analogue that deals with medical privacy or privacy more generally to resolve these controversies. There are two main practical benefits to state entities in adapting the HHS Secretary's analysis of FOIA to their state FOI laws. First, this approach simplifies the analysis by requiring

---

<sup>69</sup> HHS noted that it received many comments urging the deletion of the "required by law" section of the HIPAA Privacy Rule so as to be more protective of privacy. See Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 82,462, 82,666 (Dec. 28, 2000). In response, HHS noted the many situations in which disclosures required by state or federal law might be warranted and stated that "given the variety of these laws, the varied contexts in which they arise, and their significance in ensuring that important public policies are achieved, we do not believe that Congress intended to preempt each such law unless HHS specifically recognized the law or purpose in the regulation." *Id.* at 82,667. Although this conjecture as to congressional intentions may be accurate, the exception does poke many holes, of which FOIA is only one, in the privacy coverage that HIPAA was supposed to supply.

<sup>70</sup> See *id.* at 82,482 ("Uses and disclosures required by FOIA come within § 164.512(a) of the privacy regulation that permits uses or disclosures required by law if the uses or disclosures meet the relevant requirements of the law.").

<sup>71</sup> *Id.* It should be noted that the HHS Secretary's interpretation of FOIA would receive no deference in court. See 5 U.S.C. § 552(a)(4)(B) (2000 & Supp. IV 2004) ("On complaint, the district court of the United States . . . shall determine the matter de novo . . .").

<sup>72</sup> The interaction of these clauses may pose an insurmountable obstacle for both textualist and intentionalist theories of statutory interpretation. For the former, the words themselves seem to present an inescapable circularity for the interpreter. For the latter, the breadth of both FOIA's Exemption Three and HIPAA's "required by law" exception suggest that the legislature and agency meant to defer to all other statutes, or they would have only included enumerated exemptions. This does not resolve the question of which statute governs when the two conflict. Thus, for practical purposes, focusing on Exemption Six and its analogues may be the soundest option.

only an interpretation of state law. Second, there is a wealth of persuasive authority on which to draw to assist in the task. At the federal level, Exemption Six has spawned a large body of case law interpreting its provisions,<sup>73</sup> and state courts could look to this case law for guidance in interpreting state FOI laws. Other states' case law could also serve as a source of persuasive authority.<sup>74</sup>

The Texas court in *Abbott* was the only one to articulate and apply this strategy. In Texas, the Exemption Six analogue comes in the form of a confidentiality exemption, and it clearly did not apply to the statistical information at issue in *Abbott*. This example demonstrates that under the interpretive strategy suggested here, the result in a given case will be highly dependent on the statutory language of the state Exemption Six analogue and the nature of the information requested.<sup>75</sup> The state legislatures have chosen numerous paths to protecting medical information in their Exemption Six analogues, and courts should give force to these different approaches.

The Ohio Supreme Court in *Daniels* correctly took notice of the "required by law" exception, focusing its analysis on the circularity problem and the definition of protected health information under HIPAA. However, it failed to consider explicitly whether the lead risk assessment reports in question fell under its Exemption Six analogue, which takes a different line than Texas by exempting medical records, defined as "any document or combination of documents . . . that pertains to the medical history, diagnosis, prognosis, or medical condition of a patient and that is generated and maintained in the process of medical treatment."<sup>76</sup> Because the lead risk assessment reports and notices were generated as a result of the provision of medical services, it is plausible that they would fall within this exemption.

The Louisiana court in *Hill* made an error of a different sort. It considered its Exemption Three analogue, which provides an exception "as otherwise provided by law" and incorporates by reference a confidentiality exemption similar to Texas's, finding over a vigorous dissent that it applied. But remarkably, it failed to discuss HIPAA's "required by law" exception, applying HIPAA directly to the 911 calls

---

<sup>73</sup> See, e.g., *U.S. Dep't of State v. Wash. Post Co.*, 456 U.S. 595, 602 (1982); *Dep't of the Air Force v. Rose*, 425 U.S. 352, 372 (1976); *Sherman v. U.S. Dep't of the Army*, 244 F.3d 357, 361 (5th Cir. 2001); *N.Y. Times Co. v. NASA*, 920 F.2d 1002, 1005 (D.C. Cir. 1990) (en banc).

<sup>74</sup> In fact, state courts already reference both federal courts, see, e.g., *Campbell v. Town of Machias*, 661 A.2d 1133, 1136 (Me. 1995), and other state courts, as the *Abbott* court did in considering *Daniels*.

<sup>75</sup> For instance, states that use more subjective language similar to that of FOIA likely require application of a balancing test of medical privacy interests and the public interest in disclosure. Those states that make use of more objective language will require judgments merely classifying information instead.

<sup>76</sup> OHIO REV. CODE ANN. § 149.43(A)(3) (West 2002).

and finding the information protected from disclosure on that basis. Because the court arrived at the same result under state law, the outcome of this case would not have been altered by the correct reading of HIPAA. However, with another Exemption Six analogue, the conclusion may have been different.

Journalists and other media entities should be pleased by the Secretary of HHS's commentary and its application to state law as suggested in this Part. In theory, the breadth of the Secretary's "required by law" exception should lead state agencies and courts to proceed as they did prior to HIPAA, considering health information under state Exemption Six analogues. The courts have not yet uniformly followed this approach, so it remains to be seen if HIPAA will in practice have a wider impact.<sup>77</sup> If it does not, this limited effect may be a source of dismay for medical privacy advocates, as it leaves HIPAA toothless when interacting with state FOI laws.<sup>78</sup> However, these backers of stronger medical privacy protections are not without recourse. They could urge state legislatures to modify their FOI laws, as Utah has,<sup>79</sup> to exempt protected health information as defined by HIPAA.<sup>80</sup> Although the outcome under this method would clearly fail to live up to the ideal of a national standard of medical privacy, the completed battle to remove the "required by law" exception to the HIPAA regulations has made that a *fait accompli*.

### *E. Conclusion*

Courts in Louisiana, Ohio, and Texas have been the first to consider the conflict between HIPAA and state FOI laws. The analysis suggested in this Part provides a framework for states to decide future cases that is consonant with the HIPAA regulations as articulated by the Secretary of HHS and faithful to the myriad statutory exemptions to the state FOI laws enacted by the state legislatures. HIPAA may have the effect of raising awareness about medical privacy in many states, but its actual impact on newsgathering from public records will likely be minimal. The media check on the government's activity will continue, and the media watchdog will roam as free as it has in the past.

---

<sup>77</sup> One could also argue that HIPAA has at least raised awareness of medical privacy concerns, and this heightened awareness might affect judgments about whether information is disclosable.

<sup>78</sup> Some of those who commented on the proposed HIPAA regulations predicted this result. *See supra* note 69.

<sup>79</sup> *See* UTAH CODE ANN. § 63-2-107 (2004).

<sup>80</sup> They could also push for state court judges to expand interpretations of existing Exemption Six analogues, as the Louisiana court may have done in *Hill*. However, the case for this judicial "updating" of state FOI laws in reaction to HIPAA is particularly weak, as the HIPAA regulations were only recently implemented, and legislatures have not had much time to react.