

April 18, 2018

Philip S. Kaplan  
Chief Privacy Officer  
Privacy Office  
Department of Homeland Security  
Washington, DC 20528-0655

**RE: Docket No. DHS-2017-0071; Notice of Modified Privacy Act System of Records**

Dear Mr. Kaplan:

We write to offer brief comments in response to the Department of Homeland Security’s March 19, 2018, notice of modified Privacy Act system of records (Notice) concerning the “Department of Homeland Security (DHS)/U.S. Immigration and Customs Enforcement (ICE)-013 Alien Health Records System.”<sup>1</sup>

We are specifically concerned with the Notice’s statement that the ICE Health Services Corps (IHSC) “is not subject to the provisions of the Health Insurance Portability and Accountability Act of 1996 (HIPAA) regulation, ‘Standards for Privacy of Individually Identifiable Health Information’ (Privacy Rule).”<sup>2</sup> We write to urge you to substantiate the claim that IHSC is not a “covered entity” for purposes of the HIPAA Privacy Rule and, barring an adequate explanation, to reconsider this conclusion. Withholding application of the Privacy Rule imposes a barrier to currently and formerly detained individuals—including U.S. citizens—who attempt to access their own medical records, often forcing them to make a request for their own records under the Freedom of Information Act, which introduces intolerable delays and allows IHSC to redact or withhold the records. Failure to recognize the applicability of the Privacy Rule also insufficiently protects those records against nonconsensual dissemination to third parties.

**I. DHS Does Not Adequately Explain Why the ICE Health Services Corps Is Not a Covered Entity for Purposes of the HIPAA Privacy Rule**

As stated in the Notice, DHS takes the position that IHSC is not subject to the HIPAA Privacy Rule. However, DHS’s proffered reasoning is incomplete.

---

<sup>1</sup> 83 Fed. Reg. 12015 (Mar. 19, 2018) (hereinafter, “Notice”), *available at* [https://www.regulations.gov/document?D=DHS\\_FRDOC\\_0001-1647](https://www.regulations.gov/document?D=DHS_FRDOC_0001-1647).

<sup>2</sup> The HIPAA Privacy Rule is found at 45 C.F.R. Parts 160 and 164.

The HIPAA Privacy Rule applies to “covered entities,” which include “health plan[s],” “health care clearinghouse[s],” and “health care provider[s] who transmit[] any health information in electronic form in connection with a transaction covered by this subchapter.”<sup>3</sup> DHS asserts that “IHSC does not meet the statutory definition of a covered [health] plan under HIPAA,” because it falls within the statutory exclusion for “government-funded program[s] . . . [w]hose principal activity is [t]he direct provision of health care to persons.”<sup>4</sup> Therefore, DHS claims that IHSC is not a covered entity for purposes of the Privacy Rule. However while addressing whether IHSC is a “health plan,” DHS does not address whether IHSC meets the definition of a “health care provider.”

Even if IHSC is excluded from the definition of “health plan,” it may fall within the definition of a “health care provider who transmits any health information in electronic form in connection with a transaction covered by this subchapter,” and therefore constitute a covered entity under the HIPAA Privacy Rule.<sup>5</sup> The exclusion cited by DHS for a “government funded program . . . [w]hose principal activity is [t]he direct provision of healthcare to persons” applies to the definition of “health plan,” but not to the definition of “health care provider” found elsewhere in the governing regulations.<sup>6</sup>

Under the regulations, “health care provider” is defined as:

a provider of services (as defined in section 1861(u) of the Act, 42 U.S.C. 1395x(u)), a provider of medical or health services (as defined in section 1861(s) of the Act, 42 U.S.C. 1395x(s)), and any other person or organization who furnishes, bills, or is paid for health care in the normal course of business.<sup>7</sup>

IHSC is a “provider of medical or health services,” which include “physicians’ services,”<sup>8</sup> “services and supplies (including drugs . . . ) furnished as an incident to a physician's professional service,”<sup>9</sup> services provided by physician assistants, nurse practitioners, and clinical nurse specialists,<sup>10</sup> and numerous other routine and specialized medical services.<sup>11</sup> As documented by

---

<sup>3</sup> 45 C.F.R. § 160.103.

<sup>4</sup> *See id.* (definition of health plan at subsection (2)(ii)(B)(1)).

<sup>5</sup> 45 C.F.R. § 160.103.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> 42 U.S.C. § 1395x(s)(1).

<sup>9</sup> *Id.* § 1395x(s)(2)(A).

<sup>10</sup> *Id.* § 1395x(s)(2)(K)

<sup>11</sup> *See generally id.* § 1395x(s).

ICE, IHSC provides such services to ICE detainees hundreds of thousands of times each year.<sup>12</sup> And even if IHSC’s activities were not specifically enumerated by statute (which they are), IHSC clearly falls within the catchall category of an “organization who furnishes . . . health care in the normal course of business.”<sup>13</sup>

As a health care provider, IHSC is a covered entity if it “transmits any health information in electronic form in connection with a transaction covered by [the HIPAA Privacy Rule].”<sup>14</sup> DHS fails to explain why it does not meet this definition, and why it does not therefore qualify as a covered entity for purposes of the HIPAA Privacy Rule. DHS should provide the public with an analysis of whether IHSC (or its fiscal agent, the Veterans Administration Financial Services Center) engages in covered transactions.<sup>15</sup>

In issuing the HIPAA Privacy Rule, the Department of Health and Human Services (HHS) specifically contemplated and rejected a proposal to exempt the health information of “inmates of correctional facilities and detainees in detention facilities” from coverage.<sup>16</sup> Instead, HHS concluded that “[i]ndividually identifiable health information about inmates is protected health information under the final rule.”<sup>17</sup> Moreover, DHS already recognizes that outside medical

---

<sup>12</sup> U.S. Immigration & Customs Enforcement, *Detainee Health Care – FY2015*, <https://www.ice.gov/factsheets/dhc-fy15>.

<sup>13</sup> 45 C.F.R. § 160.103.

<sup>14</sup> *Id.*

<sup>15</sup> “Transaction” is defined as “the transmission of information between two parties to carry out financial or administrative activities related to health care,” including “[h]ealth care claims or equivalent encounter information,” “[h]ealth care payment and remittance advice,” “[c]oordination of benefits,” and “[h]ealth care electronic funds transfers (EFT) and remittance advice.” 45 CFR 160.103. The various types of covered transactions, which generally require interaction with a health plan, are defined at 45 C.F.R. §§ 162.1101 through 162.1801. While publicly available materials do not clearly explain whether IHSC engages in covered transactions with health plans, IHSC has disseminated information to outside medical providers about mandatory payment reductions in the Medicare Fee-For-Service program, which suggests that rates of Medicare/Medicaid reimbursement are relevant to IHSC’s billing practices. *See ICE, IHSC – Managed Care*, <https://www.ice.gov/ihs-managed-care#wcm-survey-target-id>. Further, as explained by the Centers for Medicare and Medicaid Services in the Department of Health and Human Services, although Medicaid generally does not cover health care provided to inmates in public institutions, Medicaid reimbursement is available for care provided to incarcerated persons who are admitted as inpatients to an outside medical institution for a stay of 24 hours or more. *See Centers for Medicare & Medicaid Services, Memorandum re: To Facilitate Successful Re-Entry for Individuals Transitioning from Incarceration to Their Communities*, at 11 (Apr. 28, 2016), <https://www.medicare.gov/federal-policy-guidance/downloads/sho16007.pdf> (citing 42 U.S.C. § 1396d(a)(29)(A) and 42 C.F.R. § 435.1010). IHSC regularly refers detainees to off-site medical providers. *See ICE, Detainee Health Care – FY2015*, <https://www.ice.gov/factsheets/dhc-fy15> (showing 19,483 such referrals in FY 2015).

<sup>16</sup> Standards for Privacy of Individually Identifiable Health Information, 64 Fed. Reg. 59,918, 59,938 (proposed Nov. 3, 1999) (proposing exclusion of inmates’ and detainees’ medical records from the definition of “protected health information”).

<sup>17</sup> Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 82,462, 82,496, 82,540–41, 82,622 (Dec. 28, 2000) (explaining that “[t]he final rule considers individually identifiable health information of individuals who are prisoners and detainees to be protected health information”).

providers with whom ICE contracts to provide health services to detainees are covered entities.<sup>18</sup> It makes little sense to treat individuals' medical records differently depending on whether they are held in the electronic files of IHSC itself or of a contractor providing medical care on IHSC's behalf.

Finally, there is no legal basis for denying HIPAA Privacy Rule coverage based on individuals' immigration or citizenship status.<sup>19</sup> And in any event, the ICE Alien Medical Records System includes medical records of U.S. citizens and lawful permanent residents. That is because ICE has erroneously detained a number of U.S. citizens,<sup>20</sup> lawful permanent residents may be detained while they are in removal proceedings, and many individuals who were not U.S. citizens or lawful permanent residents at the time of their detention have since adjusted status or naturalized.

For these reasons, IHSC must adequately explain why it is not a covered entity to ensure compliance with the protections for individuals' protected health information required by the Privacy Rule.

## **II. Recognizing the Applicability of the HIPAA Privacy Rule to Protected Health Records Held by IHSC Would Protect Current and Former Patients of IHSC**

The HIPAA Privacy Rule is an important tool "to assure that individuals' health information is properly protected while allowing the flow of health information needed to provide and promote high quality health care and to protect the public's health and well being."<sup>21</sup> Among other requirements, the Privacy Rule seeks to achieve these ends by ensuring the right of individuals "to inspect and obtain a copy of" their own medical records<sup>22</sup> and by imposing limitations on unconsented disclosure of protected health information by medical providers.<sup>23</sup> Without application of the HIPAA Privacy Rule, current and former ICE detainees may be deprived of

---

<sup>18</sup> See, e.g., U.S. Dep't of Homeland Sec., Privacy Impact Assessment for the ICE Alien Medical Records System 21 (Nov. 27, 2012), [https://www.dhs.gov/sites/default/files/publications/privacy\\_pia\\_ice\\_alien%20medical%20records%20systems\\_november%202012\\_0.pdf](https://www.dhs.gov/sites/default/files/publications/privacy_pia_ice_alien%20medical%20records%20systems_november%202012_0.pdf).

<sup>19</sup> See 45 C.F.R. § 160.103 (defining an "individual" whose records are protected by the HIPAA Privacy Rule as any "person").

<sup>20</sup> See Joel Rubin & Paige St. John, *How a U.S. Citizen was Mistakenly Targeted for Deportation. He's Not Alone*, L.A. Times (Nov. 29, 2017), <http://www.latimes.com/local/lanow/la-me-ice-citizen-arrest-20171129-story.html> ("Since 2002, Immigration and Customs Enforcement has wrongly identified at least 2,840 United States citizens as possibly eligible for deportation, and at least 214 of them were taken into custody for some period of time.").

<sup>21</sup> U.S. Dep't of Health & Human Servs., *Summary of the HIPAA Privacy Rule*, <https://www.hhs.gov/hipaa/for-professionals/privacy/laws-regulations/index.html>.

<sup>22</sup> 45 C.F.R. §§ 164.502(a)(1)(i), 164.524.

<sup>23</sup> See 45 C.F.R. Part 164, Subpart E.

these crucial protections. Whether or not IHSC is deemed to be a covered entity, the agency should conform its policies and practices to the requirements of the Privacy Rule in order to sufficiently protect the rights of patients in its care.

#### **A. The HIPAA Privacy Rule Protects Patients' Ability to Obtain Their Own Medical Records**

The HIPAA Privacy Rule guarantees individuals “a right of access to inspect and obtain a copy of” their medical records.<sup>24</sup> As the HHS explains,

Providing individuals with easy access to their health information empowers them to be more in control of decisions regarding their health and well-being. For example, individuals with access to their health information are better able to monitor chronic conditions, adhere to treatment plans, find and fix errors in their health records, track progress in wellness or disease management programs, and directly contribute their information to research.<sup>25</sup>

In the absence of the protections of the Privacy Rule, currently or formerly detained persons face an impediment to obtaining their medical records, which they may need in order to effectively participate in their medical treatment, to obtain continuing treatment from other medical providers following release from detention, to obtain redress for potentially deficient medical care received while in detention, or for other purposes. The Privacy Rule also grants executors, administrators, or other representatives of a deceased person the right to obtain the decedent's medical records,<sup>26</sup> which can become particularly important when family members seek to establish whether deficient medical care in ICE detention contributed to the cause of death.

In the absence of Privacy Rule protections, ICE forces many individuals seeking their own medical records from IHSC (or the records of a deceased family member) to rely on requests under the Freedom of Information Act (“FOIA”).<sup>27</sup> In contrast to the strong right to obtain one's

---

<sup>24</sup> 45 C.F.R. § 164.524(a)(1).

<sup>25</sup> U.S. Dep't of Health & Human Servs., *Individuals' Right under HIPAA to Access their Health Information 45 CFR § 164.524*, <https://www.hhs.gov/hipaa/for-professionals/privacy/guidance/access/index.html>.

<sup>26</sup> 45 C.F.R. § 164.502(g)(4).

<sup>27</sup> Although some ICE policy documents state that individuals in detention may directly request their own medical records, other documents state that individuals must make a request pursuant to FOIA. *Compare* ICE ERO, National Detainee Handbook: Custody Management, at 20 (Apr. 2016), <https://www.ice.gov/sites/default/files/documents/Document/2017/detainee-handbook.PDF> (“You have a right to a copy of your medical records upon request. Check your local rules to understand how you can receive a copy of your medical records while you are in custody.”), *with*, Immigration Health Services Corp, Medical Orientation and Health Information, *in* ICE, Northwest Detention Center, Detainee Handbook § 4.1.4, at 32 (“If you would like a copy of your medical record from this facility you may request it at any time by completing the Freedom of

own medical records enshrined in the Privacy Rule, under FOIA the government claims a right to withhold or redact records if they fall within one of the statute’s specifically enumerated exemptions.<sup>28</sup> This includes withholding records the release of which would invade personal privacy<sup>29</sup>—which ICE has interpreted to include the privacy of physicians and other medical professionals, not just the privacy of patients—or which “could reasonably be expected to interfere with enforcement proceedings.”<sup>30</sup> Moreover, FOIA requests are subject to notorious backlogs leading to long delays in processing times, whereas the Privacy Rule requires that records be provided within 30 days.<sup>31</sup>

Several examples demonstrate the problem with denying detained individuals (or their next of kin) of the protections of the Privacy Rule:

- In 2017, Jeancarlo Alfonso Jimenez Joseph, a 27-year-old recipient of Deferred Action for Childhood Arrivals (“DACA”), died in solitary confinement while in ICE custody in Georgia.<sup>32</sup> Although ICE was aware of his history of acute mental health issues and had identified him as a suicide risk, Mr. Jimenez was placed in solitary confinement without access to mental health treatment for prolonged periods. After a plea to ICE medical personnel for an upward adjustment to his anti-psychotic medication went unheeded, Mr. Jimenez committed suicide.

Following Mr. Jimenez’s death, his family sought records from ICE and other components of DHS concerning his treatment and death, including his medical records. Because DHS believes IHSC is not subject to the HIPAA Privacy Rule, the family was forced to request the medical records under FOIA. Yet, after a several-month delay, ICE informed Mr. Jimenez’s family that the agency was withholding the records based on an exemption to FOIA’s disclosure obligation tied to “the open status of ongoing criminal law enforcement investigations” into Mr. Jimenez’s death.<sup>33</sup> To date, Mr. Jimenez’s

---

Information Act (FOIA) G-639 Form.”). These policies do not cover people who are no longer in detention or the family members of former detainees who have died.

<sup>28</sup> 5 U.S.C. § 552(b).

<sup>29</sup> *Id.* § 552(b)(6), (b)(7)(C).

<sup>30</sup> *Id.* § 552(b)(7)(A).

<sup>31</sup> 45 C.F.R. § 164.524(b)(2).

<sup>32</sup> *See* Complaint for Declaratory & Injunctive Relief and Petition for Writ of Mandamus, *Chaverra v. U.S. Immigration & Customs Enf’t*, No. 1:18-cv-00289-JEB (D.D.C. filed Feb. 9, 2018); *see also* Jeremy Redmon, *GBI: ICE Detainee Who Died in Georgia Was Isolated for 19 Days*, Atlanta Journal Constitution (May 16, 2017), <https://www.ajc.com/news/breaking-news/gbi-ice-detainee-who-died-georgia-was-isolated-for-days/DcGHSwotmwlu5oi8yGJqwM/>.

<sup>33</sup> *See* 5 U.S.C. § 552(b)(7)(A) (exempting from disclosure under FOIA “records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings”).

family has been unable to obtain the medical records, meaning that they cannot establish the extent to which Mr. Jimenez's death was a result of deficient medical care in detention.

- ICE frequently redacts the names of treating physicians and other medical professionals before releasing the medical records of former ICE detainees and related documents under FOIA.<sup>34</sup> This includes redacting information from records of people who died while in ICE detention. These redactions, which would not normally be permitted when a person obtains their medical records pursuant to the HIPAA Privacy Rule, frustrate the ability of former detainees, their families, and advocates to assess the quality of care while in ICE custody and to seek redress for deficient care.
- A recent analysis by independent medical experts of ICE reports of its investigations into deaths in custody identified a pattern of substandard and deficient medical care and found that inadequate care contributed to a number of the deaths.<sup>35</sup> Indeed, ICE's own death reviews have identified cases where violations of ICE medical standards contributed to deaths in detention.<sup>36</sup> These analyses follow a number of earlier reports and investigations by non-governmental organizations, press outlets, and government oversight bodies that identified serious deficiencies in medical care provided to ICE detainees.<sup>37</sup> In light of these well documented deficiencies, it is all the more important

---

<sup>34</sup> See, e.g., Human Rights Watch & Community Initiatives for Visiting Immigrants in Confinement, *Systemic Indifference: Dangerous & Substandard Medical Care in US Immigration Detention* 33 (May 2017), [https://www.hrw.org/sites/default/files/report\\_pdf/usimmigration0517\\_web\\_0.pdf](https://www.hrw.org/sites/default/files/report_pdf/usimmigration0517_web_0.pdf) (quoting record from which ICE redacted name of treating physician before release); American Civil Liberties Union, Detention Watch Network & National Immigrant Justice Center, *Fatal Neglect: How ICE Ignores Deaths in Detention* 15 n.104 (Feb. 2016), [https://www.aclu.org/sites/default/files/field\\_document/fatal\\_neglect\\_acludwnnjc.pdf](https://www.aclu.org/sites/default/files/field_document/fatal_neglect_acludwnnjc.pdf) (noting ICE's redaction of name of physician who conducted mortality review of individual who died in ICE custody).

<sup>35</sup> See *Systemic Indifference*, supra note 34.

<sup>36</sup> *Fatal Neglect*, supra note 34.

<sup>37</sup> See Women's Refugee Commission, *Migrant Women and Children at Risk: In Custody in Arizona* (Oct. 2010), [http://www.womensrefugeecommission.org/resources/doc\\_download/656-migrant-women-andchildren-at-risk-in-custody-in-arizona](http://www.womensrefugeecommission.org/resources/doc_download/656-migrant-women-andchildren-at-risk-in-custody-in-arizona); Human Rights Watch, *Detained and Dismissed: Women's Struggles to Obtain Health Care in United States Immigration Detention* (Mar. 17, 2009), <https://www.hrw.org/report/2009/03/17/detained-and-dismissed/womens-struggles-obtain-health-care-united-states>; Americans for Immigrant Justice (formerly Florida Immigrant Advocacy Center), *Dying for Decent Care: Bad Medicine in Immigration Custody* (Feb. 2009), [http://www.aijustice.org/dying\\_for\\_decent\\_care\\_bad\\_medicine\\_in\\_immigration\\_custody](http://www.aijustice.org/dying_for_decent_care_bad_medicine_in_immigration_custody); Nina Bernstein, *Few Details on Immigrants Who Died in Custody*, N.Y. Times (May 5, 2008), <http://www.nytimes.com/2008/05/05/nyregion/05detain.html>; Dana Priest and Amy Goldstein, *System of Neglect: As Tighter Immigration Policies Strain Federal Agencies, the Detainees in Their Care Often Pay a Heavy Cost*, Wash. Post (May 11, 2008), [http://www.washingtonpost.com/wp-srv/nation/specials/immigration/cwc\\_d1p1.html](http://www.washingtonpost.com/wp-srv/nation/specials/immigration/cwc_d1p1.html); Human Rights Watch, *Chronic Indifference: HIV/AIDS Services for Immigrants Detained by the United States* (Dec. 5, 2007), <https://www.hrw.org/report/2007/12/05/chronic-indifference/hiv/aids-services-immigrants-detained-united-states>; U.S. Dep't of Homeland Security, Office of Inspector General, *Treatment of Immigrant Detainees Housed at Immigration and Customs Enforcement Facilities* (Dec. 2006), [https://www.oig.dhs.gov/assets/Mgmt/OIG\\_07-01\\_Dec06.pdf](https://www.oig.dhs.gov/assets/Mgmt/OIG_07-01_Dec06.pdf).

that current and former detainees and their next of kin have reliable access to their medical records in order to evaluate the quality and consistency of care, seek second opinions, or seek accountability or redress after injury or death resulting from deficient care.

These impediments could be easily avoided if the protections of the HIPAA Privacy Rule were applied by IHSC.

We recognize that the Notice contains an announcement that ICE plans to establish a new “IHSC Patient Medical Record Portal (the ‘Portal’), whereby individuals discharged from Immigration and Customs Enforcement facilities (either released from custody or removed from the United States) can log in and get a copy of their electronic medical record.” While the creation of this Portal is laudable, it does not undermine the need to apply the full protections of the Privacy Rule.

As explained in the Notice, the Portal will permit “individuals discharged from ICE custody to access a copy of their electronic medical record for a period of up to 12 months after they are discharged.” Even once the Portal is up and running, it will not provide a means of medical records access for those currently in detention, former detainees more than a year past their release date, or the family members or other personal representatives of former detainees who have died—including those who died in detention. Limiting individuals to an untested Portal with severe access limitations or to a request under FOIA fails to offer the same guarantee of access to medical records as the HIPAA Privacy Rule.

## **B. The HIPAA Privacy Rule Protects Against Unjustified Disclosure of Protected Health Information to Third Parties**

The Notice lists the circumstances under which ICE is considered to be permitted to disclose detainees’ medical records to individuals or entities outside of DHS. Because some of those uses fall short of the requirements of the HIPAA Privacy Rule, DHS should issue a new System of Records Notice conforming its list of routine uses to the requirements of the Privacy Rule. Among the situations where the HIPAA Privacy Rule is more protective of detainees’ privacy than current DHS policy are:

- Litigation-Related Requests
  - DHS permits disclosure of medical records to federal prosecutors, other Department of Justice employees, and “courts, magistrates, administrative tribunals, opposing counsel, parties, and witnesses” for litigation purposes when it

is “relevant or necessary to the litigation” and the litigation involves the United States government or a current or former DHS employee.<sup>38</sup>

- The HIPAA Privacy Rule allows disclosure of records for judicial or administrative proceedings only in response to a court order, or to a “subpoena, discovery request, or other lawful process” accompanied by assurances that reasonable efforts have been made to give the subject of the protected record notice of the request and to secure a protective order.<sup>39</sup> The Privacy Rule thus provides additional protection against unnecessary or unjustified incursions into medical privacy by providing either judicial supervision or alternative protections against misuse (i.e., a protective order).
- Law Enforcement Requests
  - DHS permits disclosure of medical records to law enforcement agencies whenever the record “indicates a violation or potential violation of law . . . and such disclosure is proper and consistent with the official duties of the person making the disclosure.”<sup>40</sup>
  - The HIPAA Privacy Rule requires law enforcement agents to present a court order, grand jury subpoena, or administrative subpoena or summons. Administrative subpoenas and summonses must be limited to seeking information that is “relevant and material to a legitimate law enforcement inquiry,” must be “specific and limited in scope,” and must state that “[d]e-identified information could not reasonably be used.”<sup>41</sup> Requiring legal process of this kind can help protect against unjustified, overbroad, or abusive requests.
- Purposes Related to Detention
  - DHS permits disclosure of medical records for a number of purposes, including medical treatment of a detainee or transfer of a detainee to another facility or governmental entity. In some circumstances, disclosure is permitted even after a detainee has been released.<sup>42</sup>
  - The HIPAA Privacy Rule permits several uses of medical records pertaining to a current detainee in a detention facility, including for treatment of that individual, for health and safety purposes, and for addressing law enforcement and security needs at the facility.<sup>43</sup> Once a person has been released from detention, however,

---

<sup>38</sup> Notice, Routine Uses §§ A, U.

<sup>39</sup> 45 C.F.R. § 164.512(e).

<sup>40</sup> Notice, Routine Uses § G.

<sup>41</sup> 45 C.F.R. § 164.512(f).

<sup>42</sup> See Notice, Routine Uses § Q.

<sup>43</sup> 45 C.F.R. § 164.512(k)(5).

the HIPAA Privacy Rule grants that person “the same privacy rights that apply to all other individuals under this rule.”<sup>44</sup>

### **III. The Need To Apply The HIPAA Privacy Rule is Particularly Pressing In Light of DHS’s Changed Position on Applicability of Privacy Act Protections**

DHS has taken the position that IHSC is not subject to the HIPAA Privacy Rule since at least 2009.<sup>45</sup> The need to better justify this position and to apply the protections of the Privacy Rule has become even more pressing in recent months, however, in light of the government’s change of policy removing Privacy Act protections from people who are not U.S. citizens or lawful permanent residents.

On January 25, 2017, President Trump issued Executive Order 13768, which instructed agencies to “exclude persons who are not United States citizens or lawful permanent residents from the protections of the Privacy Act regarding personally identifiable information.”<sup>46</sup> DHS implemented this directive on April 27, 2017.<sup>47</sup> Although the Privacy Act, on its own terms, applies only to U.S. citizens and lawful permanent residents (or “U.S. persons”), the new policy reverses a longstanding government policy and practice of applying the protections of the Privacy Act to both U.S. persons and non-U.S. persons when their records are held in “mixed systems” of records, which contain records about both U.S. and non-U.S. persons.<sup>48</sup>

---

<sup>44</sup> Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 82,462, 82,541 (Dec. 28, 2000); *see also* 45 C.F.R. § 164.512(k)(5)(iii) (explaining that the special rules pertaining to records of inmates in correctional institutions have “[n]o application after release”).

<sup>45</sup> *See* Notice, Privacy Act of 1974; Dep’t of Homeland Security U.S. Immigration & Customs Enforcement-013 Alien Medical Records System of Records, 74 Fed. Reg. 57,688, 57,689 (Nov. 9, 2009).

<sup>46</sup> Exec. Order No. 13,768, 82 Fed. Reg. 8,799, 8,802 (Jan. 25, 2017), *available at* <https://www.gpo.gov/fdsys/pkg/FR-2017-01-30/pdf/2017-02102.pdf>.

<sup>47</sup> Privacy Policy Guidance Mem. from Jonathan R. Cantor, Acting Chief Privacy Officer, DHS, Re: DHS Privacy Policy Regarding Collection, Use, Retention, and Dissemination of Personally Identifiable Information (hereinafter “2017 DHS Privacy Act Guidance”) (Apr. 27, 2017), *available at* <https://www.dhs.gov/sites/default/files/publications/Privacy%20Policy%20Guidance%20Memo%202017-01%20-%20FINAL.pdf>.

<sup>48</sup> *See* Letter from American Civil Liberties Union to Donald F. McGahn, Assistant to the President & White House Counsel, Re: Privacy Implications of Executive Order 13768: Enhancing Public Safety in the Interior of the United States (Feb. 28, 2017), *available at* [https://www.aclu.org/sites/default/files/field\\_document/2017-02-28\\_aclu\\_letter\\_privacy\\_implications\\_eo\\_13768.pdf](https://www.aclu.org/sites/default/files/field_document/2017-02-28_aclu_letter_privacy_implications_eo_13768.pdf) (discussing policy originally propounded by the Office of Management and Budget in 1975); Mem. from Hugo Teufel III, Chief Privacy Officer, Dep’t of Homeland Security, DHS Privacy Policy Regarding Collection, Use, Retention, and Dissemination of Information on Non-US Persons (Jan. 7, 2009), *available at* [https://www.dhs.gov/xlibrary/assets/privacy/privacy\\_policyguide\\_2007-1.pdf](https://www.dhs.gov/xlibrary/assets/privacy/privacy_policyguide_2007-1.pdf) (DHS statement of policy).

DHS’s policy implementing Executive Order 13768 makes clear that non-U.S. persons have been stripped of several important protections that would otherwise have been provided by application of the Privacy Act:

- The Privacy Act grants individuals a right to review and obtain a copy of their own records.<sup>49</sup> The HIPAA Privacy Rule provides a similar right of access.<sup>50</sup> Without Privacy Act or HIPAA Privacy Rule protections, individuals may be forced to use the Freedom of Information Act, which is subject to the delays and disclosure exemptions discussed above.
- The Privacy Act grants individuals a right to request a “correction of any portion [of their record] which the individual believes is not accurate, relevant, timely, or complete.”<sup>51</sup> The HIPAA Privacy Rule provides a similar right to amend an individual’s medical records.<sup>52</sup> Without Privacy Act or HIPAA Privacy Rule protections, individuals may be denied a right to correct errors in their medical records.
- The Privacy Act prohibits use and disclosure of records without the written consent of the individual to whom they pertain unless one of twelve enumerated exceptions applies.<sup>53</sup> Although DHS imposes limits on the use and disclosure of records in the Alien Health Records System,<sup>54</sup> the limits are more permissive than what the Privacy Act and the HIPAA Privacy Rule permit.

Recognizing the applicability of the HIPAA Privacy Rule would fill the gap left by revocation of Privacy Act protections.

Moreover, the Privacy Act does currently apply to records in the ICE Alien Medical Records System that pertain to U.S. persons, including U.S. citizens who were erroneously placed in deportation proceedings,<sup>55</sup> lawful permanent residents who are placed in detention pending removal proceedings, and individuals who were not U.S. citizens or lawful permanent residents

---

<sup>49</sup> 5 U.S.C. § 552a(d)(1).

<sup>50</sup> 45 C.F.R. § 164.524.

<sup>51</sup> 5 U.S.C. § 552a(d)(2).

<sup>52</sup> 45 C.F.R. § 164.526(a).

<sup>53</sup> 5 U.S.C. § 552a(b).

<sup>54</sup> *See* Notice.

<sup>55</sup> *See* Joel Rubin & Paige St. John, *How a U.S. Citizen was Mistakenly Targeted for Deportation. He’s Not Alone*, L.A. Times (Nov. 29, 2017), <http://www.latimes.com/local/lanow/la-me-ice-citizen-arrest-20171129-story.html> (“Since 2002, Immigration and Customs Enforcement has wrongly identified at least 2,840 United States citizens as possibly eligible for deportation, and at least 214 of them were taken into custody for some period of time.”).

at the time of their detention, but who have since adjusted status or naturalized.<sup>56</sup> Applying the HIPAA Privacy Rule would complement the coverage of the Privacy Act and provide those individuals with the full complement of protections to which they are entitled.

\* \* \* \* \*

In conclusion, we strongly urge DHS to adequately explain why the HIPAA Privacy Rule does not apply to protected health information contained in ICE's Alien Health Records System. Even if DHS is able to demonstrate that the ICE Health Service Corps is not a covered entity for purposes of the Privacy Rule, the agency should apply the protections contained in the Privacy Rule to the medical records of individuals who are or have been held in ICE detention because of the substantial benefits of doing so for ensuring current and former detainees' access to their own records and protecting against unjustified disclosure of records to third parties.

Please contact Nathan Freed Wessler with any questions. He can be reached at [nwessler@aclu.org](mailto:nwessler@aclu.org) or 212-519-7847. Thank you for this opportunity to comment.

Sincerely,

Nathan Freed Wessler  
**American Civil Liberties Union**

Silky Shah  
**Detention Watch Network**

**Human Rights Watch**

Tanya Broder  
**National Immigration Law Center**

---

<sup>56</sup> See 2017 DHS Privacy Act Guidance at 12 (“Once a person changes status to a U.S. citizen or LPR, all records on that individual maintained by DHS are subject to the Privacy Act. This includes all records maintained by the Department on that individual prior to the individual becoming a U.S. citizen or LPR.”).