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FILED
FIFTH DISTRICT COURT
2007 MAY 11 PM 4:00
WASHINGTON COUNTY

BY 

**IN THE FIFTH DISTRICT COURT
WASHINGTON COUNTY, STATE OF UTAH**

STATE OF UTAH,

Plaintiff,

vs.

WARREN STEED JEFFS,

Defendant.

**DEFENDANT'S MEMORANDUM ON
MEDICAL PRIVACY RIGHTS**

Case No. 081500526

Judge James L. Shumate

The Defendant, Warren Steed Jeffs, by and through his attorneys, respectfully submits the following memorandum pursuant to this Court's Minute Entry Order, dated April 20, 2007, which directed the parties to address Mr. Jeffs federal medical privacy rights under the Health Insurance Portability and Accountability Act ("HIPAA"). By way of overview, both HIPAA and state law are premised on a strong public policy to protect

an individual's interest in health care information. The prosecution and detention of Mr. Jeffs does not strip him of his medical privacy rights. Both the federal and state law authorize disclosure of health information pursuant to judicial order. In evaluating any press request for access to health information, the Court will need to factor into the equation the significant interest in medical privacy along with Mr. Jeffs' right to fair trial.¹

I. APPLICATION OF HIPAA PRIVACY REGULATIONS TO PRE-TRIAL DETAINEES

Whether HIPAA privacy rights apply to any health information concerning Mr. Jeffs turns on whether the agencies or persons creating or maintaining his health information are "covered entities" within the meaning of 45 CFR 160.103. This provision defines a "covered entity" as a (1) health plan; (2) health care clearinghouse; or (3) health care provider who transmits any health information in electronic form in connection with certain transactions.² A "health care provider" is broadly defined to include a health care professional and "any other person or organization who furnishes, bills, or is paid for health care in the normal course of business." *Id.* A correctional institution may qualify as a covered entity under HIPAA if it engages in the electronic transmission of the designated transactions. See, e.g., 45 CFR 164.512(5)(ii)

¹ This discussion is limited to the HIPAA issue raised by the Court. Mr. Jeffs reserves his right to further brief constitutional issues, including his privacy and fair trial rights, in connection with particular sealed records to which the press-interveners may seek access.

² A health care provider covered by HIPAA is one who electronically transmits one or more of the following transactions: * (1) Health care claims or equivalent encounter information. (2) Health care payment and remittance advice. (3) Coordination of benefits. (4) Health care claim status. (5) Enrollment and disenrollment in a health plan. (6) Eligibility for a health plan. (7) Health plan premium payments. (8) Referral certification and authorization. (9) First report of injury. (10) Health claims attachments. (11) Other transactions that the Secretary may prescribe by regulation." 45 CFR 160.103 (defining the standard HIPAA transactions).

(indicating covered correctional institutions, including jails, are permitted to use health care information of inmates for limited custodial purposes).

To determine the applicability of HIPAA to Mr. Jeffs health information, additional information would be needed pertaining to the administration of the health care function at the Purgatory Correctional Facility. Typically, jails contract with local health care providers and may have a small medical staff. Assuming that the health care providers for the detainees are covered entities, the use and disclosure limitations of the HIPAA would apply.

The HIPAA regulations protect the privacy interests of prisoners and detainees in their health information. HIPAA limits the use and disclosure to legitimate custodial purposes, as follows:

(5) Correctional Institutions and other law enforcement custodial situations.

(i) Permitted disclosures. A covered entity may disclose to a correctional institution or a law enforcement official having lawful custody of an inmate or other individual protected health information about such inmate or individual, if the correctional institution or such law enforcement official represents that such protected health information is necessary for: (A) The provision of health care to such individuals; (B) The health and safety of such individual or other inmates; (C) The health and safety of the officers or employees of or others at the correctional institution; (D) The health and safety of such individuals and officers or other persons responsible for the transporting of inmates or their transfer from one institution, facility, or setting to another; (E) Law enforcement on the premises of the

correctional institution; and (F) The administration and maintenance of the safety, security, and good order of the correctional institution.

(ii) *Permitted uses.* A covered entity that is a correctional institution may use protected health information of individuals who are inmates for any purpose for which such protected health information may be disclosed.

45 CFR 164.512(5)(I) & (ii).

In addition to the above disclosure limitations, HIPAA generally authorizes a covered entity to disclose protected health information pursuant to a court order. 45 CFR 164.512(e)(1). This section reads, "A covered entity may disclose protected health information in the course of any judicial or administrative proceeding: (i) In response to an order of a court or administrative tribunal, *provided that* the covered entity discloses only the protected health information expressly authorized by such order." *Id.*

(Emphasis added.) HIPAA does not expressly require a court to conduct a balancing of interests when determining whether to disclose health information and under what limitations. *Armstrong v. Commonwealth*, 205 S.W.3d 230 ((Ky. App. 2006)(finding HIPAA attempts to balance competing interests but does not require court to conduct balancing test). HIPAA apparently presupposes that a court will conduct such an analysis.

II. HIPAA AND STATE LAW

HIPAA does not preempt state law to the extent that state law provides for more stringent protection of health information. 45 CFR 160.202. Nor, does HIPAA affect the state law which pertains to the obligation of non-covered entities to protect health information from disclosure. *Id.* Accordingly, if the entities creating or maintaining

health information on Mr. Jeffs do not fall within the purview of HIPAA, Utah state law continues to protect his medical records. Moreover, if the state law more stringently protects health information, the state law applies regardless of whether the entity is covered under HIPAA.

Under the Government Records Access and Management Act ("GRAMA"), records maintained by governmental entities (including the state agencies, state political subdivisions, and the judiciary) which contain medical history, diagnosis, condition, treatment, evaluation, or other such health information are deemed to be "private records." U.C.A. §§ 63-2-103(11)(a) & -302(1)(b). Access to private records is generally limited to the subject of the records or an appropriate representative thereof. *Id.* § 63-2-202(1). Similarly, the Utah Judicial Administration Rule 4-202.02(4)(J) also classifies court records which contain "medical, psychiatric, or psychological records" as "private records."

Like HIPAA, GRAMA provides for disclosure of private records pursuant to judicial order. *Id.* § 63-2-202(1)(e) & (7). GRAMA provisions authorizing disclosure by court order, however, are more stringent than HIPAA in that a court is required to conduct a balancing of interests and, where appropriate, limit the use and disclosure of the record.³ Since GRAMA privacy provisions are more stringent than HIPAA, the court

³ Section 63-2-202(7) of GRAMA requires a court to balance the interests in a private record according to the following criteria:

(7) A governmental entity shall disclose a record pursuant to the terms of a court order signed by a judge from a court of competent jurisdiction, provided that:

- (a) the record deals with a matter in controversy over which the court has jurisdiction;
- (b) the court has considered the merits of the request for access to the record; and

must conduct a balancing of interests according to state law regardless of whether the entity creating or maintaining Mr. Jeffs health information is covered by the HIPAA.

CONCLUSION

In evaluating a request from the press-interveners for release of any health information created or maintained by health providers during the course of Mr. Jeffs' pre-trial detention, this Court must consider the strong medical privacy rights protected by federal and state law. *See, State v. Archuleta*, 857 P.2d 234, 239-41 (Utah 1993)(courts must weigh privacy and fair trial rights against public access). Of course, Mr. Jeffs' right to a fair trial must also be weighed against the public access to health information. Mr. Jeffs has a substantial interest in maintaining the privacy of his medical records. Both state and federal law recognize the strong medical privacy rights of individuals. The public's interest in gaining access to Mr. Jeffs' private medical records pales in comparison to Mr. Jeffs' right to privacy. Accordingly, the media-interveners should be denied access to Mr. Jeffs' private medical records. As stated above, Mr.

(c) the court has considered and, where appropriate, limited the requester's use and further disclosure of the record in order to protect:

(i) privacy interests in the case of private or controlled records;

(iii) privacy interests or the public interest in the case of other protected records;

(d) to the extent the record is properly classified private, controlled, or protected, the interests favoring access, considering limitations thereon, outweigh the interests favoring restriction of access; and

(e) where access is restricted by a rule, statute, or regulation referred to in Subsection 63-2-201(3)(b), the court has authority independent of this chapter to order disclosure.

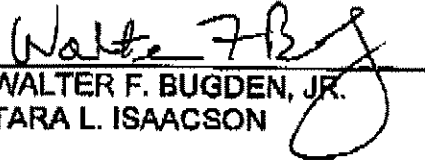
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Jeffs reserves his right to further brief the constitutional issues pertaining to specific sealed records to which the press-interveners may seek access.

DATED this 11th day of May, 2007.

BUGDEN & ISAACSON, L.L.C.

By:


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CERTIFICATE OF SERVICE

I hereby certify that, on the 11 day of May, 2007, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

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