FAIR POLITICAL PRACTICES COMMISSION
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October 13, 2011

Kathryn E. Donovan
Chief Counsel
Assembly Legislative Ethics Committee
P.O. Box 942849
Sacramento, CA 94249-0121

Re: Your Request for Advice
Our File No. A-11-156

Dear Ms. Donovan:

This letter responds to your request for advice, on behalf of Assemblymember Richard Pan, regarding the disclosure provisions of the Political Reform Act (the "Act").[1] This letter is based on the facts presented. The Fair Political Practices Commission ("the Commission") does not act as a finder of fact when it renders assistance. (*In re Oglesby* (1975) 1 FPPC Ops. 71.)

QUESTION

In light of conflicting provisions of the Health Insurance Portability and Accountability Act ("HIPPA"), do the Act's disclosure provisions require Assemblymember Pan to disclose the names of his wife's patients as sources of income to his wife's dental practice or the amounts of payments received from any particular patient?

CONCLUSION

To the extent that the dental practice owned by Assemblymember Pan's wife is a covered entity subject to HIPPA[2], under Regulation 18740, Assemblymember Pan need not disclose the names of his wife's patients, nor the amounts of payments received from any particular patient. Because Assemblymember Pan satisfied the requirements of Regulation 18740 in filing his

[1] The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

[2] We express no opinion as to whether the dental practice owned by Assemblymember Pan's wife is a covered entity under the provisions of HIPPA. For the purposes of this analysis, we must accept Assemblymember Pan's factual assertion that the practice is a covered entity.

annual statement of economic interests for 2010, no further action on his part is required in regards to this previous filing.

FACTS

Assemblymember Pan's wife, Dr. Wen-Li Wang, is a dentist and the sole owner of her dental practice, which has a fair market value of more than $2,000. While Assemblymember Pan is aware of his filing obligations under the Act, it is his belief that the disclosure of patient names and the payments that patients have made to his wife's dental practice is not permitted under the Health Insurance Portability and Accountability Act ("HIPPA"), which is a federal law enacted in 1996.

In filing his annual statement of economic interests (Form 700) for 2010, Assemblymember Pan disclosed his economic interests in his wife's dental practice, the fair market value of the practice, and his community property interest in the gross income of the practice. Assemblymember Pan did not, however, disclose the names of his wife's patients, nor the amounts of payments from any particular patient, following the procedure outlined in Regulation 18740 for privileged information. Shortly thereafter, Assemblymember Pan received a letter from the Commission's Technical Assistance Division, dated April 28, 2011, stating that the name of any patient of his wife's dental practice must be disclosed if the practice received income from the patient of $20,000 or more during the year.

ANALYSIS

Providing the fundamental purposes of the Act, Section 81002(c) states:

> "Assets and income of public officials which may be materially affected by their official actions should be disclosed and in appropriate circumstances the officials should be disqualified from acting in order that conflicts of interest may be avoided."

When reporting an economic interest in a source of income that is a business entity under the Act's disclosure provisions, Section 87207(b) requires the disclosure of the "name of every person from whom the business entity received payments if the filer's pro rata share of gross receipts from that person was equal to or greater than ten thousand dollars ($10,000) during the calendar year." "Income" under the Act is defined to include any community property interest in the income of a spouse. Accordingly, absent an exception, Assemblymember Pan must disclose the name of any person from whom his spouse's solely owned dental practice received payments equal to or greater than $20,000.

Nonetheless, Regulation 18740 provides an exception to disclosure rules if the disclosure would violate a legally recognized privilege under California Law. In pertinent part, Regulation 18740 provides the following:

"An official or candidate need not disclose under [Section] 87207(b) the name of a person who paid fees or made payments to a business entity if disclosure of the person's name would violate a legally recognized privilege under California law."

Notably, Regulation 18740 has been limited to a strict interpretation of the law of privilege in California, as addressed in a comment first published with the original adoption of the regulation in 1976:

"A person's name is not ordinarily protected from disclosure by the law of privilege in California. . . . A patient's name has been protected by the physician-patient privilege only when disclosure of the patient's name would also reveal the nature of the treatment received by the patient because, for example, the physician is recognized as a specialist. See, e.g., *Marcus v. Superior Court*, 18 Cal. App. 3d 22, 24-25 (1971) and *Ascherman v. Superior Court*, 254 Cal. App. 2d 506, 515-16 (1967)." (See also *Kellett* Advice Letter, No. A-96-268.)

This comment, however, was published well before the enactment of HIPPA and is not controlling in our analysis as to whether HIPPA has subsequently established a broad privilege encompassing the permissible disclosure of the names of all patients, and the payments from the patients, that must be recognizable under California law.

HIPPA was first enacted in 1996 (Pub.L. No. 104-191), with the Privacy Rule implemented by regulations adopted by the U.S. Department of Health and Human Services in 2000 (65 Fed.Reg. 82462) and modified in 2002 (67 Fed.Reg. 53182). In general, the Privacy Rule limits the circumstances in which an individual's "protected health information" may be disclosed by certain "covered entities."

For purposes of HIPPA's Privacy Rule, "covered entities" include health plans, health care clearinghouses, and any health care provider if the provider electronically transmits health information in connection with a covered transaction. (45 C.F.R. § 160.102.) "Protected health information" includes all "individually identifiable health information" stored or transmitted by the entity, in any form or media. (45 C.F.R. § 160.103.) "Individually identifiable health information" is defined as any information, including demographic data that identifies the individual or for which there is reasonable basis to believe can be used to identify the individual that also relates to (1) the individual's past, present, or future health or condition; (2) the provision of health care to the individual; or (3) the past, present, or future payment for the provision of health care to the individual. (*Ibid.*) "Individually identifiable health information" includes many common identifiers including names, addresses, birth dates, and Social Security Numbers. (*Summary of the HIPPA Privacy Rule* (2003) U.S. Department of Health and Human Services, available at http://www.hhs.gov/ocr/privacy/hipaa/understanding/summary/ privacysummary.pdf.)

More specifically, the Privacy Rule states that "[a] covered entity may not use or disclose protected health information, except as permitted or required by [45 C.F.R. Part 164, Subpart E] or [45 C.F.R. Part 160, Subpart C]." (45 C.F.R. § 164.502.) Further examining Part 164, Subpart E, and Part 160, Subpart C, the only provisions potentially applicable to disclosure under the Political Reform Act are found in Part 164, Subpart E, Section 164.512, which states:

> "(a) *Standard: Uses and disclosures required by law.*
>
> "(1) A covered entity may use or disclose protected health information to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law.
>
> "(2) A covered entity must meet the requirements described in paragraph (c), (e), or (f) of this section for uses or disclosures required by law."

However, disclosure under HIPPA Section 164.512, Paragraph (a)(1), is limited to Paragraphs (c), (e), and (f), none of which appear to permit disclosure of patient's names under the Act.[3] Moreover, HIPPA Section 160.203 specifically states that "[a] standard, requirement, or implementation specification adopted under [HIPPA] that is contrary to a provision of State law preempts the provision of State law" unless (1) the Secretary of the U.S. Department of Health and Human Services makes a contrary finding under HIPPA Section 160.204[4]; (2) the state law is related to privacy and is more stringent than the Privacy Rule in Part 164, Subpart E; (3) the state law provides for the reporting of disease or injury, child abuse, birth, or death, or for the conduct of public health surveillance, investigation, or intervention; or (4) the state law requires a health plan to report, or to provide access to, information for the purpose of management audits, financial audits, program monitoring and evaluation, or the licensure or certification of facilities or individuals.

Accordingly, it appears that HIPPA establishes a broad class of patient information that may not be disclosed under federal law. In determining whether the federal law must be recognized under California law, we turn to the doctrine of preemption. Preemption is rooted in the Supremacy Clause of the U.S. Constitution, which provides that the "Constitution, and the Laws of the United States which shall be made in Pursuance thereof ... shall be the supreme Law of the Land." (U.S. Const. Art. VI, Cl. 2.) Federal law preempts state law under three circumstances: "1) express preemption, which is achieved when Congress 'so stat[es] in express terms' its intention to preempt state law, 2) field preemption, which is achieved when Congress legislates in a particular area in a 'sufficiently comprehensive [way] to make reasonable the

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[3] HIPPA Section 164.512, Paragraphs (c), (e), and (f), permit disclosure of individually identifiable health information (1) in instances of abuse, neglect, or domestic violence; (2) in certain judicial and administrative proceedings; and (3) for certain law enforcement purposes.

[4] HIPPA Section 160.24 permits a state's chief elected official, or his or her designee, to seek an exemption from HIPPA from the U.S. Department of Health and Human Services. Nothing in this letter shall be construed to preclude the Commission from seeking an exception under Section 160.24 at a later date.

inference that Congress "left no room" for supplementary state regulation,' and 3) conflict preemption, which is achieved when a state law actually conflicts with a federal law, even where Congress has not preempted all state law in that area. [Citations omitted.]" (*Kehm Oil Company v. Texaco, Inc.* (2008) 537 F.3d 290, 298.)

Prohibiting the disclosure of patient's individually identifiable health information by a covered entity, HIPPA expressly preempts state laws except in limited circumstances that do not appear applicable for purposes of disclosure under the Act. Thus, HIPPA establishes a category of privileged information that, pursuant to the doctrine of preemption, must be recognized under California Law. To the extent that the dental practice owned by Assemblymember Pan's wife is a covered entity under HIPPA, Assemblymember Pan need not disclose the names of his wife's patients, nor the amounts of payments received from any particular patient, pursuant to Regulation 18740.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Zackery P. Morazzini
General Counsel

By: Brian G. Lau
Counsel, Legal Division

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