

Editorial:

The Debacle of the National Practitioner Data Bank

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The National Practitioner Data Bank (NPDB) was created by the Health Care Quality Improvement Act of 1986 (HCQIA).¹ Its stated purpose was: "...to restrict the ability of incompetent physicians to move from State to State without disclosure or discovery of the physician's previous damaging or incompetent performance."²

NPDB Information Confidential

Information reported to the NPDB is considered confidential. HCQIA §11137(b)(1) provides, in part: "Information reported under this subchapter is considered confidential and shall not be disclosed (other than to the physician or practitioner involved) except with respect to professional review activity..." HCQIA also provides for public disclosure of information, provided that the data are in a form that would not permit identification of a specific physician/practitioner or entity. Such de-identified data are considered non-confidential: "Information reported under this subchapter that is in a form that does not permit the identification of any particular health care entity, physician, other health care practitioner, or patient shall not be considered confidential."³

De-identified Information Identifiable

If the information in the NPDB Public Use File (PUF) is compared with information in publicly available documents, such as court documents, then the information in the databank can be linked to a specific physician. This type of comparison analysis allows journalists, attorneys, and others to discover information which otherwise may not be discoverable.

Malpractice settlements, for example, are reportable to the NPDB. Malpractice settlements may have confidentiality agreements that by definition would not be in public documents. However, through diligent analysis, one may be able to link a single publicly available court document with certain NPDB data, and then the physician's entire NPDB report can be revealed.

Former NPDB Official Provides Information

In a statement dated Oct 2, 2011, a former NPDB official acknowledged his role in providing extracts from the NPDB PUF to a reporter for the *Kansas City Star*:

From 1997 until my retirement in 2008, I was Associate Director for Research and Disputes for HRSA's [Health Resources and Services Administration] Division of Practitioner Data Banks, which operated the National Practitioner Data Bank. I was recruited to the Division in 1993 to establish the Data Bank's research program. Among other duties, I personally designed the Data Bank's Public Use File and oversaw its development and quarterly updating.... On a volunteer basis, I have also assisted patient safety advocates, the news media, and others in using the Data Bank's Public Use File and understanding the Data Bank. For instance, I created extracts containing Public Use File records for the *Kansas City Star*.... I did not assist the *Star* in identifying records for the physician named in the recent story that led to HRSA's removal of the Public Use File. It should be noted that what I did for the *Star* was no different from what I and my staff did hundreds of times for researchers, including newspapers and other media, as a HRSA employee.⁴

Indeed, the Association of Health Care Journalists has posted a list of examples in which reporters have used the NPDB PUF to research and write stories concerning individual physicians.⁵

HRSA Threatens Reporter

In a letter dated Aug. 26, 2011, the director of the Division of Practitioner Data Banks, Cynthia Grubbs, R.N., J.D., wrote to *Kansas City Star* health reporter Alan Bavley and threatened civil monetary penalties for any violation of the confidentiality regulations governing the NPDB. The letter stated:

The U.S. Department of Health and Human Services (HHS) has been informed that you may be writing an article for publication in the *Kansas City Star* which potentially involves the republication of information obtained from the National Practitioner Data Bank (NPDB). Please note that NPDB reports and the information derived from them are protected by Federal law.... [E]ven the existence of NPDB reports regarding specific practitioners is considered confidential information.⁶

The letter goes on to state: "Any person who violates paragraph (a) shall be subject to a civil money penalty of up to \$11,000 for each violation."

Did HRSA Director Violate Confidentiality?

As the HRSA official's letter to the reporter contained a "cc" at the end of the letter, naming the specific physician involved, the following question is raised: Did the HRSA director violate the very confidentiality regulations (45 CFR 60.15) which she cited in her threatening letter to the reporter? Her letter to the reporter essentially confirmed the existence of a report on the named physician in the NPDB.

Public Use File Removed from NPDB Website

On Sept 1, 2011, the NPDB Public Use File was removed from the NPDB's public website. A special notice posted on the website stated:

On September 1, 2011, HRSA removed the Public Use Data File (PUF) from our website. We regret that we had to take this temporary action and are committed to restore the PUF to our site as quickly as is possible. The statute that governs the NPDB clearly states that we are obligated to keep data about individual practitioners housed in the NPDB confidential. We now know that the PUF in its current form can be manipulated to identify individual practitioners, and therefore were compelled to act.... At this time, a researcher must provide a proposal (including table shells) for their need of data. DPDB will review the request and approve or deny the request for data. DPDB will provide only the variables needed to complete the research. Please contact dpdbdatarequests@hrsa.gov for research requests.⁷

Newspaper Publishes Article

Despite the threat from the NPDB official, the *Kansas City Star* published the article on Sept 4, 2011. Information attached to the article described exactly how the newspaper developed the story:

The *Kansas City Star* analyzed National Practitioner Data Bank records from 1990 through 2010 of physicians who have had payments made on their behalf in Kansas or Missouri for malpractice claims and who have not been disciplined by the state's medical board.... The methodology used to analyze the data was recommended by Robert Oshel, retired Data Bank associate director who created its public use file ... The *Star* linked [the doctor] to entries in the Data Bank by comparing its public reports to information about [the doctor] contained in court filings.⁸

HRSA took no further action against the reporter.

HRSA Failed to Protect Confidential Information

Although the new procedure for obtaining information from the NPDB has drawn protests from journalists, who have complained that the new more restrictive procedure infringes upon their First Amendment rights, one thing is certain: the agency tasked with keeping information in the NPDB confidential utterly failed to prevent violation of confidentiality as required by law. HRSA now fully admits that the data were vulnerable to manipulation so as to identify individual physicians.

Section 11137(b)(1) of HCQIA clearly states, in part:

Information reported under this subchapter that is in a form that does not permit the identification of any particular health care entity, physician, other health care practitioner, or patient shall not be considered confidential. The Secretary (or the agency designated under section 11134 (b) of this title), on application by any person, shall prepare such information in such form and shall disclose such information in such form.

The law clearly required HRSA to accept applications for information and to prepare such information, not simply place thousands of files on a public website in reckless disregard of physician confidentiality.

Conclusion

The lesson to be learned is that, despite assurances of politicians and bureaucrats to the contrary, government is not capable of keeping private information private and confidential. Those who still value their medical privacy would do well to keep this fact in mind as electronic health records and linked databases become more prevalent.

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