

From: Sebastian Arduengo, Staff Attorney
To: Data, Evaluation and Quality Team
Cc: Judith Henkin, General Counsel
Date: January 30, 2018
Re: Criteria for Defining State Agencies and Instrumentalities

Question Presented: What criteria should determine whether an entity is a state agency or instrumentality for the purposes of disseminating Medicare data through VHCURES?

Answer: Dissemination of Medicare data to state agencies and instrumentalities should be limited to entities that are: 1) Partially or fully funded by the state; 2) Performing research directed by the state; and 3) Under the direction of a state official.

1. The Privacy Act.

The dissemination of personally identifiable information (PII) by federal agencies, including the Centers for Medicare and Medicaid Services (CMS)—the agency that administers the Medicare program, is regulated by the Privacy Act of 1974. The Privacy Act strictly limits disclosure of PII such as a name, social security number, or other identifying number or symbol maintained in a “System of Records” (SOR) without the prior, written consent of the individuals to whom the records pertain. It also requires federal agencies to publish a notice in the Federal Register describing the existence and character of a new or modified SOR.

One of the exceptions to the Privacy Act’s general prohibition against the disclosure of PII without consent is “routine use” for a purpose that compatible with the purpose(s) for which the information was collected. *See* 45 C.F.R. § 5b.9(b)(3). A common routine use is to “assist another Federal or state agency with information to enable such agency . . . to fulfill a requirement of a Federal statute or regulation that implements a health benefits program funded in whole or in part with Federal funds[.]” *See, e.g.,* Centers for Medicare & Medicaid Services; Privacy Act of 1974; Report of a Modified or Altered System, 71 Fed. Reg. 17470, 17471 (Apr. 6, 2006).

2. Data Use Agreements with the Federal Government.

CMS maintains several SORs and it uses data use agreements (DUAs) to ensure its disclosures are in compliance with the Privacy Act. Vermont’s use of Medicare data in its All-Payer Claims Database, the Vermont Health Care Uniform Reporting and Evaluation System (VHCURES), is governed by one such DUA with CMS dated July 25, 2013. Under this DUA, the Green Mountain Care Board (Board) may use or reuse original or derivative data without prior written authorization from CMS for additional research projects if such projects are 1) directed and partially funded by the state; and 2) would allow for a Privacy Board or an Institutional Review Board to make the same findings regarding privacy and data security as if the anticipated data recipient were to apply for the data from CMS directly. Through this process, the Board may disseminate Medicare data “with or without direct beneficiary or physician identifiers, to other [Vermont] agencies . . . for research purposes, including to any entity performing research that is directed and partially funded by the state.” DUA Attachment for State Research Request, § A-1 (July 25, 2013).

In other words, the Board may reuse or disclose Medicare data, under the condition that the reuse or disclosure is directed to other state agencies and/or entities conducting qualified research activities on behalf of the State. Although CMS uses the term “on behalf to the state” to describe “any research performed under the direction of a state agency or official that is partially funded by the state[.]” its

guidance makes clear that “[s]tates may apply this definition narrowly or broadly based on the state’s internal operations.” CMS, State Data Requests Memo (June 2012).

3. State Agencies or Instrumentalities Under Vermont Law.

Vermont law does not neatly categorize state agencies or instrumentalities and non-state entities. Under the Public Records Act (PRA), for example, agencies are defined as “any agency, board, department, commission, committee, branch, instrumentality, or authority of the State or any agency, board, committee, department, branch, instrumentality, commission, or authority of any political subdivision of the State.” 1 V.S.A. § 317(a)(2). The Vermont Administrative Procedures Act (VAPA) defines agencies as “a state board, commission, department, agency, or other entity or officer of state government, other than the legislature, the courts, the Commander in Chief and the Military Department, authorized by law to make rules or to determine contested cases.” 3 V.S.A. § 801(b)(1). And, Title 3 of the Vermont Statutes simply lists state administrative departments and administrative agencies. *See* 3 V.S.A. § 212 (listing state administrative departments); 3 V.S.A. § 2202 (Agency of Administration); 3 V.S.A. § 2402 (Agency of Commerce and Community Development); 3 V.S.A. § 2802 (Agency of Natural Resources); 3 V.S.A. § 3002 (Agency of Human Services); 3 V.S.A. § 3102 (Agency of Transportation). For this reason, the U.S. District Court for the District of Vermont concluded that the University of Vermont (UVM) was a state agency for purposes of the PRA and Open Meeting Law, but not the Vermont Administrative Procedure Act. *See Sprague v. Univ. of Vt.*, 661 F. Supp. 1132 (D. Vt. 1987).

a. The University of Vermont.

UVM is unique in that it is designated by the Legislature as “an instrumentality of the state for providing public higher education[.]” 16 App. V.S.A. c. 1 § 1-1, and the Legislature retains the power to amend its charter. 16 App. V.S.A. c. 1 § 1-16. UVM is also subject to legislative oversight, and the Legislature may annually appoint a board of visitors who may examine its affairs. 16 App. V.S.A. c. 1 § 1-8. Moreover, management and control of UVM is entrusted to a 25-member Board of Trustees, 12 of whom are appointed by either the governor or the Legislature. 16 App. V.S.A. c. 1 § 1-2. UVM receives some state funding, and enjoys some state privileges such as exemption from property taxes. *See* 16 App. V.S.A. c. 1 § 1-1. Although it is exempt from laws governing state administrative departments, *see* 1955, No. 59, and operates more autonomously than the state administrative agencies and departments, *see Sprague*, 661 F. Supp. at 1136, “judicial assessments of UVM’s position on the public-private spectrum demonstrate that it is an instrumentality of the state whose officials wield governmental authority.” *State v. Curley-Egan*, 2006 VT 95, ¶ 19. It stands in “stark contrast” to a non-state entity because it “is a creation of the Legislature and remains subject to the Legislature’s control.” *Id.* at ¶ 21.

b. The Office of the Health Care Advocate and the Vermont Program for Quality in Health Care.

The Office of the Health Care Advocate (HCA) and the Vermont Program for Quality in Health Care (VPQ) are also creations of the Legislature, but differ from UVM in some crucial respects. The Legislature requires the Vermont Department of Health to contract with VPQ to, among other things, “implement and maintain a statewide quality assurance system to evaluate and improve the quality of health care services[.]” 18 V.S.A. § 9416(a). Likewise, the Legislature requires the Agency of Human Services to maintain the HCA, which is statutorily mandated to advocate on behalf of Vermont consumers

on health care policy matters, by contract with a nonprofit organization.¹ 18 V.S.A. §§ 9602(a), 9603. Both the HCA and VPQ are partially funded by the state. *See* 18 V.S.A. §§ 9416(a), 9607. Unlike UVM, however, neither entity is subject to significant legislative oversight, and neither is under the management or control of officers appointed by the governor or Legislature. In addition, state contracts typically contain language stating that “The Contractor, and any agents and employees of the Contractor, shall act in an independent capacity and not as officers or employees of the State.” Thus, while it is unclear what position the HCA and VPQ have on the public-private spectrum, both entities are closer to the private end of the spectrum than UVM.²

4. Criteria for Determining Whether an Entity is a State Agency or Instrumentality for the Purpose of Disseminating VHCURES Data.

Based on the Privacy Act, the state’s DUA with CMS, and applicable Vermont law, dissemination of Medicare data to state agencies and instrumentalities should be limited to entities that are:

- *Partially or fully funded by the state:* The Board’s DUA with CMS requires that any entity performing research using Medicare data be at least partially funded by the state;
- *Performing research directed by the state:* The Board’s DUA with CMS requires that any entity performing research using Medicare data performing research directed by the state;
- *Under the direction of a state official:* CMS’s guidance to states regarding requests for Medicare data states that any research using that data must be performed under the direction of a state official. The Vermont Supreme Court has also looked to whether an entity is managed and controlled by state-appointed officials in determining whether or not it is an instrumentality of the state.

¹ The Agency of Human Services contracts with Vermont Legal Aid, a statewide nonprofit law firm, to maintain the HCA.

² Indeed, in its 2016 annual report the HCA flatly declares that it “is not a state agency.” Office of the Health Care Advocate, SFY 2016 Annual Report, 1 (Aug. 2016).