

THE WHITE HOUSE  
WASHINGTON

Health Care -  
Privacy

MEMORANDUM

TO: John Podesta  
Gene Sperling  
Bruce Reed

FROM: Chris Jennings  
Sally Katzen

CC: Karen Tramontano

DATE: May 17, 1999

RE: Medical Privacy Legislation

We wanted to give you a heads up that the medical privacy issue will be heating up.

As you know, Congress has until August 21<sup>st</sup> to make significant headway towards the enactment of legislation; if it doesn't, then HHS gets a green light to issue regulations. The President has recently re-committed to this in both the State of the Union and at the Consumer Financial event two weeks ago.

Beginning with the Senate Labor Committee markup on May 25<sup>th</sup>, the Congress is now sorting through / marking-up a number of privacy bills, putting us in the position of having to react to a wide variety of proposals with several tough issues. Attached is a brief description of four of the major issues. We will know in a few weeks if Congress can make significant progress on legislation by August; if it doesn't, we will face many of the same issues in the regulatory process.

The last time serious thought was given to medical privacy issues was two years ago, and a lot has changed. There is considerable interest in this topic in OVP, among Congressional Democrats, and the elite media. We are launching an interagency process to sort through the major issues, and will keep you advised.

As we reengage in this process, we would like to ask your opinion as to how to proceed on the issue of law enforcement access to medical records. The position we articulated two years ago, which does not impose any new constraints on the ability of law enforcement officials to access to medical records, is extremely controversial and has been criticized by advocates, members of Congress, and the media. This Administration position is less protective of medical records privacy than all of the legislative proposals currently being debated, including the legislation

proposed by Senator Bennett, who represents the most conservative position on this issue.

At a recent hearing in front of the Senate Labor Committee, Senators from both sides of the aisle, including Senator Jeffords, Dodd, Frist, and Kennedy, stated their strong interest in implementing new limits on law enforcement officials' current access to medical records, and Senator Collins specifically criticized the Administration for not moving independently to address this issue. The Committee requested that the Department of Justice report back to them with a list of concessions that they would be willing to make on this issue. DOJ recently drafted a response that defends the agency's current policy but does not take significant steps towards addressing the concerns expressed by the Labor Committee. For example, DOJ is now prepared to agree that the agency should be required to destroy or return medical records after they have finished using them for law enforcement purposes. However, they still have not indicated that they would be willing to accept even the most fundamental provisions included in all three of the Senate bills, which would require law enforcement officials to use some type of legal instrument, such as a warrant, a subpoena, or a court order, before accessing identifiable health information.

We are currently holding the DOJ response and are recommending to you that we wait until after the Labor Committee mark-up on May 25 in order to ensure that our response is not substantively at odds with the current bipartisan Congressional position on this issue. If this approach is acceptable to you, we will proceed accordingly.

After the mark-up, we will want to discuss with you whether it is appropriate to alter our position on the law enforcement issue and, if so, how best to proceed.

## Medical Privacy Issues

- *Law enforcement access.* In the Shalala report, the Administration supported no change to law enforcement's current access to medical records. All of the major Senate bills are more protective of patient privacy, requiring subpoenas or warrants before police and other officials can see patient records.
- *Preemption of state laws.* The Administration is currently allied with privacy advocates in setting a federal floor of privacy protection but allowing states to set stricter standards. The business community and Republicans may kill the bill rather than accept that position. A compromise may exist, at the proper time, to set the bar high and then accept preemption except for carve-outs such as mental health, where stricter state laws would still be allowed.
- *Sharing of research information.* All of the bills agree that patient records can be shared for core medical research approved by investigatory review boards. A complex debate has arisen about how far "research" should be extended, and especially how best to protect privacy in privately funded research. The Administration may need flexibility on how to reach agreement on this issue.
- *Disclosure for "treatment and payment."* Our proposal would not require patient consent where disclosures be made for "treatment and payment." Privacy advocates have pushed for consent in all instances, while industry is pushing to consider many marketing actions as "treatment and payment." There are some tough line-drawing problems here, and again we may need flexibility.