

Legal Consult: Data Privacy Doctrine in Motion?

Peter J. Martin, Esq



Health information privacy law at its core involves a balancing between individuals' privacy interests and countervailing interests such as the need for personal health information for treatment, research, public health and other purposes.

Current state and federal law effects this balancing by providing exceptions to the general rule that an individual's health information is confidential and must not be used or disclosed unless in pursuit of specified legitimate interests. A recent Massachusetts Supreme Court decision in the distinct but related context of public records law contains rulings that may have a significant impact on how this balancing is to take place with respect to health records.

The Supreme Judicial Court's opinion in *Boston Globe Media Partners, LLC v. Department of Public Health* was issued in June of this year. The *Globe* had sought DPH indices of publicly available birth and marriage data. The DPH had argued that these public records could be withheld under two statutory exceptions: either because they were exempted from disclosure by other statutes or because they were medical files or information disclosure of which would lead to an unwarranted invasion of personal privacy. The trial court judge ruled that DPH could withhold the requested records based on the second but not the first exception.

On appeal, the SJC remanded the matter to the lower court for further proceedings on both grounds. In doing so, the court required the lower court to make specific factual findings about the "extent to which the indices requested here could be compared against later-requested indices to reveal information protected from disclosure" under either statutory exception. It noted that the application of the medical files or information exemption from public disclosure "involves a privacy issue we have yet to address in the public records context, namely, whether there is a greater privacy interest in a compilation of personal information than in the discrete information that a compilation summarizes." The court concluded that in certain circumstances there is such a greater privacy interest.

The court's analysis contains two points that may have relevance to medical data privacy law. First, the court noted that a comparison of an individual's data at two points in time increases its informational value and thus increases the individual's privacy interest in that data. Second, the court noted that in the public records context, when balancing individuals' interest in privacy against a public interest in disclosure, the public interest ought to be understood as broader than the traditional interest in learning

about government operations. The court's decision thus contains potential grounds for further strengthening both private and public interests in health-related information, which may lead to changes in how those two interests are balanced.

The first point stresses the significant difference between accessing two rather than just one piece of data. The court's discussion of this is worth quoting at length: "protected information could be gleaned through comparison if the *Globe* or another requester were to obtain in the future an updated version of the same indices requested here. A side-by-side comparison of the same person's data at difference points in time might reveal, for example, the biological parents' names of an individual who has since been adopted, the name of a putative father whose nonpaternity has since been established, and the previous name and sex of an individual who has since completed sex reassignment surgery." While a single datum may not itself be protected health information, placing that data in motion through comparison of data over time may result in information the individual has an interest in protecting. The court thus instructed the lower court to make factual findings "about the extent to which the indices requested here could be compared against later-requested indices to reveal information protected from public disclosure by statute."

THIS ENHANCED UNDERSTANDING OF THE PRIVACY INTEREST IN PERSONAL DATA THAT MAY BE ACCESSED REPEATEDLY OVER TIME MAY INCREASE THE SCOPE OF PRIVACY PROTECTIONS THAT INDIVIDUALS MIGHT EXPECT OR DEMAND IN THIS EMERGING ERA OF BIG DATA ANALYTICS.

While the public interest in the results of such data processing is difficult to dispute, especially in the field of public health, the court's decision here may result in a corresponding increase in the private interest in the privacy of data in motion. This balancing of interests is itself evolving over time.

The second point in the court's analysis treats the other side of that balancing by expanding how the law may understand the public interest in disclosing personal information in the context of public records requests. Traditionally, the public interest in disclosure must be weighed against the privacy interest in non-disclosure of such records. That public interest is usually described as the public's right to know about the operations of government, whether that be confirming that public servants are carrying out their duties lawfully and efficiently or uncovering official misconduct. The court in this decision expands this public interest analysis: "public records laws serve an important

purpose in addition to shining sunlight on government operations . . . Information is the bread and butter of democracy, and the government is in a unique position to collect and aggregate information from which the public may benefit . . . To ensure that the public-private balancing test reflects the various uses of which government information may be put, we conclude that where a requester articulates with specificity a public interest, even one unrelated to government operations, ‘that non-dispositive factor can add weight to whatever [public] interest exists on that side of the balancing test [reference omitted].’”

In this case, the Globe argued that the public had an interest in identifying individuals in news reports, investigating voter fraud and studying birth and marriage trends. As a result of this decision, public records requesters may be given additional grounds, such as these, on which to seek disclosure of such records containing personal information. Informed by the decision in this case, this re-balancing of the public versus the private interests will no doubt take place through a good deal of public records litigation over the coming years.

Although the Supreme Judicial Court in this decision interpreted public records law, and remanded the matter for specific factual findings as to the existence and significance of privacy interests in public records data compilations, the decision contains food for thought with respect to health care data privacy in general. The idea that an individual has a greater privacy interest where his/her data may be accessed over time may lead to an expanded definition of “protected health information” in such areas as parentage, paternity and gender identity. A re-balancing of public and private interests in public records law may eventually lead to a similar re-balancing in health privacy law. How the lower court in this case, and judges in the future relying on this decision, interpret these issues will be of continuing interest to those concerned with health data privacy.



El Basha Middle Eastern & American Cuisine

Serving Central Mass Quality Food for 25 Years!

ELBASHARESTAURANT.COM

256 PARK AVE., WORCESTER • 508-795-0222
 424 BELMONT ST., WORCESTER • 508-797-0884
 2 CONNECTOR RD., WESTBORO • 508-366-2455
 423 BOSTON POST RD., SUDBURY • 978-579-4970
 880 WALNUT ST., NEWTON • 617-916-9076

INQUIRE ABOUT OUR BEAUTIFUL FUNCTION SPACE
 AT THE PARK AVE. LOCATION
 ACCOMMODATES UP TO 150 PEOPLE

OPEN MONDAY - SATURDAY
 OPEN SUNDAYS ON BELMONT ST.
 LUNCH 12:30AM - 3PM • DINNER 4:30PM - 10PM

**COMMONWEALTH
 OF MASSACHUSETTS**

**JUSTICE
 OF THE
 PEACE**



**“FOR ALL YOUR
 WEDDING NEEDS”**

Paul Giorgio
(508) 414-4454
 pgiorgio@pagioinc.com