

EXHIBIT NO.         # 6        DATE:         1-7-05        BILL NO.         5B46        Access to Confidential information for the MH Ombudsman

**1999:** Original legislation creating the MH Ombudsman does not specify access to information except as may be implied from the ombudsman model...i.e.

- a) Has responsibility to receive and investigate complaints against governmental agencies;
- b) Has freedom to investigate on its own motion;
- c) May exercise full powers of investigation, to include access to all necessary information both testimonial and documentary.
- d) The MH Ombudsman was advised by Governor's Office legal staff to acquire a signed release before accessing confidential medical information

**2001:** A bill was introduced to Legislature at the ombudsman's request to clarify legislative intent with regard to access to confidential information:

- a) The ombudsman's request for subpoena power not granted (went to conference committee but was defeated)
- b) New language was added to 53-21-166 (Records to be confidential-exceptions)
- c) Question arises: how broadly can 53-21-166 be applied when the language appears in section of law dealing with commitment?

**2003:** Federal law HIPAA takes effect on 4/15.

- a) Long term care ombudsmen have an understanding with HHS that they are "health oversight entities", as described in the law and can access PHI under certain circumstances.
- b) Protection and Advocacy organizations (such as the Montana Advocacy Program) have a memo of understanding clarifying their authority to access confidential health information is "required by law" so they can access PHI.
- c) State Health Information Programs (SHIP) can access Medicare eligibility information using a unique ID number.
- d) Montana's mental health ombudsman received a letter from Pete Surdock, AMDD privacy officer at the time, concluding that the ombudsman must have written authority from the client to access PHI.
- e) On June 30, 2003, Jean Robertson, DPHHS privacy officer determine that the mental health ombudsman could no longer access the Medicaid data system (MMIS) in order to obtain eligibility information pursuant to an investigation.

Summary of efforts to date to clarify the MH Ombudsman's access to information

1. At the request of the Children, Families, Health and Human Services Interim Committee, Greg Petesch, Legislative Legal Services Director, wrote a letter with his opinion that the MH Ombudsman should be recognized as a health oversight entity (or as a public health authority) and can receive PHI without a written authorization. He believes current state law provides access to PHI and other information needed by the Ombudsman for an investigation.

2. The Mental Health Ombudsman forwarded Mr. Petsch's letter to DPHHS. Subsequently, the Ombudsman had discussions with the DPHHS staff responsible for enforcing HIPAA and other state and federal privacy laws without resolution.
3. DPHHS and the Ombudsman both requested clarification from federal agencies, including the Centers for Medicare and Medicaid Services (CMS) and Office of Civil Rights (OCR) of the Ombudsman access to Medicaid information and to other PHI.
4. The Children, Families, Health and Human Services Interim Committee notified Director Gray of DPHHS it will request an Attorney General's opinion if DPHHS determines it is not able to provide the Ombudsman access to PHI.
5. Director Gray of DPHHS wrote back that until CMS and OCR confirm, in writing, that the Ombudsman may access confidential information without prior written authorization from the individual, the department will require it. Later, CMS confirmed in writing its opinion that federal rule does not allow the Ombudsman to access the Medicaid database directly. OCR has not responded to the request for clarification.
6. DPHHS chief legal counsel wrote to the Committee that DPHHS is willing to accept verbal authorization from the client to the Ombudsman as sufficient to give the Ombudsman access to requested Medicaid eligibility information. However, the Ombudsman will not be given direct access to the MMIS system. Mr. Cater is silent about whether DPHHS recognizes the Ombudsman as a "health oversight entity".