

REPORT OF THE BOARD OF TRUSTEES

B of T Report 29 - A-05

Subject: USA Patriot Act
(Resolution 902, I-04)

Presented by: J. James Rohack, MD, Chair

Referred to: Reference Committee B
(Richard M. Peer, MD, Chair)

BACKGROUND

At the 2004 Interim Meeting, Resolution 902, "USA Patriot Act," was introduced by the American Academy of Child and Adolescent Psychiatry and the American Psychiatric Association. Resolution 902 asked that the AMA "(1) study the potential impact of the USA Patriot Act on patient confidentiality; ... (2) develop recommendations for physicians who are contacted for information about patients pursuant to provisions of the USA Patriot Act; ... (3) advocate for such modifications to the USA Patriot Act as may be necessary to protect patient confidentiality and minimize legal liability for physicians." Reference Committee L communicated the confusion physicians have over the USA Patriot Act's exact disclosure requirements and their concern for the impact that disclosures could have on the physician-patient relationship and patient confidentiality. The House of Delegates referred Resolution 902 to the Board of Trustees.

DISCUSSION OF ISSUE

AMA Policy

AMA policy recognizing and protecting patient privacy and confidentiality as sacrosanct is long-standing and voluminous. The policy presumption in favor of honoring patient confidentiality can be overridden in only select circumstances, such as waiver, a strong public health or safety reason or where required by law.

In "A Declaration of Professional Responsibility," H-140.900 (AMA Policy Database), physicians pledge to "[p]rotect the privacy and confidentiality of those for whom we care and breach that confidence only when keeping it would seriously threaten their health and safety or that of others."

"Confidentiality," E-5.05, states, "[t]he information disclosed to a physician during the course of the relationship between physician and patient is confidential to the greatest possible degree. ... The physician should not reveal confidential communications or information without the express consent of the patient, unless required to do so by law. The obligation to safeguard patient confidences is subject to certain exceptions which are ethically and legally justified because of overriding social considerations." As examples of justified exceptions, AMA policy suggests scenarios involving "a patient [who] threatens to inflict serious bodily harm to another person or to him or herself" and incidents reportable under the law such as "communicable diseases and gun shot and knife wounds."

1 “Privacy in the Context of Health Care,” E-5.059, states that, “[p]hysicians must seek to protect
2 patient privacy in all of its forms... . Such respect for patient privacy is a fundamental expression
3 of patient autonomy and is a prerequisite to building the trust that is at the core of the patient-
4 physician relationship. ... Patients should be informed of any significant infringement on their
5 privacy of which they may otherwise be unaware.” (See also H-320.994, H-315.978).

6
7 H-315.983, “Patient Privacy and Confidentiality,” reads,

8 (1) Our AMA affirms the following key principles ... (a) That there exists a basic right of
9 patients to privacy of their medical information and records...; (b) That patients’ privacy
10 should be honored unless waived by the patient in a meaningful way or in rare instances
11 when strong countervailing interests in public health or safety justify invasions of patient
12 privacy or breaches of confidentiality, and then only when such invasions or breaches are
13 subject to stringent safeguards enforced by appropriate standards of accountability; ... (d)
14 That any information disclosed should be limited to that information, portion of the
15 medical record, or abstract necessary to fulfill the immediate and specific purpose of
16 disclosure. ...

17
18 (8) When breaches of confidentiality are compelled by concerns for public health and
19 safety, those breaches must be as narrow in scope and content as possible, must contain the
20 least identifiable and sensitive information possible, and must be disclosed to the fewest
21 possible to achieve the necessary end.

22
23 (9) Law enforcement agencies requesting private medical information should be given
24 access to such information only through a court order. This court order for disclosure
25 should be granted only if the law enforcement entity has shown, by clear and convincing
26 evidence, that the information sought is necessary to a legitimate law enforcement inquiry;
27 that the needs of the law enforcement authority cannot be satisfied by non-identifiable
28 health information or by any other information; and that the law enforcement need for the
29 information outweighs the privacy interest of the individual to whom the information
30 pertains. These records should be subject to stringent security measures. ...

31
32 In “Confidential Patient Information to Fourth Parties,” H-315.999, it is stated that “[o]ur AMA
33 will investigate, and challenge where appropriate, the authority of federal agents (including armed
34 law enforcement agents) to obtain confidential patient information in the absence of appropriate
35 search warrants.”

36 37 **The USA Patriot Act**

38
39 The “United and Strengthening America by Providing Appropriate Tools Required to Intercept and
40 Obstruct Terrorism Act of 2001,” better known as the USA “Patriot Act” (Public Law 107-56) was
41 passed on October 21, 2001. Section 215 of the Act provides that “[t]he Director of the Federal
42 Bureau of Investigation (“FBI”) or a designee ... may make an application for an order requiring
43 the production of any tangible things (including books, records, papers, documents, and other
44 items) for an investigation to protect against international terrorism or clandestine intelligence
45 activities, provided that such investigation of a United States person is not conducted solely upon
46 the basis of activities protected by the first amendment to the Constitution.”

47
48 Applications shall be made to a judge and “shall specify that the records concerned are sought for
49 an authorized investigation ... to obtain foreign intelligence information not concerning a United

1 States person or to protect against international terrorism or clandestine intelligence activities.”
2 After application, “the judge shall enter an *ex parte* order as requested, or as modified, approving
3 the release of records if the judge finds that the application meets the requirements of this section.”
4 Meanwhile, “[a]n order under this subsection shall not disclose that it is issued for purposes of an
5 investigation,” and, “[n]o person shall disclose to any other person (other than those persons
6 necessary to produce the tangible things under this section) that the FBI has sought or obtained
7 tangible things under this section.”

8
9 The statute immunizes from liability any person who produces tangible things pursuant to an order.
10 (50 USC § 1861(e)).

11
12 Under this statute, physicians can be ordered without a subpoena or warrant to produce a patient’s
13 medical record and they are prohibited from informing the patient of the occurrence. Section 215
14 of the Act is scheduled to sunset on December 31, 2005.

15 16 **Comparing AMA Policy to the Requirements of the Patriot Act**

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18 AMA policies recognize a handful of instances in which patient confidentiality is permissibly
19 circumvented or breached, including where there is a(n): serious threat to the patient’s health and
20 safety or that of others; express consent or waiver; legal mandate; reportable communicable disease
21 present; or legitimate law enforcement inquiry. AMA policy advances a number of safeguards
22 surrounding any disclosure.

23
24 AMA policy specifically recommends safeguard procedures for disclosures requested in the course
25 of a law enforcement investigation. Policy permits these disclosures only after a court order is
26 produced pursuant to a “legitimate” law enforcement inquiry where the law enforcement entity has
27 made a clear and convincing demonstration of need for the information, and shown that there is no
28 alternate information that would satisfy the investigation. Law enforcement interests must
29 additionally be deemed to outweigh the individual’s right to privacy. Additional policy also
30 requires accountability for the disclosure, disclosure of the minimum necessary information in
31 scope and content, and the least identifiable and sensitive disclosure.

32
33 Requests for information under the Patriot Act do require a court order; but a judge has no
34 authority to reject an appropriate request for an order. The order need not result from a
35 “legitimate,” but only an “authorized,” investigation. No evidentiary standards exist; indeed,
36 requestors are not obligated to produce any evidence or demonstrate probable cause to procure an
37 order. The patient whose records are requested does not have to be a terrorist suspect, so long as
38 there exists an investigation relating to “international terrorism or clandestine intelligence
39 activities.” All orders are entered and executed without the knowledge of the patient, and
40 physicians are under a legal gag not to disclose the disclosure. No balancing test comparing the
41 requestor’s need for information to the individual’s right to privacy is conducted. Law
42 enforcement need not demonstrate there is no satisfactory alternative to production of the medical
43 record. Disclosure is not necessarily limited to any one part of a medical record; anything
44 “tangible” can be compelled to be disclosed. Because the patient has no knowledge of these
45 activities, they have no way of contesting the disclosure or holding others accountable for it.

46
47 Supporters of the Act suggest that it contains sufficient checks and balances to prevent
48 inappropriate disclosures. These checks include permitting only certain officials to make requests,
49 requiring requests come only in the context of authorized investigations and requiring a judge’s

1 order to secure the desired records. Also, persons may not be targeted for investigation solely on
2 the basis of activities protected by the first amendment (e.g., speech that criticizes the Patriot Act).
3 Supporters argue that the Act's powers also serve the greater good of combating terrorism.

4 5 **Impact on Patient Confidentiality**

6
7 The Patriot Act requires the US Attorney General to make semi-annual reports to select committees
8 of Congress about the number of applications granted under Section 215 of the Act. This data,
9 however, cannot be obtained through a Freedom of Information Act request because the reports
10 have been classified as pertaining to "national security." (See e.g., *ACLU v. US Dept. of Justice*,
11 265 F. Supp. 2d 20 (D.C. Dist. Ct. 2004)). The secretive nature of disclosures pursuant to the Act,
12 and the classification of all records about disclosures which occur, make the Act's impact on
13 patient confidentiality impossible to track definitively.

14
15 Even without hard data, it can be assumed the Act will cause some patients to avoid seeking care,
16 or to be less than forthcoming in the physician's office. Quality of care may suffer. Unable to
17 protest or even publicly acknowledge a disclosure, medical professionals stand to lose the trust and
18 confidence of their patients and undermine the patient-physician relationship.

19 20 **Complying with a Court Order for Patient Information**

21
22 Physicians are legally obligated to turn over patient records pursuant to a court order issued under
23 the Patriot Act. Neither the Health Insurance Portability and Accountability Act (HIPAA) nor state
24 privacy laws provide justification for non-compliance. (See 45 C.F.R. §164.512(f)(1)). Pursuant
25 to the Act's gag provision, disclosures by a physician of patient records produced under the Act
26 cannot be noted in a patient's medical record or the disclosure log otherwise mandated by HIPAA
27 and required by AMA Policy E-5.059.

28
29 Some experts suggest that physicians offer patients general notices that their medical records are
30 subject to government request. Notices can not mention specific situations. Ideally, such notices
31 would be offered before a physician was ever subject to a government request, simply to advise
32 patients.

33
34 Physicians will not face liability for handing over medical records, since the Patriot Act immunizes
35 any person from liability to other individuals where that person, in good faith, produces tangible
36 things pursuant to a court order. (50 USC § 1861(e)).

37 38 **Attempts to Amend the Patriot Act**

39
40 Before the Patriot Act was passed, many concerned legislators unsuccessfully attempted to soften
41 its language. Still the Act passed nearly unanimously. Senator Russell Feingold (D-Wis.) provided
42 the sole dissenting Senatorial vote on the legislation, and in debate called Section 215 "a truly
43 breathtaking expansion of police power." He said, "in an *ex parte* application to a secret court,
44 with no showing even that the information is relevant to the investigation, the government can
45 lawfully compel a doctor or hospital to release medical records or a library to release circulation
46 records."

1 Many bills attempting to limit the Patriot Act have been introduced since the Act was passed,
2 though none have met with success. Hundreds of counties across the country have passed
3 resolutions opposing part or all of the Act.

4
5 Since passage of the Act, various groups (including the American Civil Liberties Union(ACLU))
6 have filed suits challenging the constitutionality of various sections of the Act. The ACLU
7 unsuccessfully argued that warrantless access to tangible things violates the fourth amendment,
8 which generally bars the government from engaging in unreasonable searches and seizures (i.e.,
9 searches conducted without probable cause). (See In re: Sealed Case No. 02-001, 310 F.3d 717
10 (US For. Intel. Ct. of Review 2002)). Elsewhere, however, the ACLU successfully argued to a
11 New York district court that portions of the Act violated the first and fourth amendments. (See
12 Doe v. Ashcroft, 334 F. Supp. 2d 471 (S.N.Y. Dist. Ct. 2004)).

13
14 Many professional groups have protested the Act, including the National Association of Social
15 Workers, Therapists for Social Responsibility and Therapists for Peace and Justice. The American
16 Library Association, in conjunction with other professional literary groups, also denounced the Act.

17 18 **The AMA's Role**

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20 To date, the AMA has not lobbied on or taken other action directed specifically at the Patriot Act.
21 Section 215 will sunset on the last day of 2005, although President George W. Bush is advocating
22 for reauthorization of "vital tools in the ongoing war on terrorism" (Presidential Press Secretary
23 Scott McClellan, Feb. 1, 2005). Many members of Congress have indicated that reauthorization
24 will face a tough challenge.

25
26 If undertaken, AMA advocacy efforts against the Act could focus on two goals: prohibiting the
27 Act's reauthorization altogether and/or calling for amendment to some of the Act's more expansive
28 provisions.

29
30 If Section 215 is to be reauthorized, enhancing patient confidentiality safeguards should be a
31 priority. Many could be recommended. For example, the term "tangible things" should be
32 narrowed; only specific, discrete and relevant portions of patient medical records should be
33 disclosable; patients subject to disclosures should have to be shown to be the focus or target of or
34 participant in a terrorist or clandestine intelligence investigation; judges should have the discretion
35 to refuse to issue a court order, particularly where there no clear and convincing evidence or
36 demonstration of probable cause that requested information is necessary and/or where alternate
37 sources of information are available; orders should be issued only with the knowledge of the
38 patient to whom the ordered disclosure pertains; the gag provision should be limited to only the
39 most extraordinary circumstances; and the Attorney General should be required to publicly disclose
40 order requests and grants on a periodic basis, among other safeguards mentioned above.

41
42 The Act currently offers physicians sufficient protection from liability for disclosure.

43 44 RECOMMENDATIONS

45
46 The Board of Trustees recommends that the following be adopted and the remainder of this report
47 be filed:

- 48
49 1) That Resolution 902 (I-04) be adopted (Directive to Take Action).

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 - 3
- 2) That our AMA advocate that Section 215 of the USA Patriot Act sunset as scheduled, or, if the Act is reauthorized, for amendments to Section 215 in accordance with the recommendations presented in this report (Directive to Take Action).

Fiscal Note: \$1870 for anticipated advocacy efforts