

To: Mark Burdick, Chair, Board of Behavioral Sciences, All Board Members

California Society for Clinical Social Work  
California Chapter, National Association of Social Workers  
Therapists for Peace and Justice  
Therapists for Social Responsibility

May 17, 2004

The undersigned professional organizations are requesting guidance from the BBS concerning the impact of the USA PATRIOT ACT Section 215 on our profession.

All of us are acutely aware that the Health Insurance Portability and Accountability Act of 1996 (HIPAA) took effect on April 14, 2003. Developed by the Department of Health and Human Services, the new standards “provide patients with access to their medical records and more control over how their personal health information is used and disclosed. They represent a uniform, federal floor of privacy protections for consumers across the country.”<sup>1</sup>

What is not commonly known, however, is that Section 215 of the “Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act” 2 (USA PATRIOT Act), hurriedly passed by Congress on October 25, 2001, allows the FBI to obtain “tangible things (including books, records, papers, documents, and other items) for investigation to protect against international terrorism or clandestine intelligence activities.” This includes medical, psychiatric, and other health care records. Most troubling is that an FBI agent does not need to demonstrate probable cause to the judge that the person under investigation is engaged in criminal activity. The agent only needs to state that “records concerned are sought for an authorized investigation.” Furthermore, a gag order prevents the holder of the record from telling anyone about any transfer of records.

Many citizens and organizations are alarmed by these losses of civil liberties. The American Library Association has taken a strong stance against the provisions of Section 215 in a resolution adopted by the ALA Council on January 29, 2003: “The American Library Association (ALA) opposes any use of governmental power to suppress the free and open exchange of knowledge and information or to intimidate individuals exercising free inquiry...ALA considers that sections of the USA PATRIOT ACT are a present danger to the constitutional rights and privacy rights of library users.”<sup>3</sup> Some libraries have decided to post notices informing library patrons that government agents could request records of borrowed books and that library workers are prohibited from notifying patrons if this occurs. Others are purging borrowing records.

The patient's right to privacy has always been the cornerstone of the physician-patient relationship. Without it, patients may not seek medical care or provide enough information to obtain successful diagnosis and treatment. The disclosure and misuse of personal health information would have a chilling effect on this relationship.

Privacy is even more critical for effective mental health treatment. The 1999 Surgeon General's Report on Mental Health <sup>4</sup> concluded: People's willingness to seek help is contingent on their confidence that personal revelations of mental distress will not be disclosed without their consent.

The U.S. Supreme Court recently has upheld the right to the privacy of these records and the therapist-client relationship. Although confidentiality issues are common to health care in general, there are special concerns for mental health care and mental health care records because of the extremely personal nature of the material shared in treatment.

What does all of this mean to psychotherapists in practice? How do we reconcile the effects on privacy of HIPPA and the PATRIOT ACT? How can patient confidentiality be protected?

Since several of our questions are directly related to the business and professional code for psychotherapists and to consumer protection, we realized that we needed to ask the consumer protection agency, the BBS, for guidance and assistance in dealing with these issues.

After much discussion, we drafted five suggestions, which we felt would help in the protection of consumers and psychotherapists. Please consider the possibility of implementing the suggestions below and give us guidance as to any other actions that might be taken:

1. That all licensed psychotherapists and interns be informed about Section 215 of the PATRIOT ACT.
2. That the conflict of confidentiality created by the PATRIOT ACT be addressed in required law and ethics courses.
3. That, in addition to informing patients about HIPPA regulations, psychotherapists notify patients about Section 215 of the PATRIOT ACT (as many librarians are now doing), perhaps including this information in their written confidentiality and HIPPA statements. (If patients have questions, they can be referred to Attorney General John Ashcroft, Department of Justice, Washington, D.C. 20530 (AskDOJ@usdoj.gov) and/or to their elected representatives in Congress.) It would be helpful for the BBS to suggest language to use in such a statement.

In addition, we encourage the BBS to take steps in the following areas, either through direct action, or by contacting other licensing boards in order to clarify the BBS' role and possible responsibility as follows:

4. That the BBS write a clarification statement concerning the discrepancies between the PATRIOT ACT and other laws concerning confidentiality.
5. That the BBS consider taking a public stance against Section 215 of the PATRIOT ACT and request that Congress pass legislation to reverse this intrusion into the privacy of our patients.

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1. <http://www.hhs.gov/news/facts/privacy.html> (accessed 4/25/04)
  2. [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107\\_cong\\_public\\_laws&docid=f:publ056.107.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_cong_public_laws&docid=f:publ056.107.pdf) (accessed 4/25/04)
  3. <http://www.ala.org/Template.cfm?Section=ifresolutions&Template=/ContentManagement/ContentDisplay.cfm&Content ID=11891> (accessed 4/25/04)
  4. <http://www.surgeongeneral.gov/library/mentalhealth/chapter1/sec4.html#chap7> (accessed 4/25/04)