



U.S. Department of Justice

Civil Rights Division

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*Special Litigation Section - PHB
950 Pennsylvania Avenue, NW
Washington, DC 20530*

March 12, 2008

BY FIRST CLASS MAIL AND FACSIMILE

George Zimmermann
Interim County Attorney
Erie County
69 Delaware Avenue
Buffalo, NY 14202

RE: Investigation of the Erie County Holding Center and the
Erie County Correctional Facility

Dear Mr. Zimmermann:

This is in response to your letter of February 1, 2008. In your letter, you raise concerns regarding privacy issues related to inmate medical records and personnel records of police and corrections officers employed at the Erie County Holding Center ("ECHC") and the Erie County Correctional Facility ("ECCF"). Specifically, you raise concerns regarding various New York statutes and the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"). The Department of Justice shares the County's interest in maintaining the confidentiality of inmate medical records and personnel information, and we trust that the information below adequately addresses your concerns.

As you know, the Department is conducting an investigation of ECHC and ECCF pursuant to the Civil Rights of Institutionalized Persons Act ("CRIPA"), 42 U.S.C. § 1997, which gives the Department authority to litigate when the Attorney General has reasonable cause to believe that a pattern or practice of unconstitutional conditions exists in a facility. We are, of course, in the process of gathering information to determine whether such conditions exist. It is through our process of document review; interviews with administration, staff, and inmates; and visits to the facilities that we gather the information necessary to determine whether the current conditions at the facilities violate the constitutional rights of inmates. We appreciate the County's willingness to cooperate with our efforts.

In connection with this investigation, we have requested documents concerning medical care and treatment of ECHC and ECCF inmates, including medical files. We have also requested documents concerning general correctional practices at ECHC and ECCF, including, but not limited to, disciplinary records of ECHC and ECCF personnel. We appreciate that many of the records and other documents that we routinely review in our investigations are confidential and warrant the highest degree of protection.

First, we would like to address concerns you raised regarding New York's statutory mental health privilege and medical records privileges, which we believe are preempted by CRIPA. The Department's federal authority to investigate the potential violation of constitutional rights under CRIPA contemplates that the Department will be granted access to institutions and the documents relevant to the investigations. Indeed, several United States district courts have ordered jurisdictions to disclose information necessary to carry out CRIPA investigations where the information was otherwise protected by state confidentiality laws. United States v. Illinois, 148 F.R.D. 587, 591 (N.D. Ill. 1993) (ordering access to records of a mental health facility where "recognition of the state created privilege would thwart the Congressional intent and purpose" of CRIPA); United States v. County of San Diego, 1991 WL 642768, No. 91-0764-R(m), at *2 (S.D. Cal. 1991) (holding that CRIPA preempts state confidentiality law and ordering county to provide access to county jails and records); United States v. County of Los Angeles, 635 F. Supp. 588, 594 (C.D. Cal. 1986) (holding that CRIPA preempts state confidentiality law and ordering county to provide access to juvenile halls and juvenile records). Accordingly, we believe that the Department's authority to conduct CRIPA investigations preempts New York's statutory mental health privilege and medical records privilege.

Second, we understand that the County is concerned with our request for the disciplinary records of current and former ECHC and ECCF employees, specifically as it pertains to police and correctional officers. In your letter, you note New York Civil Rights Law, § 50-a, which protects the personnel records of police officers, firefighters, and corrections officers from disclosure, absent individual consent or a court order. New York Civil Rights Law, § 50-a(4); however, provides several exceptions allowing the disclosure of this information under certain circumstances. Specifically § 50-a(4) provides that "the provisions of this section shall not apply to . . . any agency of government which requires the records described in subdivision one, in furtherance of their official functions."

Accordingly, our request for disciplinary records of current and former police and corrections officers are exempt from § 50-a privilege because the request is being made in furtherance of an official Department of Justice investigation. We appreciate your concerns for maintaining the confidentiality of these personnel records, however we would like to receive the requested information unredacted. We understand the sensitive nature of these documents and would like to confirm that we do not voluntarily disclose non-public information to private parties, and we will not do so in this investigation.

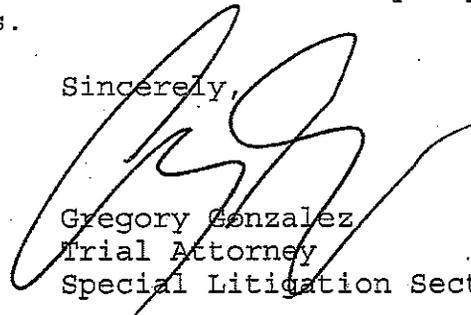
We next address your concerns regarding the privacy regulations of HIPAA. As you are aware, HIPAA places restrictions on health care providers, including institutions such as ECHC and ECCF that provide medical care, which limit the institutions' ability to communicate individually identifiable health information to third parties without the individual's consent. 45 C.F.R. § 164.508. The HIPAA regulations, however, provide several exceptions which allow the disclosure of this information under certain circumstances. Specifically, the HIPAA regulations provide that "[a] covered entity may disclose protected health information to a health oversight agency for oversight activities authorized by law, including [...] other activities necessary for appropriate oversight of: (iv) Entities subject to civil rights laws for which health information is necessary for determining compliance." 45 C.F.R. § 164.512(d). In response to public comments on the draft HIPAA regulations, the Department of Health and Human Services expressly identified the United States Department of Justice's civil rights enforcement activities, particularly enforcement of CRIPA, as an example of "health oversight activities" pursuant to which institutions are exempted from the HIPAA restrictions and permitted to disclose otherwise protected health information. 65 F.R. 82,462, 82,592 (Dec. 28, 2000). The final definition of "health oversight agency" in HIPAA includes agencies or authorities of the United States and persons or entities acting under a grant of authority from agencies authorized by law to enforce civil rights laws for which health information is relevant. 45 C.F.R. § 164.501.

Accordingly, our requests for inmate medical records are exempt from the HIPAA prohibitions against disclosure because the requests are being made for the purpose of enforcement of civil rights laws, specifically CRIPA, for which health information is relevant.

We note that in our CRIPA investigations and litigation, we do not disclose the identities of any individuals at the facilities in our findings, pleadings, or in any correspondence related to the investigation. Our expert consultants are subject to confidentiality agreements. In similar investigations, the Department has entered into confidentiality agreements to protect the confidential information of the individuals institutionalized in the facilities that we investigate. We would be happy to provide a draft confidentiality agreement for your review.

We appreciate the County's continued cooperation in this matter and trust that the information above addresses your concerns regarding the confidentiality of the information we have requested. We look forward to speaking with you, as we have arranged, on March 13 at 1 p.m. to address and clarify any additional questions or concerns.

Sincerely,



Gregory Gonzalez
Trial Attorney
Special Litigation Section