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Jumping Off the Merry-Go-Round: How the Federal Courts Will Reconcile the Circular Deference Problem Between HIPAA and FOIA

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ARTICLES

JUMPING OFF THE MERRY-GO-ROUND: HOW THE FEDERAL COURTS WILL RECONCILE THE CIRCULAR DEFERENCE PROBLEM BETWEEN HIPAA AND FOIA

Catherine J. Cameron+

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I. INTRODUCTION

In February of 2007, the Washington Post published a series of reports over two days documenting the degenerating conditions of Walter Reed Army Medical Center in Washington, D.C., one of the military’s chief recuperation centers for soldiers wounded in the military operations in Afghanistan and Iraq. These articles, highlighting the poor medical care, patient neglect, and deplorable sanitary conditions at Walter Reed, led to the dismissal of many of the hospital’s top brass. Because of these articles, Congress and the President called for a system-wide review and upgrade of medical care for the country’s

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veterans. Notably, these stories were based solely on interviews with patients, their families, and Walter Reed personnel, not hospital records.

Writing stories based solely on personal interviews is not usually the preferred method of fact checking by reporters at major news organizations. Generally, most news organizations prefer to verify information gleaned from personal interviews by checking independent documentation, when available. For seasoned reporters of medical and health-related news, the lack of citation to records from the hospital came as no surprise—reporters have had virtually no access to hospital records since the enactment of the Health Insurance Portability and Accountability Act of 1996 (HIPAA). The Washington Post certainly would have had a stronger story if its reporters could have documented average wait times for medical care, average numbers of misdiagnoses, and medical problems that may have been caused by unsanitary conditions; but this was not a possibility because of the closure of these records under HIPAA.

Perhaps HIPAA would not be such a frustrating obstacle to medical reporters seeking medical records from government if it did not conflict with state and federal open records laws. Since the enactment of HIPAA, there has been much confusion of the statute's intersection with state and federal

3. Id.

4. Priest & Hull, supra note 1.

5. See Maria Trombly, To Check, Or Not to Check?, QUILL, May 2004, at 19 (noting that a fact checker who had worked at Fortune and the Columbia Journalism Review normally "would ask to see all the supporting materials"); see also Robert Niles, How to Report a News Story Online, http://www.ojr.org/ojr/wiki/reporting/ (last visited Mar. 24, 2009) ("Documents also provide a great way to fact-check statements made by an interview subject.").


8. It was argued in the "Developments in the Law" section of the February 2007 Harvard Law Review that the chance of a HIPAA—Freedom of Information Act (FOIA) conflict is minimal because, when both statutes are implicated by a records request, a conflict will not often arise, and if it does, the records will most likely be open under FOIA. Id. at 1064 & n.69. This argument is based on an analysis by the Department of Health and Human Services (HHS) that indicates there are not many records that would fall under the definitions of both statutes, and those records that do would clearly be controlled by FOIA because of language in HHS regulations promulgated to implement the rule. Id. But as this Article demonstrates, the analysis may not be that easy. Despite the seeming acquiescence of HHS to FOIA controlling the status of a record that falls within the definitions of both statutes, that acquiescence seems to be built on a faulty assessment of the law. Not only was the HHS analysis built on the assumption that there would not be many factual instances in which a record held by the government would fall under the purview of both HIPAA and FOIA when there appears to be many factual instances in which the two statutes could conflict, but also the HHS analysis failed to consider the possible argument for an implied repeal of FOIA by HIPAA and the circular deference problem between HIPAA’s “required by law” language and FOIA Exemption Three as explained in this Article.
freedom of information laws. Some of this confusion involves records that this Article argues are most likely to cause conflict between the federal Freedom of Information Act (FOIA) and HIPAA: statistical records of medical incidents and records of deceased individuals.

HIPAA, and the regulations that the Department of Health and Human Services (HHS) have promulgated to implement HIPAA, do not allow certain medical providers to release medical records. When those same records are deemed open for public inspection under a state or federal records law, records custodians at government agencies that fall under the HIPAA definition of "health care providers" may not know which disclosure law controls.

Even more confounding for records custodians at federal agencies is the circular deference problem created by HHS regulations that implement HIPAA's record closure requirements, and the federal FOIA. The HHS regulations contain an explicit exemption to HIPAA's mandated closure of access to medical records when those records are deemed open by another law, such as FOIA. FOIA, in turn, allows agencies to deny public access to records if another statute requires disclosure of those records, such as HIPAA and the HHS regulations promulgated under HIPAA. Because both laws

9. Three state attorneys general have been asked to explain how HIPAA affects state open records laws. See Ky. Att’y Gen. 04-ORD-143 (2004) (detailing how city police and city attorneys were incorrect in their belief that HIPAA controlled access to police records involving persons that received medical treatment); 04018 Op. Neb. Att’y Gen. (2004) (responding to a request by the Director of the Department of Health and Human Services, Finance & Support to clarify whether HIPAA or Nebraska law governs public access to death records); Tex. Att’y Gen. ORD-681 (2004) (responding to questions from a Texas Senator about the intersection of the Texas public records law and HIPAA).


16. 45 C.F.R. § 164.512(a).

defer to the terms of the other, records custodians and courts are faced with an inability to determine which statute controls the public nature of the record.

This confusion has made its way into state court systems, causing at least two states to reconcile the state’s open records law with HIPAA. The federal court system has yet to face a case in which the interaction of FOIA with HIPAA must be resolved, but such a case is surely on the horizon. This Article argues that such a case should end much like the state cases have ended—with a decision that finds that the HHS interpretations of HIPAA allow FOIA to control. Although a federal court could find that HIPAA and the HHS regulations impliedly repealed Exemption Six of FOIA, the FOIA exemption that governs access to medical records, this finding is not likely because courts disfavor implied repeal analysis and there are several other choices the court could make that would not force it to find an implied repeal of FOIA.

If the court does not entertain an implied repeal argument, it will next need to look to the text of the statutes to determine if the statutes can be read in concert. Because of the circular deference problem between these two statutes, a court will have difficulty determining which statute controls on the face of the statute and, consequently, will look to legislative intent to resolve the conflict. The only indication of intent is found in the preamble of the 2000 regulations that implemented HIPAA, in which HHS indicates that FOIA should control access to a record covered by HIPAA and FOIA. Although

18. See Cincinnati Enquirer, 844 N.E.2d at 1183–84 (finding that the Ohio public records law controlled access to a record that fell under the terms of HIPAA and the HHS regulations implementing HIPAA); Abbott v. Tex. Dep’t of Mental Health & Mental Retardation, 212 S.W.3d 648, 665 (Tex. App. 2006) (ordering the release of a record under the Texas open records law despite the record also falling under the terms of HIPAA and the HHS regulations implementing HIPAA). These cases are discussed further in Part III of this Article, infra.

19. Conflicts between HIPAA and state law happen even outside of the state open records context. In Moreland v. Austin, 670 S.E.2d 68 (Ga. 2008), the Georgia Supreme Court found that HIPAA preempted a state statute that allowed a patient’s attorneys to speak to physicians regarding the patient’s condition outside of the presence of the patient, id. at 71–72.

20. Karen Petroski, Comment, Retheorizing the Presumption Against Implied Repeals, 92 CAL. L. REV. 487, 488–89 (2004) (The article explains that “[implied repeal] arguments fail in the face of another long-standing interpretive guideline, which advises courts to presume that such a repeal was not intended and to reconcile the statutes if at all possible. This guideline, the presumption against implied repeals, functions as an obstacle to application of the rule described above. The presumption against implied repeals, unlike the later-enacted-statute rule, embodies a policy [sic] of hostility to the notion of statutory updating unless the legislature makes that updating explicit. In its strongest form, the presumption amounts to a sort of clear-statement rule—allowing for repeal only by express provision—that negates the very notion of an implied repeal.” (footnotes omitted)).


this intent was that of an agency and not the legislature, because the legislature expressly delegated its authority to implement HIPAA to HHS, a court should defer to HHS's regulation and its interpretation of its regulation contained in the preamble to the rule. Based on this intent, a court will likely find that FOIA controls this analysis.

This Article introduces the conflict between HIPAA and FOIA in Part II, which explains the provisions of HIPAA and FOIA and the HHS regulations that cover access to medical records held by the federal government. Part III delineates the practical realities agency personnel will face when a record request falls under both HIPAA and FOIA. Part IV of this Article highlights how two states have dealt with HIPAA's conflict with state statutes to see how those courts have resolved a similar conflict. Part V delves into the case law interpreting Exemption Six of FOIA to conclude that HHS's assessment that Exemption Six should not cause a conflict with FOIA is inaccurate. Finally, this Article argues that a federal court should decide that public access to a medical record held by a government health provider is dictated by FOIA's Exemption Six instead of HIPAA and the HHS regulations. The clash of these laws will not be resolved easily because of the potential for an argument of implied repeal of FOIA's Exemption Six by HIPAA, the circular deference problem between the two statutes, and the lack of a strong statement of legislative intent indicating how Congress wanted this conflict to be resolved. Although the HHS preamble, which notes that HHS believes FOIA should control access to a medical record held by a government agency, may not be the strongest indication of legislative intent, a court should follow HHS's belief because it is the only reference to this conflict found in the record of the discussions that leads to the creation of this body of law.

23. When Congress expressly delegates its authority to implement a statute, as Congress did in the text of HIPAA, courts give "controlling weight" to agency regulations "unless [those regulations] are arbitrary, capricious, or manifestly contrary to the statute." Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844 (1984); see also United States v. Morton, 567 U.S. 822, 834 (1984). Scholars disagree over the deference that should be given to an agency's determination of a preemptive effect of a regulation stated in a preamble to the regulation. Compare Alvin D. Lurie, Age Discrimination or Age Justification? The Case of the Shrinking Future Interest Credits Under Cash Balance Plans, 54 TAX LAW. 299, 318 (2001) (arguing that because the Court has accorded Chevron deference to an amicus brief, deference would be extended to a regulation's preamble), with Thomas W. Merrill, Preemption and Institutional Choice, 102 NW. U. L. REV. 727, 772 (2008) (arguing that a preamble should be given no deference). However, because HIPAA and its accompanying preamble were the "fruit of a notice-and-comment rulemaking," United States v. Mead Corp., 533 U.S. 218, 230–31 (2001), and Congress and the regulation itself are silent on which law should control in the event of a conflict between HIPAA and FOIA, the court should defer to HHS's interpretation in the preamble to its regulation that FOIA should control this conflict.
II. HISTORY OF APPLICABLE HIPAA SECTIONS, HHS REGULATIONS, AND FOIA PROVISIONS

HIPAA was enacted in 1996. The main purpose of HIPAA was to allow employees to take health coverage with them when they changed jobs. In order to effectuate the transfer of health insurance, it is often necessary for medical documentation to be transferred among many "health care provider[s]," defined as "a hospital, critical access hospital, skilled nursing facility, comprehensive outpatient rehabilitation facility, home health agency, hospice program, or . . . a fund," "a provider of medical or other health services . . . and any other person furnishing health care services or supplies." In order to maintain the privacy of this information, Title II of HIPAA levies significant monetary penalties against "a person" who releases any documentation that could identify a patient to a third party. Despite the fact that HIPAA clearly closes access to records in the hands of government "health care providers," there does not appear to be any mention in the Congressional Record of any concern that HIPAA would conflict with the federal FOIA. HIPAA goes on to instruct HHS to create rules that make the transfer of health care information among health care organizations more efficient.

It took HHS several years, but in December of 2000, HHS finalized regulations implementing HIPAA, commonly known as "The Privacy Rule."
Those regulations did not become effective until April 14, 2001, and entities covered by the regulations had until April 14, 2003 (2004, for smaller health plans), to comply with the Privacy Rule. The Privacy Rule gives further definition to the type of information that would “identify” a patient by laying out eighteen criteria agency personnel should consider before releasing a document. Some of these criteria are obvious—names, social security numbers, and addresses are all prohibited from being on a document that is released to a third party. Some criteria, however, are not so obvious, such as the city or county in which the person resides. The Privacy Rule also leaves it to the discretion of the health care provider to redact this information in order to make these records releasable.

The Privacy Rule does allow for disclosure of identifiable medical records if “disclosure is required by law and the use or disclosure complies with and is

privacy regulations, which commentators have blamed on 50,000 public comments that were submitted to the agency while it was drafting the regulations. See id.

33. E-HEALTH BUSINESS, supra note 32, at 71. Much of this delay was because of a change in presidential administrations and a technical amendment to the final regulations. Id.


35. 45 C.F.R. § 164.514(b)(2)(i) (2007). The Privacy Rule directs agencies that medical records can be released if the following “identifiers” are redacted from the document:

(A) Names;
(B) All geographic subdivisions smaller than a State, including street address, city, county, precinct, zip code, and their equivalent geocodes, except for the initial three digits of a zip code if [the zip code is populous;]
(C) All elements of dates (except year) for dates directly related to an individual, including birth date, admission date, discharge date, date of death; and all ages over 89 and all elements of dates (including year) indicative of such age, except that such ages and elements may be aggregated into a single category of age 90 or older;
(D) Telephone numbers;
(E) Fax numbers;
(F) Electronic mail addresses;
(G) Social security numbers;
(H) Medical record numbers;
(I) Health plan beneficiary numbers;
(J) Account numbers;
(K) Certificate/license numbers;
(L) Vehicle identifiers and serial numbers, including license plate numbers;
(M) Device identifiers and serial numbers;
(N) Web Universal Resource Locators (URLs);
(O) Internet Protocol (IP) address numbers;
(P) Biometric identifiers, including finger and voice prints;
(Q) Full face photographic images and any comparable images; and
(R) Any other unique identifying number, characteristic, or code . . . .

Id. 36. Id.
37. Id.
38. Id. § 164.514(b).
limited to the relative requirements of such law."\textsuperscript{39} Presumably, this provision would defer to FOIA for records covered by FOIA.\textsuperscript{40} In the preamble of the Privacy Rule, HHS indicated that it intended, through the Privacy Rule, to "preserve access to information considered important enough by state or federal authorities to require its disclosure by law," that HHS did "not believe that Congress intended to preempt each such law," and that the Privacy Rule was intended to "avoid any obstruction to the . . . health care provider's ability to comply with its existing legal obligations."\textsuperscript{41}

In the preamble to the Privacy Rule, however, HHS made it clear that it did not feel this conflict would occur often.\textsuperscript{42} The agency pointed to Exemption Six of FOIA and said that it was consistent with HIPAA.\textsuperscript{43} The preamble, however, did admit that there may be a conflict between HIPAA and FOIA if the record was that of a deceased patient because privacy rights die with a patient,\textsuperscript{44} although the preamble noted that many courts have found that family members can have a privacy right in the records of a deceased relative.\textsuperscript{45} Left open, of course, is what happens with records of a deceased patient who has no relatives or who dies within those jurisdictions where the privacy right of relatives has not been recognized.\textsuperscript{46} Additionally, this declaration by HHS fails to recognize that Exemption Six of FOIA has a caveat that the medical records must be an "unwarranted invasion of personal privacy,"\textsuperscript{47} which is not

\begin{itemize}
\item \textsuperscript{39}. Id. § 164.512(a)(1).
\item \textsuperscript{40}. See id. HHS certainly reads the provision that way. See supra note 22 and accompanying text.
\item \textsuperscript{41}. Standards for Privacy of IndividuallyIdentifiable Health Information, 65 Fed. Reg. 82,462, 82,667–68 (Dec. 28, 2000).
\item \textsuperscript{42}. In the Preamble to the Privacy Rule, HHS wrote, "[w]e believe that generally a disclosure of protected health information, when requested under FOIA, would come within FOIA Exemption 6," thereby allowing the agency to deny access to the record. Id. at 82,482. In the Preamble, HHS also responded to summarized comments that it had received from the public regarding a proposed version of the Privacy Rule. One of those comments noted the potential conflict that could occur if a record is open to public access under FOIA but closed under HIPAA. HHS responded, "[w]e disagree, however, that most protected health information will not come within Exemption 6 of FOIA." Id. at 82,597.
\item \textsuperscript{43}. Id. at 82,482.
\item \textsuperscript{44}. Id. The Second Restatement of Torts indicates that "[e]xcept for the appropriation of one's name or likeness, an action for invasion of privacy can be maintained only by a living individual whose privacy is invaded." \textit{RESTATEMENT (SECOND) OF TORTS: INVASION OF PRIVACY} § 6521 (1976).
\item \textsuperscript{45}. 65 Fed. Reg. at 82,597.
\item \textsuperscript{46}. The right of privacy of a relative of a deceased is often called a "relational right of privacy." Clay Calvert, \textit{The Privacy of Death: An Emerging Jurisprudence and Legal Rebuke to Media Exploitation and a Voyeuristic Culture}, 26 LOY. L.A. ENT. L. REV. 133, 150 (2006). This area of the law is new, but has been growing since the U.S. Supreme Court recognized such a right in \textit{Nat'l Archives & Records Admin. v. Favish}, 541 U.S. 157 (2004). See Calvert, supra, at 135.
\item \textsuperscript{47}. 5 U.S.C. § 552(b) (2000).
\end{itemize}
language included in HIPAA or the Privacy Rule. Thus, HHS's assertion that the FOIA and HIPAA are consistent may be overstated.

FOIA has been around much longer than HIPAA, the original version of FOIA appearing on the books in the 1960s. 48 FOIA requires all government agency records to be open to the public 49 unless they fall within the enumerated exceptions. 50 Exemption Six of FOIA does ostensibly cover the medical records that are encompassed by HIPAA. 51 Exemption Six, however, only requires closure of those records when they would cause an "unwarranted invasion of personal privacy," 52 a caveat not found in HIPAA or HHS's interpretation of HIPAA. There is significant case law on Exemption Six, 53 much of which indicates that a court must balance the public interest in accessing records that show "what the[] government is up to" 54 against any privacy interest in the records in making a determination whether a record is exempted from the reach of FOIA through Exemption Six. 55

Just like the Privacy Rule's "required by law" exception that allows other laws to control the release of a record in the situation where HIPAA would have otherwise mandated closure of the same record, 56 FOIA, in turn, has an exception that allows other laws to control the closure of a record in a situation where FOIA would have otherwise mandated release of the same record. 57 FOIA Exemption Three allows agencies to close access to records if another federal statute "establishes particular criteria for withholding" those records from public view. 58 This particular exemption is often criticized as a means by which Congress can sneak FOIA exemptions into large pieces of legislation so that access proponents are not on notice that an exemption to FOIA is on the table during legislative discussions. 59 Additionally, opponents of Exemption

50. Id. § 552(b) (2000).
51. Id. § 552(b)(6).
52. Id.
53. See Developments in the Law—The Law of Media, supra note 7, at 1065 & n.73 (citing U.S. Dep't of State v. Wash. Post Co., 456 U.S. 595, 602 (1982); Dep't of the Air Force v. Rose, 425 U.S. 352, 372 (1976); Sherman v. U.S. Dep't of the Army, 244 F.3d 357, 361 (5th Cir. 2001); N.Y. Times Co. v. NASA, 920 F.2d 1002, 1005 (D.C. Cir. 1990) (en banc)).
55. See id.
57. 5 U.S.C. § 552(b)(3).
58. Id.
Three argue that agencies can point to language in a statute as a basis to withhold documents generated under it, although that language may not have been intended by Congress as "criteria for withholding." Senators Leahy and Cornyn have introduced several bills in the Senate over the last three years to fix loopholes in FOIA that allow the government to withhold records from the public. Just in the last year, one of Leahy and Cornyn's bills succeeded in becoming law, but the provision that would have removed the "criteria" language was negotiated out of the bill before it was passed. In response, Senators Leahy and Cornyn proposed the OPEN FOIA Act of 2008, which would require any statute that was to exempt records from FOIA to specifically reference that intent in the text of the statute. The OPEN FOIA Act of 2008 has been referred to a Senate committee; but even if it passes, the text of the bill does not appear to make the law retroactive. Consequently, as the law stands, the criteria language remains, and could feasibly allow, agencies to deny access to any record HIPAA deems closed.

III. THE PRACTICAL EFFECTS OF CONFLICTS BETWEEN HIPAA AND FOIA

Although HIPAA was largely contemplated as a law that would affect private health care providers, federal agencies do fall under the definition of "health care provider" in many contexts. At the federal level, health care providers include hospitals that treat military personnel and agencies that collect medical data for statistical purposes, such as HHS, the Centers for Disease Control, and the National Institutes of Health. There are potentially
Avoiding Circular Deference

even more agencies that might have medical records for other reasons, like NASA, which monitors the health of astronauts, or the Federal Bureau of Prisons, which maintains medical records of all federal prisoners. In addition, there are many equivalent state entities that could fall under the definition of "health care provider," depending on what kind of records and data those agencies compile.

The circular deference problem is perhaps the most troubling aspect for agency personnel and the courts when attempting to determine if a record that is covered by HIPAA, the Privacy Rule, and FOIA is open for public inspection. HIPAA, of course, leaves HHS to implement the requirement that medical records be kept confidential, which is what the Privacy Rule attempts to cover. The Privacy Rule then directs agencies to not release records unless another federal law requires disclosure. FOIA, in turn, defers to HIPAA and the Privacy Rule by indicating in Exemption Three that records should be withheld from public view if another federal statute has developed "criteria" for keeping records from public view, which HIPAA has done with the help of the Privacy Rule and its criteria for what constitutes an identifiable medical record. This circular deference leaves agency personnel and the courts with no real direction on what law to follow.

HHS has yet to explicitly direct agencies on how to deal with the fact patterns that could truly be implicated by both statutes. HHS's discussion of what agencies should do in the event of a conflict between HIPAA and FOIA in the preamble to the Privacy Rule neglects to explain to agencies how to resolve the issue of whether HIPAA or FOIA controls public access to records of deceased patients with no relatives. HHS has also failed to tell agencies what to do when a record seeker requests statistical records that do not identify individual patients by anything other than the city or county in which they live.

The Centers for Disease Control works with state and local governments "to monitor and prevent disease outbreaks." Id. The National Institutes of Health is the U.S. government's chief medical research department and is also under the rubric of HHS. Id.

67. REVIEW OF NASA'S LONGITUDINAL STUDY OF ASTRONAUT HEALTH 9–10 (David E. Longnecker et al. eds., 2004) (detailing NASA's efforts to monitor astronaut health in order to better understand the effect of space on the human body).

68. AUDIT DIV., U.S. DEP'T OF JUSTICE, THE FEDERAL BUREAU OF PRISONS' EFFORTS TO MANAGE INMATE HEALTH CARE i (2008), available at http://usdoj.gov/oig/reports/BOP/a0808/ final.pdf ("The Federal Bureau of Prisons (BOP) is responsible for confining federal offenders in prisons that are safe, humane, cost-efficient, and secure. As part of these duties, the BOP is responsible for delivering medically necessary health care to inmates in accordance with applicable standards of care.").


70. See supra notes 24–38 and accompanying text.

71. See supra note 39 and accompanying text.


73. See 45 C.F.R. § 160.103 (2007); id. § 164.514(b)(2)(i).

74. See supra note 46.
These are records that would be closed under HIPAA and the Privacy Rule, but would be open under Exemption Six of FOIA because their release is unlikely to be considered an "unwarranted invasion of personal privacy."  

Factual situations like these have not risen to a level of any reported court action. The federal appellate courts have yet to deal with a document that appears to fall squarely within the disclosure rules of FOIA, the closure rules of HIPAA, and the Privacy Rule. Considering HIPAA's stiff monetary penalties for violating its terms, it is likely that agency personnel making these decisions are erring on the side of closure. Although the federal courts have not yet dealt with a conflict over the release of medical records under HIPAA and FOIA, at least two states have been faced with this sort of agency personnel confusion, and determined that the agencies erred in denying access to the records in those cases. If what has happened in the states is any indication of what the federal judiciary should brace for, there will be a suit shortly that requires the federal courts to reconcile these two statutes.

IV. CONFLICTS BETWEEN HIPAA AND STATE OPEN RECORDS LAWS

Since HIPAA went into effect, two state courts have been faced with cases involving records that seem to fall within the disclosure rules of a state open records statute and the closure requirement of HIPAA. Ohio and Texas courts have dealt with this issue and both found that the state open records law prevails when pitted against HIPAA. Both cases were born out of a media

76. See supra note 29. The day after President Obama was inaugurated, he issued a memo to all executive department heads that directed agencies to "adopt a presumption in favor of disclosure" to "usher in a new era of open Government." Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 4683, 4683 (Jan. 26, 2009). Although this is a laudable goal, the state of the current law still allows courts to fine an individual $50,000 for failing to comply with HIPAA, whereas FOIA contains no mechanism for fining individuals who do not comply with its terms unless the individual is refusing to comply with a court order. See 5 U.S.C § 552(a)(4)(G).
77. State ex rel. Cincinnati Enquirer v. Daniels, 844 N.E.2d 1181, 1183-84 (Ohio 2006); Abbott v. Tex. Dep't of Mental Health & Mental Retardation, 212 S.W.3d 648, 651 (Tex. App. 2006). The Kentucky attorney general also looked at a case in which a police department denied access to police records by invoking HIPAA, and determined that the denial was not mandated under HIPAA. Ky. Att'y Gen. 04-ORD-143 (2004).
78. See Cincinnati Enquirer, 844 N.E.2d at 1187; Abbott, 212 S.W.3d at 659-60.
79. Cincinnati Enquirer, 844 N.E.2d at 1183-84; Abbott, 212 S.W.3d at 651. At least three state attorneys general have also been asked their opinion on whether their state open records laws conflict with HIPAA. All of these opinions have found that there is a conflict, but that the state's laws ultimately control access to the record at issue. The Texas and Nebraska Attorneys General have found that the "required by law" language of HIPAA defers to their state open records act. See 04018 Op. Neb. Att'y Gen. (2004); Tex. Att'y Gen. ORD-681 (2004). The Kentucky Attorney General found that the agency at issue—a city police department—was not a "covered entity" under HIPAA and therefore HIPAA did not apply to the record. Ky. Att'y Gen. 04-ORD-143 (2004).
80. Cincinnati Enquirer, 844 N.E.2d at 1183; Abbott, 212 S.W.3d at 651.
request for a document from a state government agency that was routinely granted prior to HIPAA, but was denied in these instances because of HIPAA.\textsuperscript{81} Although a conflict between state law and federal law includes federalism considerations that would not be at issue in a conflict between two federal laws, the Ohio and Texas cases are illuminating for purposes of this Article because they happen to include the very factual circumstances that will likely cause problems between the federal FOIA and HIPAA—a request for statistical information of medical occurrences within a city or state.\textsuperscript{82} The Texas decision involves a law that defers to HIPAA in a manner similar to FOIA.\textsuperscript{83}

The Ohio court was faced with the issue of a request for statistical information from a state agency that fell within the terms of HIPAA and the Ohio Public Records Act.\textsuperscript{84} In 2004, \textit{Cincinnati Enquirer} reporter Sharon Coolidge was pursuing a story on children whose blood tests showed high levels of lead.\textsuperscript{85} These children happened to live in low-end rental housing.\textsuperscript{86} The Cincinnati Health Department sent out notices to property owners stating that the unit they lived in “ha[d] been reported to [the] department as the residence of a child whose blood test indicate[d] an elevated lead level.”\textsuperscript{87} The report detailed not only the lead contamination found at the property and how the owner should abate the concern, but also included a general reference to the fact that a child at that residence tested high for lead.\textsuperscript{88} Coolidge wanted the Health Department to release 343 lead citations and any other reports it had issued over the previous ten years.\textsuperscript{89} The Health Department did not comply with Coolidge’s request, and based its refusal on HIPAA and the Privacy Rule.\textsuperscript{90} The \textit{Enquirer} filed a mandamus action, requesting that the court compel the records’ disclosure pursuant to the Ohio Public Records Act.\textsuperscript{91} The court of appeals denied the writ of mandamus, and reasoned that even though “the lead-investigation reports are public records generated as a result of the health department’s mission in the community,” [the Health Department] had established “an exception to disclosure” of the records because they contained “reference[s] to blood test results for children currently residing at particular

\begin{itemize}
\item \textsuperscript{81} \textit{Cincinnati Enquirer}, 844 N.E.2d at 1184; \textit{Abbott}, 212 S.W.3d at 651.
\item \textsuperscript{82} \textit{Cincinnati Enquirer}, 844 N.E.2d at 1181; \textit{Abbott}, 212 S.W.3d at 648.
\item \textsuperscript{83} \textsuperscript{83} \textit{See Abbott}, 212 S.W.3d at 652.
\item \textsuperscript{84} \textit{Cincinnati Enquirer}, 844 N.E.2d at 1183–84.
\item \textsuperscript{85} \textit{Id.} at 1184.
\item \textsuperscript{86} Sharon Coolidge, \textit{The Toxic Effects of Lead: One Family’s Story}, \textit{CIN. ENQUIRER}, June 25, 2006, at E4 [hereinafter Coolidge, \textit{Toxic Effects}].
\item \textsuperscript{87} \textit{Cincinnati Enquirer}, 844 N.E.2d at 1185 (internal quotation marks omitted).
\item \textsuperscript{88} \textit{Id.}
\item \textsuperscript{89} \textit{Id.} at 1184.
\item \textsuperscript{90} \textit{Id.}
\item \textsuperscript{91} \textit{Id.}
\end{itemize}
Prior to the Ohio Supreme Court’s decision in this case, the Health Department did release citations that went to multi-family residences, which amounted to about half of the citations issued, because no citation could be tracked to any individual unit, and therefore not to any identifiable patients. But the department continued to withhold citations that went to single-family dwellings. The Supreme Court of Ohio decided that the Health Department should have released all the lead citations because one “mere nondescript reference to ‘a’ child with ‘an’ elevated lead level” was not protected health information under HIPAA. The Ohio Supreme Court went further and opined that even if the reports contained protected health information, they still would have been open to public inspection. The court noted a “circular reference” problem between the Ohio Public Records Act and HIPAA. While the Privacy Rule indicates that the Health Department can release protected health information if “disclosure is required by law,” the Ohio Public Records Act exempts from disclosure documents closed by federal law. The court focused on the intent behind the passage of HIPAA and case law that interpreted the Ohio Public Records Law to resolve the conflict. Because HHS indicated that Congress did not intend to supersede any existing disclosure laws, such as the Ohio Public Records Act, and because Ohio case law required that a record be made public if there was any doubt if it fell within the terms of the Public Records Act, the court decided that the record would be open if it fell within the terms of both statutes.

Although the legal battle took two years, Coolidge was finally able to publish her article in 2006. Her story consisted of a five-page special

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92. Id. (quoting State ex rel. Cincinnati Enquirer v. Adcock, C-040064, 2004 WL 3015329, at *3 (Ohio Ct. App. Dec. 30, 2004)). In Ohio, a party that has been denied access to a government record may seek redress by filing a writ of mandamus in the Court of Common Pleas, Court of Appeals, or Supreme Court of Ohio. OHIO REV. CODE ANN. § 149.43(C)(1) (LexisNexis 2007). It appears from the text of this case that the Cincinnati Enquirer initiated this writ in the Court of Appeals. Cincinnati Enquirer, 844 N.E.2d at 1184.

93. Cincinnati Enquirer, 844 N.E.2d at 1184.
94. Id.
95. Id. at 1185–86.
96. Id. at 1186.
97. Id. at 1187; see also supra note 14 (explaining circular deference as opposed to reference).
98. Id. at 1186–87 (emphasis in original).
99. Id. at 1187.
100. Id. at 1187–88 (citing Ohio Legal Rights Serv. v. The Buckeye Ranch, Inc., 365 F. Supp. 2d 877 (S.D. Ohio 2005)); see also Ohio Legal Rights Serv. v. The Buckeye Ranch, Inc., 365 F. Supp. 2d 877, 879, 889–90 (S.D. Ohio 2005) (finding that records of the treatment of a mentally ill patient that were open under the Ohio Public Records Law, were not closed under HIPAA because the “required by law” exception allowed the Ohio Public Records Law to control the disclosure of the records).
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The special section focused on several families whose small children had suffered lead poisoning in low-end housing, but could not afford to get out of the lead contaminated housing, and the failure of the Housing Court to make the landlords of these properties abate the lead paint. Two days after the article was published, the Mayor of Cincinnati demanded change and the health department began investigating and demanding clean up of all of these properties.

A Texas court has also looked at the intersection of a state open records act and HIPAA and came to the same conclusion as the Ohio court in the Cincinnati Enquirer case—that the “required by law” language means that HIPAA does not preempt the state open records law. In Abbott v. Texas Department of Mental Health & Mental Retardation, a reporter for a Dallas TV station sought access to statistical reports held by Texas’s Department of Mental Health and Mental Retardation. Specifically, the reporter requested statistics involving the allegations of abuse and the investigations of those allegations, including the name of the facility at which the abuse allegedly occurred, and the date on which it occurred. The department handed over a statistical report that indicated information about allegations and investigations, but did not tie those incidents to specific facilities. Pursuant to the Texas Public Information Act, the department sought the opinion of the Texas Attorney General for whether statistics tied to specific facilities would violate HIPAA. The attorney general opined that the records were open under the Texas Public Information Act and because of the “required by law” language in the HHS regulations, the required release of the document would not violate HIPAA. Although the Texas law does exempt information from being disclosed that is “confidential by law,” creating a circular deference problem between the two statutes, much like FOIA and HIPAA, the attorney general reasoned that a record does not become “confidential” simply because

102. Id.
103. Id.; see also Coolidge, Toxic Effects, supra note 86.
104. Sharon Coolidge, Records Battle: Challenge to HIPAA Over Lead Records Results in Court’s Groundbreaking Ruling, http://frontier.cincinnati.com/blogs/footnotes/ireleadstory.pdf (last visited Mar. 4, 2009). In a section of the Cincinnati Enquirer’s website devoted to reporter blogs about how they developed a story, Coolidge detailed the record battle that she went through to get access to the lead reports that formed the basis of her story, and the swift government response to the story. Id.
106. See Reporters Guide to Medical Privacy, supra note 14 (noting that Abbott involved a Dallas television station).
107. Abbott, 212 S.W.3d at 651.
108. Id. at 651–52.
109. Id. at 652.
110. Id.
111. Id.
it falls within the terms of HIPAA or the Privacy Rule. The department sued the attorney general’s office, arguing that this opinion was incorrect. The trial court agreed, finding that the documents were exempted from the Texas Public Information Act because they were “confidential”; however, this decision was overturned by the Texas Court of Appeals. The court of appeals began its opinion by questioning whether the information was even “protected health information” under HIPAA because it did not have any identifiable information about individual health records. The court continued its analysis based on the assumption that the information was “protected health information” because that issue was not fully briefed by the parties. The court noted that the “required by law” exception seemed to encompass the Texas Public Information Act, thereby making the record open under the act absent an exception. Furthermore, the court agreed with the attorney general that the record did not become “confidential by law” under HIPAA, thereby skirting the circular deference problem. Additionally, the Department of Mental Health looked at the language in the HHS preamble that indicates that Exemption Six of FOIA—the exemption that HHS indicated in its regulatory preamble—would cover the same records HIPAA covers, and wrote that because the intent of the Texas law is the same the court should find that medical records are exempted as the preamble indicates; but the court refused because it found that the request was not for an individual’s records. The Texas court also looked at both the language of the HHS preamble that indicated HHS did not believe Congress intended to preempt any state laws through HIPAA, and the public interest in disclosing abuse or neglect at a mental hospital, and the court found that its opinion properly balanced these two interests. 

Although Texas and Ohio are the only two states with reported cases involving a perceived conflict between HIPAA and state open records laws, there are surely more states that will face similar decisions. Whether those states follow Ohio and Texas might largely be determined by the strength of

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112. Id.
113. Id.
114. Id. at 652–53, 664.
115. Id. at 655.
116. Id. at 657. Implicit in this statement from the court is that it may have ruled that these documents were not “protected health information” had the issue been fully briefed by the parties.
117. Id. at 660.
118. Id. at 662.
119. Id. at 661–62.
120. Id. at 662–63.
121. A case out of Louisiana, Hill v. East Baton Rouge Parish Department of Emergency Medical Services., 925 So. 2d 17 (La. Ct. App. 2005), dealt with a record covered by HIPAA and the Louisiana public records law, but the court found that both laws exempted the records from public view; thus, there was no conflict between the two statutes, id. at 21, 23.
the state's open records law. Both Ohio and Texas have laws that place considerable emphasis on public access to government records and both states have significant case law recognizing the importance of public access to records. Whether states with weaker public access laws follow Ohio and Texas remains to be seen, but there is a long history of case law at the federal level that interprets the intent of FOIA much in the same way as the Ohio and Texas cases—that public disclosure is an important right that must be weighed against other rights. This history should cause a federal court to consider the law in a manner similar to the Ohio and Texas courts.

V. CASE LAW INTERPRETING EXEMPTION SIX TO THE FEDERAL FOIA

HHS claims that the "medical records" provision of Exemption Six of FOIA would exempt from FOIA all records covered by HIPAA and the Privacy Rule. A careful review of the case law does not bear this out.

According to the HHS explanation of identifiable records, any record that does not redact someone's name, social security number, address, zip code, city, or county designation, among other criteria, is exempt from public disclosure. Any agency personnel who discloses such information faces stiff penalties. Exemption Six, however, gives agency personnel discretion to withhold medical documents from public view because the standard it specifies for withholding the documents is one that would be a "clearly unwarranted invasion of personal privacy." Although Exemption Six does not focus on whether the documents identify an individual like the HIPAA regulation does, it can be presumed that, similar to HIPAA, releasing a document constitutes an "unwarranted invasion of personal privacy" if a reader can identify the individual whom the document relates to. Based on this language, courts have leeway under Exemption Six to find that documents listing only city or county

122. See State ex rel. Cincinnati Enquirer v. Daniels, 844 N.E.2d 1181, 1183 (Ohio 2006); Abbott, 212 S.W.3d at 651.

123. See REPORTERS COMM. FOR FREEDOM OF THE PRESS, OPEN GOVERNMENT GUIDE: OHIO (2006), http://www.rcfp.org/ogg/item.php?c=full&state=OH&level=F1 (indicating that Ohio has a history of public access laws that date back to 1787 and a long history of cases that "recognize[] that unrestricted public access to governmental records was one of the elements distinguishing American government from the government of England"); REPORTERS COMM. FOR FREEDOM OF THE PRESS, OPEN GOVERNMENT GUIDE: TEXAS (2006), http://www.rcfp.org/ogg/item.php?c=full&state=TX&level=F1 ("Texas has a rich political heritage, one which has historically demonstrated a strong commitment to the free flow of information and open government.").


125. See supra note 35.

126. See supra note 29.

designations do not identify an individual, and would not trigger an “unwarranted invasion of personal privacy.” In addition, courts have interpreted the “unwarranted invasion of personal privacy” language as calling for a balancing test between the public’s right to know and the privacy interests of the individual at issue in the document, which is not a test that HIPAA invokes.\(^{128}\) Probably the most striking difference between HIPAA and Exemption Six is that HIPAA requires closure if a record falls within its terms,\(^{129}\) while Exemption Six makes closure discretionary if a record falls within its terms.\(^{130}\) Because of these differences, it is likely that records that fall under HIPAA will not fall under Exemption Six, confusing agency personnel over which statute to follow.

A few federal appellate court cases highlight the differences between the considerations over disclosure of medical records under Exemption Six and closure of those same records under HIPAA. In Dobronski \textit{v.} FCC, the plaintiff requested sick and vacation leave records of an FCC official.\(^{131}\) The FCC believed the request should be denied under Exemption Six.\(^{132}\) Dobronski argued that the public had an interest in investigating whether a government official is taking unwarranted sick and vacation leave.\(^{133}\) The court used a four-part balancing test to determine if the records were an unwarranted invasion of personal privacy: “(1) the plaintiff’s interest in disclosure; (2) the public interest in the disclosure; (3) the degree of the invasion of personal privacy; and (4) the availability of any alternate means of obtaining the requested information.”\(^{134}\) The court noted that there was little privacy interest in the sick leave records because the records only indicated the employee’s name, social security number, and the date that sick leave was taken, but contained no indication of the actual sickness the leave was taken for.\(^{135}\) Additionally, the court determined that the information could not be found any other way.\(^{136}\) Because the public interest in knowing whether a government official is taking unwarranted sick and vacation leave largely outweighed the privacy interest, the court held that the records were not closed

\(^{128}\) See, for example, \textit{McDonnell v. United States}, 4 F.3d 1227 (3d Cir. 1993), as a court setting forth the test for determining whether the release of a record would be an unwarranted invasion of privacy as “a balancing of the public interest served by disclosure against the harm resulting from the invasion of privacy. In striking this balance, the court must keep in mind that there is a presumption in favor of disclosure.” \textit{Id.} at 1251–52 (quoting \textit{I.B.E.W. Local Union No. 5 v. Dep’t of Housing & Urban Dev.}, 852 F.2d 87, 89 (3d Cir. 1988)).

\(^{129}\) 45 C.F.R. § 164.502(a) (2007).

\(^{130}\) 5 U.S.C. § 552(b)(6).

\(^{131}\) Dobronski \textit{v.} FCC, 17 F.3d 275, 277 (9th Cir. 1994).

\(^{132}\) \textit{Id.}

\(^{133}\) \textit{Id.}

\(^{134}\) \textit{Id.} at 278 (citing \textit{Multnomah County Med. Soc’y v. Scott}, 825 F.2d 1410, 1413 (9th Cir. 1987)).

\(^{135}\) \textit{Id.} at 279.

\(^{136}\) \textit{Id.} at 280.
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by Exemption Six.\textsuperscript{137} Perhaps this particular record would not have been covered by HIPAA because the FCC would not be considered a "health care provider" under HIPAA, but the \textit{Dobronski} case does emphasize the different considerations between the requirements of HIPAA and Exemption Six. Had this record been held by a government entity that would be deemed a "health care provider" under HIPAA, there is no indication that the analysis of Exemption Six would be any different.

To be sure, there are cases where the court has found that the amount of identifying information in a medical record does cause the release of the record to become an "unwarranted invasion of personal privacy."\textsuperscript{138} In these cases, however, the court still weighs that privacy interest against the public interest,\textsuperscript{139} which is a balancing test that HIPAA and the Privacy Rule do not require agency personnel to consider when deciding whether to release a record. Additionally, based on the \textit{Dobronski} case, the court can find that records containing identifying information, which HIPAA would require to be closed from public view, are open under Exemption Six.\textsuperscript{140}

The case law on the privacy rights involved when the person identified in the records is deceased is inconsistent, which does not bode well for documents regarding deceased persons not creating a conflict if they are covered by both FOIA and HIPAA. In \textit{McDonnell v. United States}, the Third Circuit Court of Appeals found that if the subject of a record is deceased, "the Government must assert some privacy interest other than the individual's interest in keeping this personal information from public view in order to justify continued withholding of the requested information."\textsuperscript{141}

Probably the biggest difference between HIPAA and FOIA is the very nature of the presumption behind each statute. FOIA was created with a presumption of disclosure.\textsuperscript{142} If a court finds that the call is fifty–fifty on disclosure, the FOIA case law indicates that the court should err on the side of disclosure.\textsuperscript{143} Additionally, the terms of FOIA make exemptions permissible, but not

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\textsuperscript{137} \textit{Id.}

\textsuperscript{138} \textit{E.g.,} Whitehouse v. U.S. Dep't of Labor, 997 F. Supp. 172, 175 (D. Mass. 1998) (finding that Exemption Six barred disclosure of any records showing the outcome of evaluations made for patients claiming worker's compensation by a particular group of doctors because the public interest in an attorney obtaining the records for discovery purposes was low in comparison with the invasion of personal privacy, because these medical records were easily identified with individual patients).

\textsuperscript{139} \textit{Id.} at 174–75.

\textsuperscript{140} \textit{Dobronski}, 17 F.3d at 279.

\textsuperscript{141} \textit{McDonnell v. United States}, 4 F.3d 1227, 1254 (3d Cir. 1993).

\textsuperscript{142} \textit{Id.} at 1251–52 (finding that "the court must keep in mind that there is a presumption in favor of disclosure" when balancing the public interest against the privacy interest in a release of a record (quoting I.B.E.W. Local Union No. 5 v. Dep't of Housing & Urban Dev., 852 F.2d 87, 89 (3d Cir. 1988))).

\textsuperscript{143} \textit{Id.} at 1252 ("[T]he agency bears the burden of proving an exemption from the disclosure requirements." (quoting \textit{I.B.E.W. Local Union No. 5}, 852 F.2d at 89)).
\end{flushleft}
Agency personnel have discretion to decide to release the document despite a FOIA exemption. Under the terms of the FOIA statute, the only situation in which agency personnel can incur penalties under FOIA is if they fail to disclose a record after a court has ordered them to do so. HIPAA and the Privacy Rule, on the other hand, were written with a presumption of closure. If the medical records at issue identify someone by containing any of the criteria listed by HIPAA, HIPAA requires that the record be closed to public access. Agency personnel run the risk of fines if they do not comply with HIPAA-mandated closure.

VI. HOW THE COURT WILL RESOLVE THE CONFLICT

A threshold issue for any court looking at a FOIA–HIPAA conflict is whether HIPAA impliedly repealed Exemption Six of FOIA. There are two options for the court when considering this argument: find that HIPAA impliedly repealed Exemption Six of FOIA or that the “required by law exception” allows HIPAA to work in conjunction with FOIA. The foundation of the implied repeal doctrine appears to relate to the theory that, occasionally, Congress intends to repeal a previous statute, but either did not know the statute existed or did not draft the new statute correctly to indicate its intent. Because a court can glean the intent of Congress to repeal the former statute from the text of the latter statute, or the debate that went into the formation of the latter statute, a repeal of the former statute is appropriate and intended.

Like many statutory interpretation tools, courts seem to invoke an “implied repeal” analysis in an ad hoc fashion. Some courts have entertained “implied repeal” arguments, finding that the last word of the legislature on a subject should be considered the true intent of the legislature. This analytical tool is sometimes referred to as the “later-enacted-statute rule” and finds its roots in Roman law. This rule indicates that when the legislature creates a statute that conflicts with a previous statute, the court should find that the latter statute controls, even if the legislature never expressly indicated that the latter statute

145. This discretion is influenced by the directives of the current presidential administration. See supra note 76 (regarding the directives issued to agencies by President Obama).
148. Id. § 164.514(b)(2)(i).
149. See supra note 29.
150. Petroski, supra note 20, at 488.
151. Id.
152. Id. at 488 & n.4.
153. Id. at 500 & n.58. Petroski notes that the Roman versions of the rule can be found in The Digest of Justinian 13, 15 (Alan Watson ed., 1985). Petroski also points to Dr. Foster's Case, (1614) 77 Eng. Rep. 1222, 1231 (K.B.), as the origin of the rule in English law. Petroski, supra note 20, at 499–500 & nn.56 & 58.
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should supersede the former. Of course, despite the impartiality implicit in the use of most rules of statutory interpretation, the use of "implied repeal" or the "later-enacted-statute rule" has been roundly criticized as being open to significant judicial interpretation, which allows the court to appear to be rigidly and formally applying a rule when the court is actually exhibiting judicial activism. The "implied repeal" analysis is particularly open to judicial interpretation because the court must find that two statutes do, in fact, conflict, and cannot be read as coexisting, in order to find that the later-enacted statute controls. This criticism dates back to a mid-seventeenth century treatise that advocated for a judicial presumption against using the "implied repeal" analysis because the wisdom of the legislature requires the court to endeavor to read statutes together in the absence of expressed repeal. This argument is based on a concern over judicial encroachment on an essential function of the legislature. If the legislature wanted to repeal a statute, the reasoning goes, it would do so explicitly. The court interpreting a repeal when none has been expressly stated by the legislature would be in violation of the separation of powers doctrine.

This presumption against using an "implied repeal" analysis continued in American courts after the United States seceded from England. But over the years, American courts began to use the "implied repeal" analysis, or the "later-enacted-statute rule," more and more frequently, sometimes not even referencing the presumption against its use. By the late nineteenth century, American courts began to broaden the "implied repeal" analysis by permitting the implied repeal of a prior-enacted statute if the new statute showed legislative intent to repeal it. The "implied repeal" analysis has continued to alternate between an oft-used statutory interpretation method to a maligned, and often avoided, tool of activist judges. Beginning in the 1980s, however, the Supreme Court began straining to avoid using the "implied repeal" analysis by narrowing the scope of the text of a statute in order to avoid conflict with a

154. Petroski, supra note 20, at 499–500 & n.58.
155. Id. at 498–99 & n.54.
156. Id. at 498.
157. Id. at 500 ("[I]t must be known, that forasmuch as Acts of Parliaments are established with such gravity, wisdom, and universal consent of the whole realm, for the advancement of the commonwealth, they ought not by any constrained construction out of the general and ambiguous words of a subsequent Act, to be abrogated [but] ... ought to be maintained and supported with a benign and favourable construction." (quoting Dr. Foster's Case, 77 Eng. Rep. at 1232) (alterations in original)).
158. Id. at 496.
159. See id. at 489.
160. Id. at 501–02.
161. Id. at 503.
162. Id. at 504.
163. Id. at 506.
previously enacted statute.\textsuperscript{164} For instance, in the 2003 case of \textit{Branch v. Smith}, Justice Scalia found that no conflict existed between two clauses of a statute regarding the reapportionment of congressional districts.\textsuperscript{165} The statute addressed the procedure for when a federal reapportionment of congressional representatives would leave a state with more districts than representatives.\textsuperscript{166} One section of the statute indicated that the state should immediately reapportion the districts and another said that the representatives should be elected by the entire state until redistricting could be accomplished.\textsuperscript{167} Justice Scalia’s attempt to reconcile the two subsections was so elaborate that it prompted Justice O’Connor to refer to his efforts in her opinion as “tortured judicial legislation.”\textsuperscript{168}

Despite the distaste of some Supreme Court Justices for the “implied repeal” analysis, lower courts use it routinely, often citing reasons of practicality for its use.\textsuperscript{169} As the American body of legislation continues to grow, legislators cannot possibly be expected to know that a new law may conflict with a previous law, especially if the law is obscure.\textsuperscript{170} Because the later-enacted statute is the best evidence of the current intention of the legislature and its electorate, that law should control even if the legislator did not find an obscure and dated law that happened to conflict with this new statute.\textsuperscript{171} Although the use of “implied repeal” is checkered, one tenant of the analysis remains throughout its use in American jurisprudence—the text or the legislative history of the latter statute must show the legislature’s intent to repeal the earlier statute by taking the law in a different direction.\textsuperscript{172}

Even if a court would entertain an “implied repeal” analysis of FOIA Exemption Six by HIPAA, this strong evidence of legislative intent appears to be lacking. In fact, there is no discernable mention of FOIA in the legislative history. Congress explicitly granted the authority to promulgate regulations implementing HIPAA’s dictate to keep medical records from being released by medical providers to HHS,\textsuperscript{173} so it would be difficult to argue that HHS lacked

\begin{itemize}
\item 164. See id. at 516.
\item 166. See id. at 266 (majority opinion).
\item 167. \textit{Id}. at 266–67.
\item 168. \textit{Id}. at 292 (Stevens, J., concurring in part and concurring in the judgment) (“It is far wiser to give effect to the manifest intent of Congress than, as the plurality attempts, to engage in tortured judicial legislation to preserve a remnant of an obsolete federal statute and an equally obsolete state statute.”).
\item 169. See Petroski, supra note 20, at 516–18.
\item 171. \textit{Id}. § 23:9, at 469–70.
\item 172. Petroski, supra note 20, at 491.
\item 173. 42 U.S.C. § 300gg-92 (2000) (“The Secretary, consistent with section 104 of the Health Care Portability and Accountability Act of 1996, may promulgate such regulations as may be necessary or appropriate to carry out the provisions of this subchapter. The Secretary may...
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authority to dictate that HIPAA's mandates on records access should be considered secondary to other laws. When Congress enacts such an explicit mandate, agency regulations are generally given deference by the Court, especially if those regulations were promulgated pursuant to a notice-and-comment rulemaking procedure.\textsuperscript{174} HHS even anticipated that an implied repeal analysis would be conducted if the Privacy Rule conflicted with other privacy statutes.\textsuperscript{175}

Indeed, before implied repeal fell out of favor with the Supreme Court, the Court found in the 1975 case of \textit{Gordon v. New York Stock Exchange, Inc.} that agency regulations did impliedly repeal a federal statute, even though the Court acknowledged the presumption against finding such an implied repeal.\textsuperscript{176} In \textit{Gordon}, the Court found that an SEC regulation impliedly repealed a federal antitrust statute. Because the agency had an expertise in the substantive area covered by the regulation, the Court reasoned, Congress had placed its confidence in the agency for regulation of this area of the law, and both Congress and the agency had taken an active role in regulating this area of the law.\textsuperscript{177} The opinion hinged on the concept that the agency regulations would not function as Congress intended unless they impliedly repealed the previously enacted statute.\textsuperscript{178} Additionally, the Court noted that the repeal should only repeal what is necessary to preserve the functionality of the enabling statute for the agency action.\textsuperscript{179}

The federal courts may entertain such an implied repeal argument, especially the lower federal courts, which seem to be more amenable to the implied repeal analysis than the Supreme Court. Despite its reluctance to use the implied repeal analysis, the Supreme Court has still employed it in the past to maintain the intended regulatory function of a federal agency.\textsuperscript{180} The Court could find that the Privacy Rule impliedly repealed Exemption Six of FOIA promulgate any interim final rules as the Secretary determines are appropriate to carry out this subchapter.").

\textsuperscript{174} See United States v. Mead Corp., 533 U.S. 218, 229–31 (2001). The Mead Court found that \textit{Chevron} deference should be given to agency regulations when Congress has made a clear delegation of authority to an agency to make those regulations. See \textit{id.} at 226–27. Additionally, when an agency goes through a notice-and-comment rulemaking procedure, the court can use that as evidence that Congress intended to delegate authority to make those regulations. \textit{Id.} at 227–30.

\textsuperscript{175} Standards for Privacy of Individually Identifiable Health information, 65 Fed. Reg. 82,462, 82,481–82 (Dec. 28, 2000) ("[W]e believe courts would apply the standard rules of interpretation with regard to regulatory conflicts... In some cases,... courts will find that the later statute repeals the earlier statute by implication.").


\textsuperscript{177} \textit{Id.} at 689–91.

\textsuperscript{178} \textit{Id.} at 691; cf. Silver v. N.Y. Stock Exch., 373 U.S. 341, 357 (1963) (finding no implied repeal of antitrust statute by SEC regulations because reconciling the conflict was the "proper approach" in this instance).

\textsuperscript{179} See \textit{Gordon}, 422 U.S. at 685.

\textsuperscript{180} See Petroski, \textit{supra} note 20, at 505–18.
based on its decision in Gordon. Because HHS has an expertise in the substantive area covered by the regulation, the Court could reason that Congress has explicitly placed its confidence in the agency for regulation of this area of the law, and Congress and the agency have taken an active role in regulating this area of the law. Because of the disfavored nature of implied repeal, however, this path seems unlikely and unwarranted, especially because the Court has so many other, less controversial, paths it can choose. Additionally, it seems antithetical for the federal courts to entertain an implied repeal analysis that would find that HIPAA and the Privacy Rule impliedly repeal Exemption Six of FOIA when state courts have refused to find that HIPAA preempted state open records laws.\footnote{181}

In addition to not finding implied repeal, the Court should find that implied repeal is unneeded in order to allow HHS to do what HIPAA enabled it to do—protect the privacy of medical records—because Exemption Six also seeks to protect the privacy of medical records.\footnote{182} The rationale behind Gordon suggests that a regulation cannot preempt a statute if the enabling statute for the regulatory power can function without such a preemptory repeal.\footnote{183} Although FOIA protects the privacy of medical records differently than the Privacy Rule, it does so because the medical records it controls are those that happen to be within the control of the federal government.\footnote{184} Medical records held by the federal government are different than medical records of other "health care providers" because they often reflect what the "government is up to," and public oversight of what the "government is up to" is an essential tenant of FOIA and the case law that interprets FOIA.\footnote{185} Because of the extra consideration of government oversight, FOIA requires the courts to balance public disclosure against the privacy of medical records by determining if release of the record is "an unwarranted invasion of personal privacy."\footnote{186} This standard is clearly different than the Privacy Rule standard, which prohibits the release of any medical record, but the difference is appropriate because the nature of the record-holder is different. Despite the difference in analysis under FOIA, privacy is still considered as part of an agency’s determination of whether to release the records. Therefore, the court should find that allowing FOIA to control this discrete part of the release of medical records does not divest HHS from its ability to regulate the privacy of medical records in the

\begin{footnotes}
\footnotetext[181]{See the discussion of state cases in Part IV., \textit{supra}.}
\footnotetext[183]{See Gordon, 422 U.S. at 691.}
\footnotetext[184]{See 5 U.S.C. § 552(f)(1).}
\footnotetext[185]{U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 772–73 (1989) ("'The generation that made the nation thought secrecy in government one of the instruments of Old World tyranny and committed itself to the principle that a democracy cannot function unless the people are permitted to know what their government is up to.'" (quoting EPA v. Mink, 410 U.S. 73, 105 (1973) (Douglas, J., dissenting))).}
\footnotetext[186]{McDonnell v. United States, 4 F.3d 1227, 1254 (3d Cir. 1993).}
\end{footnotes}
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The hands of government "health care providers." The Privacy Rule continues to control the release of medical records in the hands of all other "health care providers."

When the federal courts take up the issue of the HIPAA-FOIA conflict, there is no doubt that the controversial application of implied repeal analysis will cause a court to pause. A court has the option to read the two statutes and the regulation together, even if that reading creates the "tortured judicial legislation" that Justice Scalia was criticized for in Branch. The circular deference problem could also prompt a court to engage in "judicial legislation" to sort out which statute controls. Although the Ohio and Texas courts, in analogizing to their state public records acts, found that the "disclosure required by law" language covered Exemption Six of FOIA and agency personnel must defer to FOIA in making decisions to release medical records, those courts did not contend with the "criteria" language of FOIA. Of course, HHS has determined that the Privacy Rule should defer to FOIA because of the "disclosures required by law" language, but again, HHS does not address the possibility of "criteria" language of Exemption Three, which requires FOIA to defer to the closure requirements of HIPAA.

Authority on what a court should do in the case of circular deference like that between HIPAA and FOIA is lacking. Courts often defer to legislative intent to explain how the legislature intended the two statutes to interact or an appeal to logic if the reading of one statute as referencing another would create an "absurd" conclusion. Unfortunately, neither one of these tenets of statutory construction can guide a court in this situation, because Congress did not address HIPAA in drafting FOIA and HIPAA did not exist when Congress originally drafted Exemption Three of FOIA. In this situation, then, the next logical step is for the court to compare the explicit discussion of the HHS Secretary about deference to FOIA with a lack of discussion about deference to HIPAA in any of the recent congressional discussions regarding amendments.

189. HHS has not been completely consistent in suggesting that the Privacy Rule should defer to other federal rules, because it has suggested that the courts should determine whether the Privacy Rule has impliedly repealed previous federal statutes that involve privacy considerations over government-held records. Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 82,462, 82,481–82 (Dec. 28, 2000). Although the main thrust of FOIA is access, the exemptions contemplate privacy concerns; thus there is a likelihood that HHS may make the implied repeal argument when a case is presented to the courts where the Privacy Rule and FOIA conflict regarding whether a federal agency can release medical records.
190. E.g., H&R Block E. Tax Servs., Inc. v. Tennessee, 267 S.W.3d 848, 861 (Tenn. Ct. App. 2008) (finding it only "common-sense" that the legislature would not require an "absurd" reading of a statute to mean that "every contract for future services is one of insurance" in light of a circular reference problem that would create such a reading of the statute.).
to FOIA, including those that involved the decision not to alter Exemption Three. If the court focuses on the global intent behind every legislature and agency that has been involved in the drafting and amending of these three sets of laws—HIPAA, the Privacy Rule, and FOIA—the only specific reference to the opposing law in regards to access to medical records held by the government is found in the preamble to the Privacy Rule and in HHS's official response to questions about the interaction of FOIA and the Privacy Rule. In that specific reference, the HHS Secretary expresses an opinion that FOIA should control a true conflict between the two statutes. A court looking for a way to get off the merry-go-round of circular deference between HIPAA, the Privacy Rule, and FOIA should use the HHS Secretary’s express reference and interpretation that FOIA would control a situation in which a record is covered by both FOIA and HIPAA to determine that the regulations were, indeed, intended to bow to FOIA if FOIA requires the medical record to be open to the public.

VII. CONCLUSION

A conflict at the agency level between HIPAA, the Privacy Rule, and FOIA Exemption Six is inevitable. There are many government medical providers that routinely receive requests for medical records that, if released, would provide valuable insight into the inner-workings of government. If such a conflict makes its way to the courts, as with any records release problem, it is largely a function of how badly the records-seeker wants the records.

A court looking at a case in which a medical record is sought from a federal government medical provider has many options, most of which would allow the court to read HIPAA, the Privacy Rule, and FOIA Exemption Six together, but finding that HIPAA and the Privacy Rule defer to an Exemption Six analysis when the medical records at issue are in the hands of the government is a conclusion the court can reach if it chooses to avoid the circular deference problem between the two statutes by looking to the legislative and agency intent in drafting the laws at issue. The only option that would allow the Privacy Rule to control would be for the court to find that the Privacy Rule impliedly repealed FOIA Exemption Six, which would be a controversial stance for the court to take in light of the fact that implied repeal is a tool of statutory analysis that is largely disfavored. Accordingly, a court should choose to read Exemption Six as controlling in a factual situation involving the release of medical records in the hands of the federal government. Such a decision is not only legally sound, but is sound public policy, given the

191. See supra note 22 and accompanying text.
192. See supra note 22 and accompanying text.
193. See supra note 22 and accompanying text.
194. See supra note 20.
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importance of government oversight that is pervasive through federal record access law. 195

195. See supra note 185.