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Information Systems Division
Office of Management and Budget
Washington, D. C. 20503

Dear Sirs:

In attempting to implement the Privacy Act of 1974 the Railroad Retirement Board has discovered a possible conflict between section 552a(d)(1) of title 5 of the United States Code and section 12(n) of the Railroad Unemployment Insurance Act, which is codified as section 362(n) of title 45 of the United States Code. The Railroad Retirement Board is submitting the question to the Office of Management and Budget along with the Board's views on the subject, in hopes that a final answer might be rendered which will resolve the problem and permit the Board to proceed in preparing regulations to implement the Privacy Act.

The Railroad Retirement Board is an independent agency within the executive branch of the United States Government charged with administering the Railroad Retirement Act (45 U.S.C. § 231, et seq.) and the Railroad Unemployment Insurance Act (45 U.S.C. § 351, et seq.). Among the benefits payable by the Railroad Retirement Board are disability benefits under the Railroad Retirement Act and sickness benefits under the Railroad Unemployment Insurance Act. The payment of such benefits requires that the Board collect and maintain medical records on the claimants. Authority to collect and maintain such records is provided in section 7(b)(6) of the Railroad Retirement Act (45 U.S.C. § 231f(b)(6)) and section 12 of the Railroad Unemployment Insurance Act (45 U.S.C. § 362).

Disclosure of information by the Railroad Retirement Board is statutorily restricted by sections 12(d) and 12(n) of the Railroad Unemployment Insurance Act, which are incorporated by reference into the Railroad Retirement Act by section 7(b)(3) of that Act. The two disclosure of information sections of the Railroad Unemployment Insurance Act provide as follows:

Information Systems Division

Section 12(d):

"Information obtained by the Board in connection with the administration of this Act shall not be revealed or open to inspection nor be published in any manner revealing an employee's identity: Provided, however, That (i) the Board may arrange for the exchange of any information with governmental agencies engaged in functions related to the administration of this Act; (ii) the Board may disclose such information in cases in which the Board finds that such disclosure is clearly in furtherance of the interest of the employee or his estate; and (iii) any claimant of benefits under this Act shall, upon his request, be supplied with information from the Board's records pertaining to his claim. Subject to the provisions of this section, the Board may furnish such information to any person or organization upon payment by such person or organization to the Board of the cost incurred by the Board by reason thereof; and the amounts so paid to the Board shall be credited to the railroad unemployment insurance administration fund established pursuant to section 11(a) of this Act."

Section 12(n), paragraph 2:

"Any doctor who renders any attendance, treatment, attention, or care, or performs any examination with respect to a sickness of an employee, upon which a claim or right to benefits under this Act is based, shall furnish the Board, in such manner and form and at such times as the Board by regulations may prescribe, information and reports relative thereto and to the condition of the employee. An application for sickness benefits under this Act shall contain a waiver of any doctor-patient privilege that the employee may have with respect to any sickness period upon which such application is based: Provided, That such information shall not be disclosed by the Board except in a court proceeding relating to any claims for benefits by the employee under this Act."

The Board has interpreted the two above-quoted sections as prohibiting the disclosure of medical records to anyone, even the individual on whom the records are kept, except when the records are required in a "court proceeding relating to any claims for benefits by the employee under this Act."

The Privacy Act of 1974 amends title 5 of the United States Code by adding a new section 552a to that title. Section 552a(d)(1) provides that each agency that maintains a system of records shall,

Information Systems Division

"upon request by any individual to gain access to his record or to any information pertaining to him which is contained in the system, permit him and upon his request, a person of his own choosing to accompany him, to review the record and have a copy made of all or any portion thereof in a form comprehensible to him, except that the agency may require the individual to furnish a written statement authorizing discussion of that individual's record in the accompanying person's presence."

In addition, the Privacy Act of 1974 adds a new section 552a(f)(3) to title 5 of the United States Code which states that an agency shall promulgate rules to

"establish procedures for the disclosure to an individual upon his request of his record or information pertaining to him, including special procedure, if deemed necessary, for the disclosure to an individual of medical records, including psychological records, pertaining to him."

The two above-quoted sections indicate that the Privacy Act of 1974 was intended to apply to medical records. However, there is no language in the Privacy Act of 1974 which would indicate that Congress intended to repeal a statutory prohibition against disclosure of medical evidence such as that found in section 12(n) of the Railroad Unemployment Insurance Act.

The question presented is, therefore, what effect, if any, do the access provisions of the Privacy Act of 1974 have on section 12(n) of the Railroad Unemployment Insurance Act? Before discussing the Board's position regarding this question, I believe it would be helpful to provide a brief discussion of the rationale supportive of the Board's interpretation of section 12(n).

Section 12(n) was added to the Railroad Unemployment Insurance Act as a portion of the amendments of July 31, 1946, under which benefits for unemployment because of sickness were first made payable. Since the enactment of section 12(n), the Board has been operating under its interpretation of that section, that disclosure of medical information to anyone is prohibited, without any indication from either Congress or the courts that its interpretation was erroneous. The question of the Board's interpretation of section 12(n) has actually been presented in two court cases, but in each case the court declined to render a definitive opinion as to the scope of that section. In the case of Hubbard v. Southern Railway Company, 179 F. Supp. 244 (M.D. Ga., 1959), the Court held that a Board regional director could not be

Information Systems Division

compelled by subpoena to produce an individual's medical records when to require such would be contrary to the Board's regulations. The Court expressly declined to reach the Board's arguments with respect to the prohibition contained in section 12(n). The same arguments with regard to section 12(n) were raised by the Board in the case of Haynie v. Southern Railway Company, Civ. No. 60 C 1185 (D.C. W.D. Ill., 1963). The Court in the Haynie case dismissed a petition brought by the plaintiff to compel the Board's General Counsel to disclose medical records. However, the Court's order dismissing the plaintiff's petition did not include any written decision from which the basis for its order could be determined.

The basic rationale for the Board's interpretation of section 12(n) is drawn from the language of that section, along with its interrelationship with the general disclosure of information provision found in section 12(d) of the Railroad Unemployment Insurance Act. The language found in the proviso clause of section 12(n) is clear and unambiguous in stating that medical evidence shall not be disclosed except in a court proceeding relating to a claim for benefits under the Act. It is possible, however, to read the proviso clause as merely a statutory restoration of the patient-physician privilege which section 12(n) requires that the patient-applicant waive. Although such an interpretation seems possible when section 12(n) is viewed separately from the other provisions of the Act, it hardly seems to be the correct interpretation when viewed together with section 12(d) of the Act. Section 12(d), which was quoted earlier in this discussion, provides that no information collected in connection with the administration of the Act shall be disclosed with few exceptions, one of which is when the individual himself requests or authorizes disclosure. Section 12(d) was already a part of the Railroad Unemployment Insurance Act when section 12(n) was added. Section 12(d) would have sufficiently protected an individual's rights to privacy in the medical records maintained in his case without the addition of the proviso clause of section 12(n) if that clause was intended only to restore the patient-physician privilege with respect to the Board. It does not seem reasonable to assume that Congress intended the proviso clause to have no independent significance. The more reasonable assumption is that Congress intended the proviso clause to mean exactly what it says and to prohibit disclosure of medical records to anyone.

Furthermore, the existence of such a blanket prohibition against disclosure is of great importance to the Board's operations. The Board, in administering the disability benefit provisions of the Railroad Retirement Act and the sickness benefit provisions of the Railroad Unemployment Insurance Act, depends on accurate and candid

Information Systems Division

medical reports submitted by private physicians. Confidentiality of those reports is desirable from the standpoint that physicians will feel more free to discuss candidly the patient-claimant's condition if assured that the reports will not be disclosed without their consent. In addition, the Board's interpretation of section 12(n) protects the patient-client from being compelled by subpoena to produce confidential Board-maintained medical records.

While it is quite clear that the individual access provision of the Privacy Act of 1974 was intended to apply to medical records, it is nowhere provided in that Act that such provision repeals statutory prohibitions against disclosure of medical evidence. Further, Congress did not utilize the universal repealing phrase "Notwithstanding any other provision of law" to begin the individual access provision. The question of whether that provision repeals or amends the provide language of section 12(n) therefore becomes one of whether that section was repealed by implication.

Statutory provisions may be repealed or amended by implication. However, the courts have made it quite clear that such a result is not favored and will be found to have occurred only in the rarest of situations. (See e.g., Blanchette v. Connecticut General Ins. Corps., 95 U.S. ___, 95 S. Ct. 335 (1974); United States v. Pacelli, 491 F. 2d 1108, 1113 (C.A. 2, 1974). The United States Supreme Court in Blanchette stated, at page 353, that where two statutory provisions are "capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." In the case of Mercantile Nat. Bank v. Langbeau, 371 U.S. 555, 565 (1963), the United States Supreme Court stated that in order for one statute to impliedly repeal another there must be "some manifest inconsistency or positive repugnance between the two statutes." A further illustration of the dislike which courts harbor for repeals by implication may be found in the following statement of the United States Supreme Court in the Blanchette case at page 354:

"A new statute will not be read as wholly or even partially amending a prior one unless there exists a 'positive repugnancy' between the provisions of the new and those of the old that cannot be reconciled. * * * This principle rests on a sound foundation. Presumably Congress had given serious thought to the earlier statute, here the broadly based jurisdiction of the Court of Claims. Before holding that the result of the earlier consideration has been repealed or qualified, it is reasonable for a court to insist on the legislature's using language showing that it has made a considered determination to that end. * * *"

Information Systems Division

In light of the narrow approach taken by courts in deciding questions of repeal or amendment by implication, it seems highly unlikely that any court would hold that the Privacy Act of 1974 repealed or amended the proviso clause of section 12(a) of the Railroad Unemployment Insurance Act. It can hardly be said that there exists a "positive repugnance" between the individual access provision of the Privacy Act of 1974 and the proviso clause of section 12(a). In fact, it appears that Congress in enacting the individual access provision recognized the unique nature of medical records in providing in the new section 552a(f)(3) of title 5 of the United States Code that disclosure of such records might be handled under a special procedure. Evidence indicating that the access provision was not intended to override statutory provisions prohibiting the disclosure of medical records may also be drawn from the legislative history of that provision. The Senate Report on S. 3418 indicates that the access provision was only intended to override unilateral agency determinations to withhold certain types of records when it states as follows:

"The Committee recognizes that while many agencies afford such rights, many agencies deny them with respect to certain files. Allowing only these narrow areas for exemption may well promote the reassessment of existing practices whereby individuals are deprived of full access to records about themselves, and some agencies, in the year before the Act takes effect, may well see fit to seek special legislation permitting special treatment of certain files they hold. * * *" (Emphasis added.)
Senate Rep. No. 93-1183, 93d Cong., 2d sess., 21 (1974).

I trust the information contained in the above discussion is sufficient to enable your agency to render an opinion in this matter. If, however, you feel additional information is required, I shall be very happy to assist in any way possible.

Very truly yours,

Dale G. Zimmerman
General Counsel

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