



STATE OF WISCONSIN  
DEPARTMENT OF JUSTICE

PEGGY A. LAUTENSCHLAGER  
ATTORNEY GENERAL

Daniel P. Bach  
Deputy Attorney General

114 East, State Capitol  
P.O. Box 7857  
Madison, WI 53707-7857

Representative Terese Berceau  
State Capitol  
Post Office Box 8952  
Madison, WI 53708

Dear Representative Berceau: *Terese*

Your November 22, 2004, letter asks whether Wisconsin law preempts the United States Department of Housing and Urban Development ("HUD") Final Standards for Homeless Management Information Systems ("HMIS") released on July 30, 2004 ("Final Standards"). Your letter also asks whether Wisconsin domestic abuse programs are required to comply with the HMIS Final Standards and, if so, to what extent.

You indicate that "[t]he issue of concern is whether Wisconsin law supersedes the HUD final standard and therefore, are domestic violence programs prohibited by state law from releasing confidential, sensitive personal information regarding their clients." I interpret your letter as pertaining to those provisions of the Final Standards that require programs receiving federal McKinney-Vento Act funds to submit client specific information to their local HMIS. It is my understanding that many Wisconsin domestic violence programs receive McKinney-Vento funds through the Emergency Shelter Grant ("ESG") program administered by the Wisconsin Department of Commerce or through Supportive Housing Grant contracts with HUD.

Section 895.67 of the Wisconsin Statutes preempts certain provisions of the Final Standards, as discussed below. Provisions of the Final Standards frame the preemption analysis.

HUD announced the Final Standards in its Homeless Management Information Systems (HMIS); Data and Technical Standards Final Notice, 69 Fed. Reg. 45888 (July 30, 2002) ("Final Notice"). HUD subsequently clarified HMIS participation for domestic violence programs in its Homeless Management Information Systems (HMIS) Data and Technical Standards Final Notice; Clarification and Additional Guidance on Special Provisions for Domestic Violence Provider Shelters, 69 Fed. Reg. 61617 (Oct. 19, 2004) ("Clarification").

An HMIS is a computerized system for collecting and storing information about people using homeless assistance services in a geographic Continuum of Care ("CoC"). A CoC is a local body that plans for and coordinates homeless services. An HMIS is intended to integrate data from all homeless service providers in its CoC and capture basic descriptive information on every person served. Final Notice at 45888. Each participating provider is to report client-level information to the HMIS central server at least once a year. Final Notice at 45900-02. Identified

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purposes of this data collection effort include improved understanding of the characteristics of homeless persons in that community, improved service delivery, and assessment and documentation of the community's progress in reducing homelessness. Final Notice at 45888. CoCs must retain reported data for seven years. Final Notice at 45901, 45934. I understand that Wisconsin has several CoCs.

The Final Notice imposes both data collection and data reporting responsibilities on homeless service agencies.

The Final Notice identifies two types of client-level data for collection and reporting: universal data elements, and program-specific data elements. HUD expects domestic violence programs receiving McKinney-Vento funds to implement the universal, and, where applicable, program-specific data elements. Final Notice at 45902.

#### Data Collection.

Providers participating in a local HMIS are required to collect the universal data elements from all homeless clients seeking housing or services. Final Notice at 45901. All universal data elements must be obtained from each adult and unaccompanied youth who applies for homeless assistance services; most universal data elements are also required of children under age 18 in a household. The universal data elements include:

- name
- social security number
- date of birth
- ethnicity and race
- gender
- veteran status
- disabling condition
- residence prior to program entry
- zip code of last permanent residence
- program entry date
- program exit date
- unique person identification number (software generated)
- program identification number (software generated)
- household identification number (software generated)

Final Notice at 45905.

The Final Standards attempt to restrict access to identifying client-level data. Final Notice at 45905. "Protected personal information" is defined as any information maintained by

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or for a covered homeless organization about a living homeless client or homeless individual that (1) identifies, either directly or indirectly, a specific individual; (2) can be manipulated by a reasonably foreseeable method to identify a specific individual, or (3) can be linked with other available information to identify a specific individual. Final Notice at 45928. Some universal data elements are specifically designated as protected personal identifiers, subject to special security standards: name, social security number, date of birth, zip code of last permanent residence, program entry date, program exit date, and unique person identification number. Final Notice at 45906-10.

Program-specific data elements must be collected from all clients required to report that information to HUD or other organizations pursuant to various provider agreements. Final Notice at 45901. Program-specific data elements required for HUD's current annual reporting include—among others—income and sources, non-cash benefits, physical disability, and developmental disability. Final Notice at 45894, 45914.

#### Data Reporting.

Homeless providers are required to report the client-level data specified in the Final Notice to their CoC's central data storage facility at least once a year, so that the CoC can eliminate duplicate records and analyze the data for local planning purposes. Final Notice at 45901, 45910, 45934.

The Final Notice requires domestic violence programs receiving McKinney-Vento funds to participate in their local HMIS, and to submit client-level information in order to obtain an unduplicated count of homeless persons at the CoC level. Final Notice at 45892.

#### Special Provisions for Domestic Violence Providers.

HUD's goal for HMIS implementation was October 2004. Final Notice at 45903. At this time, however, HUD is not requiring domestic violence providers to comply with HMIS data reporting requirements.

HUD has acknowledged that "unlike other special populations, victims of domestic violence could be physically at risk if individuals who intend to cause them harm are able to obtain personal information from an HMIS with inadequate security and confidentiality protections." Final Notice at 45891-92. Acknowledging that communities and domestic violence programs need additional time to develop and implement methods to effectively address domestic violence provider HMIS participation, HUD therefore authorized domestic violence program entry into HMIS after the October 2004 target date. Final Notice at 45892, 45902-03; Clarification at 61517. HUD has not announced any expected compliance date for domestic violence programs.

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HUD also has authorized some specific HMIS reporting modifications intended to address the confidentiality concerns of domestic violence providers.

First, HUD exempted domestic violence providers from submitting client identifiers (name and SSN) to their CoCs for unduplication and data analysis. HUD instead requires programs electing that exemption to use a proxy, coded, encrypted or hashed unique identifier—in lieu of name and SSN—appended to the full service record of each client served and submitted to the CoC central server at least once annually for purposes of unduplication and data analysis. Each of these unique identifiers must include, but are not limited to, characters and digits from a portion of the client's name, date of birth, and gender. Clarification at 61518.

Second, HUD authorized domestic violence providers to adopt a delayed data entry protocol in which client records are not entered into the provider's HMIS for some set period of time after clients exit their program. Clarification at 61518-19.

Third, domestic violence providers will not be required to share client data with any organization other than the central coordinating entity identified by their CoCs. Clarification at 41518.

Additionally, HUD has directed CoC representatives to meet with domestic violence providers in their communities to develop plans for domestic violence provider HMIS participation. These participation plans are to include protocols addressing concerns of the domestic violence programs and ensuring adequate data protection. Final Notice at 45892, 45902-03; Clarification at 61518. CoCs also are charged with deciding how to use coded identification numbers. Clarification at 61518.

Most significantly, however, HUD also has required domestic violence service providers, to comply with federal, state and local rules that require additional confidentiality protections. Final Notice at 45928-29. "In the event that state laws conflict with the Final [Standards], as determined by an appropriate state government entity, state law will prevail." Clarification at 61518.

Conflict with Wisconsin Law. Section 895.67 of the Wisconsin Statutes provides confidentiality protections exceeding and conflicting with those available under the Final Standards.

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Absent informed written consent, Section 895.67<sup>1</sup> prohibits an employee or agent of a domestic abuse organization from intentionally disclosing the location of an agency service recipient or children with specified connections to the service recipient. A "service recipient" is "any person who receives or has received domestic violence services from a domestic abuse services organization." Wis. Stat. § 895.67(1)(c) (2003-04). The seriousness with which our legislature views the non-disclosure provisions of § 895.67 is evidenced by its authorization of both fines and imprisonment to penalize violations. Wis. Stat. § 895.67(b).

Unfortunately, it is well known that some domestic violence abusers will go to great lengths to track down—and harm—their victims. It is equally well known that domestic violence knows no boundaries of income or profession. Even the Final Notice acknowledged concerns that some law enforcement personnel have abused access to databases containing sensitive personal information and situations where law enforcement personnel have been domestic violence abusers, thus placing domestic violence service recipients at risk. Final Notice at 45896.

The HMIS security provisions incorporated in the Final Standards are based on current information technology practices, and rely upon software applications that typically come with computer hardware purchased in recent years. Final Notice at 45895. Although HUD consulted with information privacy experts to develop privacy and confidentiality requirements regarded as current best practices, Final Notice at 45928-28, recently publicized security breaches demonstrate the continuing fallibility of those methodologies. *See, e.g., Hacking Attacks Rarely Made Public, Experts Say*, N.Y. Times, Feb. 17, 2005, available at <http://www.nytimes.com/reuters/tehnology/tech-tech-disclosure.html>; *Internet Fraud Threatens Economy—Secret Service*, N.Y. Times, Feb. 17, 2005, available at <http://www.nytimes.com/reuters/technology/tech-tech-security.html>; *Info Breach Puts Data*

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<sup>1</sup> No employee or agent of a domestic abuse services organization who provides domestic abuse services to a service recipient may intentionally disclose to any person the location of any of the following persons without the informed, written consent of the service recipient:

1. The service recipient.
2. Any minor child of the service recipient.
3. Any minor child in the care or custody of the service recipient.
4. Any minor child who accompanies the service recipient when the service recipient receives domestic abuse services.

Wis. Stat. § 895.67(2)(a) (2003-04).

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*Firm in Hot Seat*, N.Y. Times, Feb. 18, 2005, available at <http://www.nytimes.com/aponline/business/AP-ChoicePoint-Identity-Theft.html> (ChoicePoint); *Names of AIDS Patients are E-Mailed by Mistake*, Wis. State Jour., Feb. 21, 2005, at A2; Rachel Konrad, *ID Theft can Haunt Victims for Life*, Wis. State Jour., Feb. 25, 2005, at E1 (ChoicePoint) Tom Zeller, Jr., *Data on 30,000 Consumers Stolen From LexisNexis*, Milw. Jour.-Sent. (Mar. 10, 2005) available at <http://www.jsonline.com/news/nat/mar05/308257.asp> (LexisNexis and Bank of America).

Section 895.67 is not limited to express disclosure of the current location of a service recipient. Our state constitution mandates that crime victims are to be treated with "fairness, dignity, and respect for their privacy." Wis. Const. Art. I, § 9m; *Schilling v. State of Wisconsin Crime Victim Rights Board*, 2005 WI 17, ¶ 27, \_\_\_ Wis. 2d \_\_\_, 692 N.W.2d 623. That mandate must guide interpretation of our statutory provisions concerning the rights of crime victims. *Id.* Moreover, our statutes must be construed with the "saving grace of common sense." *State v. Eisch*, 96 Wis. 2d 25, 38, 291 N.W.2d 800 (1980). Intentionally disclosing information that a knowledgeable person could piece together to ascertain the past or present location of a service recipient or other person specified in § 895.67 amounts to intentionally disclosing the location of that person.

Therefore, I conclude that a domestic violence agency that receives McKinney-Vento funds through the ESG or Supportive Housing grant programs may provide protected personal information to its HMIS if, pursuant to § 895.67, the agency obtains informed written consent for that disclosure of information. Affected domestic violence agencies should make reasonable, good faith efforts to obtain such consents from their service recipients. Domestic violence agencies that do not receive McKinney-Vento funds need not provide this information to the local HMIS, but may do so if they choose to participate and obtain appropriate consents.

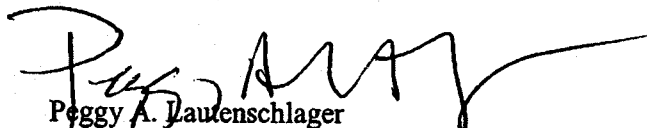
If a service recipient declines to provide consent, however, then § 895.67 prohibits an agency from providing protected personal information about the service recipient or other persons described in § 895.67 to the local HMIS. The agency may provide such information as could not be used by a knowledgeable person to identify a specific person: gender, for example; age or year of birth, when not uniquely identifying; race, when not uniquely identifying; and so forth. The agency also may provide aggregate service information. What the agency may not do is provide information sufficiently and uniquely specific that someone bent on wrongdoing could cobble together information provided to the HMIS to locate a specific person. That prohibition includes unique person identifiers that could be deconstructed or unscrambled by a knowledgeable person to reveal elements of a specific person's name, birthdate or other identifying information. The agency must exercise its best judgment, within the constraints of § 895.67, about which and how much information to provide the HMIS about a specific person. The appropriate amount of information to be provided will depend on the relative uniqueness of each individual's descriptive information. As specifically allowed by the Clarification, an agency also may adopt a delayed entry protocol for providing client information to its HMIS.

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While I appreciate the admirable coordination and evaluation objectives HUD is pursuing through HMIS data applications and the Final Standards, implementation of those Standards in Wisconsin must yield to the confidentiality requirements of Wis. Stat. § 895.67. We must diligently protect the privacy of our domestic violence victims and strenuously protect them against possible future harm.

I recognize the importance of both effective programs for our homeless citizens and the privacy and safety of our citizens victimized by domestic violence. Please do not hesitate to call on me if my office can be of further assistance to you or other entities of state government charged with implementing the HMIS regulations in Wisconsin.

Very truly yours,



Peggy A. Lautenschlager  
Attorney General

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