



APR - 2 2014

Deputy Administrator
Washington, DC 20201

James L. Madara, M.D.
Executive Vice President & CEO
American Medical Association
25 Massachusetts Avenue, NW, Suite 600
Washington, DC 20001

Dear Dr. Madara:

I write to inform you of the latest steps that the Department of Health and Human Services (Department) is taking in our ongoing efforts to increase transparency in health care. Transparency is an important key to transforming the health care delivery system, and is crucial for helping patients make informed decisions about the care they receive.

As indicated in the Department's January 17 Federal Register notice, the Department issued a new policy regarding requests made under the Freedom of Information Act (FOIA) for information on amounts paid to individual physicians under the Medicare program in which the Centers for Medicare & Medicaid Services (CMS) will make case-by-case determinations as to whether Exemption 6 of the Freedom of Information Act, 5 U.S.C. § 552(b)(6), applies to a given request for such information. This new policy became effective March 18.

The Department received multiple FOIA requests, seeking physician Medicare payment information. In accordance with the FOIA, an agency is required to make frequently requested materials available electronically after the material has been reviewed under the FOIA. 5 U.S.C. § 552(a)(2)(D). This letter notifies you that CMS has decided to publicly release certain physician payment information on its website, because CMS has determined that the FOIA requires CMS to release that information.

No sooner than April 9, CMS plans to publicly release a data set on the types of medical services and procedures furnished by physicians and other health care professionals as well as certain payment and charge data related to those services, organized by National Provider Identifier (NPI), Healthcare Common Procedure Coding System (HCPCS) code, and whether the service was furnished in a facility or office setting (i.e., place of service). For each NPI/HCPCS code/place of service combination, this public data set will include number of services, average submitted charges and standard deviation in submitted charges, average allowed amount and standard deviation in allowed amount, average Medicare payment and standard deviation in Medicare payment, and a count of unique beneficiaries treated.

The Department takes beneficiary privacy very seriously, and will not release any personally-identifiable information about beneficiaries. To further protect beneficiary identities and safeguard this information, CMS will redact all data elements where the data element represents fewer than 11 beneficiaries.

Prior to deciding to release physician payment information, as required by the FOIA and case law interpreting FOIA Exemption 6, the Department weighed the privacy interests of physicians and the public's interest in shedding light on Government activities and operations and has determined that the public's interest outweighs the privacy interests. The Department concluded that the data to be released would assist the public's understanding of Medicare fraud, waste, and abuse, as well as shed light on payments to physicians for services furnished to Medicare beneficiaries, which are governed by statutory requirements that CMS must follow.

As an example, using similar payment information, *The Wall Street Journal* was able to identify and report on a number of instances of Medicare fraud, waste, and abuse, using Medicare payment data in its *Secrets of the System* series. In *Consumers' Checkbook Center for the Study of Services v HHS*, the United States Court of Appeals for the District of Columbia Circuit indicated that, where evidence showed that the data could be used to identify fraud, waste, and abuse, the release could be proper. 554 F.3d 1046, 1054-55 (D.C. Cir. 2009). Unlike *Consumers' Checkbook Center for the Study of Services v HHS*, where the requester did not present evidence to demonstrate that the requested data could be used to identify fraud, waste, and abuse to bolster the Government's efforts to prevent the same, the *Secrets of the System* series presented such evidence. Accordingly, release of physician-identifiable payment information will serve a significant public interest by increasing transparency of Medicare payments to physicians, which are governed by statutory requirements, and shed light on Medicare fraud, waste, and abuse.

Furthermore, by providing information about the types of Medicare services furnished by physicians, the charges sought, and Medicare payment, CMS is shedding light on Medicare payment to specific physicians, the types of services paid under the Medicare program, and the average amount of the Medicare payment for those services. This information educates the public on how the agency operates the Medicare program, which is defined in statutory requirements, and how CMS pays physicians for services furnished to Medicare beneficiaries. It will also allow a more informed debate about the appropriate Medicare payment for particular services.

As mentioned above, Exemption 6 of the FOIA requires CMS to weigh the balance between the privacy interest of individual physicians and the public interest in disclosure of such information. In making this decision, CMS did not consider the requester's intended use of the data before making a disclosure: a requester's personal interest in disclosure is irrelevant to the public interest analysis. See *Department of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. at 771-72 & n.20. As the Supreme Court held in *Reporters Committee*, the requester's identity can have "no bearing on the merits of his or her FOIA request." 489 U.S. at 771. In so declaring, the Court ruled that agencies must treat all requesters alike in making FOIA disclosure decisions, and should not consider a requester's "particular purpose" in making the request. 489 U.S. at 771-72 & n.20.

Over the past 30 years, the landscape has changed with respect to physician information that is available to the public. The passage of the Affordable Care Act in 2010 extended health insurance coverage to millions of additional people and included a range of provisions which use transparency in the health care system as a tool to improve health care quality. As a result, the health care system is changing from a system dominated by a dearth of usable, actionable

information to one where care coordination and dramatically enhanced data availability and data exchange will power greater innovation, higher quality, increased productivity and lower costs.

An example of this change is section 10331 of the Affordable Care Act, which required that not later than January 1, 2011, the Secretary develop a Physician Compare Internet website with information on physicians enrolled in the Medicare program and other eligible professionals who participate in the Physician Quality Reporting System. This provision of the Affordable Care Act also required the Secretary, not later than January 1, 2013, to implement a plan for making publicly available through Physician Compare information on physician performance that provides comparable information for the public on quality and patient experience measures with regard to Medicare enrolled physicians. Section 10331(c) of the Affordable Care Act specifically requires the Secretary to ensure patient privacy when making information publicly available, but the provision does not contain a requirement for physician privacy. This may reflect the changing nature of what information is publicly available about physicians' services and payment. For instance, states have begun to require providers to publish certain charge and payment information for health care services and procedures.
<http://www.dhs.wisconsin.gov/2009wisact146/>.

Moreover, section 1874(e) of the Social Security Act, as enacted by section 10332 of the Affordable Care Act, was effective January 1, 2012 and permits certain qualified entities to receive Medicare claims data for purposes of creating, reviewing, and publishing performance reports about individual providers. The qualified entities are required to combine Medicare data with claims data from other sources and produce performance reports at the individual provider level. The performance reports are to cover one or more types of measures: quality, efficiency, effectiveness, and resource use. Section 1874(e) requires that the qualified entities make these performance reports available to the public, and these reports will contain individual physicians' names.

When considering the changes the Affordable Care Act has made in making information about physicians available to the public to inform their decisions in selecting a physician and educating them about payment, the physicians' privacy interest in payment data is not the same as it was over 30 years ago or even 5 years ago. Unlike the physicians' privacy interests in the total annual Medicare payment amounts found in *Consumers' Checkbook Center for the Study of Services v HHS*, CMS intends to release more meaningful data, as described above, than merely raw totals of annual Medicare payment amounts or total numbers of Medicare-paid procedures furnished by physicians. CMS will not release data where the number of beneficiaries associated with that data is less than 11.

For all of the reasons noted above, the Department has decided that the public's interest outweighs the privacy interest for the data that CMS plans to release on its website.

Lastly, unrelated to the FOIA, CMS plans to offer modifications to its current data use agreements to allow researchers to use our data as we are permitted to do under the applicable routine uses in our Privacy Act systems of record notices. This would include the removal of the prohibition on researchers redisclosing physician-identifiable information. As with the public release of information described above, CMS will continue to protect beneficiary privacy and generally prohibit the release of patient-identifiable information. For more information about

CMS's disclosures to researchers, please see <http://www.cms.gov/Research-Statistics-Data-and-Systems/Computer-Data-and-Systems/Privacy/Researchers.html>.

Sincerely,

A handwritten signature in black ink, appearing to read 'Jonathan Blum', with a long horizontal flourish extending to the right.

Jonathan Blum
Principal Deputy Administrator