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Administration Sets Forth a Limited View on Privacy

By **ROBERT PEAR** and **ERIC LICHTBLAU**

WASHINGTON, March 5 — In a sharp departure from its past insistence on the sanctity of medical records, the Bush administration has set forth a new, more limited view of privacy rights as it tries to force hospitals and clinics to turn over records of hundreds and perhaps thousands of abortions.

Federal law "does not recognize a physician-patient privilege," the Justice Department said last month in court papers that sought abortion records from Planned Parenthood clinics in California, Kansas, Missouri, Pennsylvania, New York City and Washington. Moreover, the department said in another abortion case, patients "no longer possess a reasonable expectation that their histories will remain completely confidential."

Health lawyers and privacy experts said that position reflected a significant shift after six years in which Bush and Clinton administration officials had promised to strengthen the confidentiality of medical records.

Two federal judges have also expressed alarm over the government position. The latest blow to the government was on Friday, when a federal district judge in San Francisco denied a demand by the Justice Department for access to abortion records from a public hospital there and from six Planned Parenthood affiliates in the county.

The judge, Phyllis J. Hamilton, said forcing the providers to turn over the records would undermine the privacy rights of patients and could dissuade some from seeking treatment.

"There is no question that the patient is entitled to privacy and protection," Judge Hamilton said. "Women are entitled to not have the government looking at their records."

Judge Hamilton said the records included "potentially identifying information of an extremely personal and intimate nature" like age of first sexual experience, types of contraception used and details of abuse or sexually transmitted diseases.

The city said federal officials were seeking the records of 2,700 patients.

What began late last year as a fairly modest government effort to obtain records appears to have ballooned into a systematic effort in courts around the country to define the limits of medical privacy.

Health care professionals and privacy advocates say the government's position has broad implications beyond abortion. If patients have no reasonable expectation of privacy, the critics say, the government may be more aggressive in seeking records from hospitals, insurance companies and other businesses in criminal, civil and administrative cases.

The Justice Department says it needs the records to defend a new law that prohibits what opponents call partial-birth abortions. Doctors and clinics have challenged the law, saying it bars them from performing certain medically needed abortions.

A spokesman for the White House, Trent D. Duffy, defended the subpoenas. The administration is "strongly committed to medical privacy," and the subpoenas are "completely consistent" with federal privacy rules, Mr. Duffy said.

A spokeswoman for the Justice Department, Monica M. Goodling, said, "We are respecting patient privacy by having hospitals delete any information that identifies specific patients."

[President Bush](#) was elected on a platform that proclaimed support for medical privacy. In April 2001, he said he would protect "the right of every American to have confidence that his or her personal medical records will remain private."

At the time, Tommy G. Thompson, secretary of health and human services, said, "We are giving patients peace of mind in knowing that their medical records are confidential and their privacy is not vulnerable to intrusion."

The federal rules, adopted under a 1996 law, have touched off a quiet revolution in health care. Doctors, hospitals and drugstores routinely give "notices of privacy practices" to patients, assuring them that personal information will be protected.

Privacy advocates say the administration has rolled back some safeguards adopted by President Bill Clinton, and the Justice Department says now that the 1996 law is no obstacle to its efforts to obtain abortion records. In court papers, the Justice Department says the records are needed to show that the banned procedure is almost never medically necessary and "poses serious risks."

Dennis J. Herrera, the city attorney for San Francisco, said he was deeply troubled by Washington's stance.

"Any reasonable person has an expectation that their medical records are going to be kept private," Mr.

Herrera said. "If physicians and patients are left wondering whether their records are going to be made public, that has a real chilling effect. How candid are people really going to be with their doctors?"

The abortion recipients are not directly involved in the litigation, and the government has not told them that it wants their records.

The Justice Department says the federal rules allow the disclosure of medical records in judicial proceedings, with safeguards to protect patients' names. But doctors and hospitals say state laws often prohibit such disclosures, even with deleted names.

Representative Edward J. Markey, the Massachusetts Democrat who is co-chairman of the Congressional Privacy Caucus, said the records would have clues that could identify patients.

"How many hundreds of women, or thousands, will have the frightening experience of their medical records being handed over to the Justice Department as part of a fishing expedition?" Mr. Markey asked.

Representative Nita M. Lowey, Democrat of New York, said: "This administration claims to have taken great pride in adopting regulations aimed at ensuring the sanctity and privacy of medical records. But in an attempt to defend the so-called partial-birth abortion ban, it seems to have lost sight of its promises."

The demand for files is not limited to records of that type of abortion, known medically as intact dilation and extraction. The government also seeks these materials for the last three years:

- ¶ Records of any second-trimester abortion in which the patient suffered a medical complication, regardless of the technique.
- ¶ Records of any case in which a doctor caused a fetus's death by injecting chemical agents in the womb in the second or third trimester.
- ¶ Documents related to any medical malpractice claims arising from certain abortions.
- ¶ The names of all doctors who have performed any type of abortion.

The recent subpoenas appear to have struck a nerve with Attorney General John Ashcroft's critics, because of his history as an outspoken opponent of abortion in almost all cases. Advocates of abortion rights said they did not trust his department to judge whether abortions were medically necessary.

The federal standards have real-life implications for people like Sally Scofield, a legal secretary in Manhattan, Ill., who has joined a suit to fight the rules. After knee surgery and spinal injections in 2002, Ms. Scofield said, she was shocked to learn that her records had been given without her consent to a medical research business, an investigation company and a photocopying service.

"I have nothing to hide about my knee or my spine," Ms. Scofield said. "But every woman will tell you she has medical records she does not want shared. Rape victims, child molestation, incest, H.I.V., there are a lot of things people don't need to know about."

Carolyn Marshall contributed reporting from San Francisco for this article.

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