

Certified Mail 2 May 2012

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

ELIZABETH DENISE CALDON,
PLAINTIFF,

V.

BOARD OF REGENTS OF THE
UNIVERSITY SYSTEM OF GEORGIA,

DEFENDANT.

*
*
*
*
*
*
*
*
*
*

Civil Action File No.:
2009-CV-165267

FILED IN OFFICE
MAY 04 2012
DEPUTY CLERK SUPERIOR COURT
FULTON COUNTY, GA

Handwritten signature

**PLAINTIFF ELIZABETH DENISE CALDON
THIRD MOTION TO LIFT PROTECTIVE ORDERS**

COMES NOW, a **Third Motion** by *Elizabeth Denise Caldon*, Plaintiff in the above-styled civil action, requesting approval to release the following **Depositions/Affidavits** taken in **Caldon v BOR Georgia Whistleblower Case 2009-CV-165267** immediately due to evidence that none of these **Depositions or Affidavits** meet the statutory definitions of being a "Covered Entity" under HIPPA.

The following Depositions are hereby requested to be lifted from any and *all* Protective Orders ("Orders") issued by this Court that previously sealed these documents in regards to **Georgia Whistleblower Protection Act Case 2009-CV-165267** filed in January 2009:

Date of Deposition/Affidavit	Deposition/Affidavit of:
30-Jan-10	AFFIDAVIT: Mary Edenfield Gibbs
4-Feb-10	DEPOSITION: E. Denise Caldon
8-Feb-10	DEPOSITION: Doreen Stiles Poitevint
11-Feb-10	DEPOSITION: Levy Youmans
17-Mar-10	DEPOSITION: John Cole
19-Mar-10	DEPOSITION: David Bell
30-Mar-10	AFFIDAVIT: Claudia Pecor
12-Apr-10	DEPOSITION: Letitia Langley
12-Apr-10	DEPOSITION: Joann Whatley
12-Apr-10	DEPOSITION: David Bell
7-Jun-10	DEPOSITION: Caroline Keller

This motion is made in accordance with USCR 6.1.

The Court's Protective Order dated September 22, 2009 states:

"This Protective Order shall govern all pre-trial proceedings, but **shall be subject to modification** either before, during, or **after the trial upon the merits**, upon consent of the parties, **or upon application and showing of good cause by any of the parties**. This Order shall not affect the right of any party to use summary data or calculations based thereon. Any confidential record that is admitted into evidence shall not lose its confidential designation under this agreement unless expressly ordered by the Court."

GOOD CAUSE:

Invalid Claim of "HIPPA Law Protection" of Depositions and Affidavits

(a) In Response to Plaintiff's First Motion to Lift Protective Order(s), the Defendant, under Paragraph II "Argument And Legal Authority," begins at the bottom of Page 2 with the following:

"As previously recognized by this Court, such information is protected by the Health Insurance Portability and Accountability Act of 1996 ("HIPPA"), 42 U.S.C. § 1320 et seq., and its regulations, 45 C.F.R.160.102 et seq.... Under the terms of the Consent Protective Order, good cause must be shown to alter the Protective Order without both parties' consent. In Plaintiff's Motion, she fails to provide any legal justification for revoking the Consent Protective Order...See Baker v. Wellstar Health Sys., Inc., 288 Ga. 336, 337 (2010) (noting that HIPPA requires that a party seek an appropriate qualified protective order before protected health information may be disclosed in a judicial proceeding)." [bolding and italics added by Plaintiff for more focused attention and discussion in this Third Motion.]

(b) In Response to Plaintiff's Second Motion filed in Fulton County Superior Court on 30 January 2012, the Defendant's Response to the Court submitted on 2 February 2012 by Attorney General Sam Olen, et al., declared the following on Page 3 of 3 pages, Line 8: *"...and Plaintiff nevertheless has not provided any persuasive argument or legal authority to show why Dr. Bell's HIPPA-protected information should be released to her for these purported purposes."*

"HIPPA" is a U.S. Federal Law that comes under the responsibility and direction of the **U.S. Department of Health & Human Services ("HHS")**. HHS has a publicly-accessible Website on which it describes what the HIPPA law is, and, most importantly, with regards to this Motion and the aforementioned Protective Order(s), what *specific legal entities* are required to follow this particular law.

According to **Plaintiff's Exhibit 1**, (which can also be accessed via this Web link <http://www.hhs.gov/ocr/privacy/hipaa/understanding/coveredentities/index.html>) this is what is stated on this HHS Web page, in the **very first paragraph**, regarding the HIPPA Law:

"For Covered Entities

The Privacy and Security Rules **apply only to covered entities** [emphasis added by Plaintiff]. Individuals, organizations, and agencies that meet the definition of a covered entity under HIPAA must comply with the Rules' requirements to protect the privacy and security of health information and must provide individuals with certain rights with respect to their health information. **If an entity is not a covered entity, it does not have to comply with the Privacy Rule or the Security Rule.** [emphasis added by Plaintiff]

In Response to Plaintiff's First Motion, Defendant's Attorneys cited "**45 C.F.R. 160.102 *et seq***" as part of the "legal authority" to demand a protective order on all evidence in *Caldon v. Board of Regents*. This section of the Code of Federal Regulations (*sans* the "et seq") states the following:

45 C.F.R. 160.102 - Applicability.

(a) Except as otherwise provided, the standards, requirements, and implementation specifications adopted under this subchapter apply to the following entities:

(1) A health plan.

(2) A health care clearinghouse.

(3) A health care provider who transmits any health information in electronic form in connection with a transaction covered by this subchapter.

45 C.F.R. 160.103 (which provides all Definitions of terms used in HIPPA) states the following under (3) for what "**Covered Entity**" means:

(1) A health plan.

(2) A health care clearinghouse.

(3) A health care provider who transmits any health information in electronic form in connection with a transaction covered by this subchapter.

According to information available on the HHS Website, the following is an expanded description of what HIPPA considers to be classified as "Covered Entities:"

- 1) "**A Health Care Provider:** This includes providers such as Doctors, Clinics, Psychologists, Dentists, Chiropractors, Nursing Homes, Pharmacies."
- 2) "**A Health Plan:** This includes Health insurance companies, HMOs, Company health plans, Government programs that pay for health care, such as Medicare, Medicaid, and the military and veterans health care programs."
- 3) "**A Health Care Clearinghouse:** This includes entities that process nonstandard health information they receive from another entity into a standard (i.e., standard electronic format or data content), or vice versa."
- 4) **Business Associate:** "A 'business associate' is a person or entity that performs certain functions or activities that involve the use or disclosure of protected health information on behalf of, or provides services to, a covered entity. **A member of the covered entity's workforce is not a business associate.**" [emphasis added] (this definition for a 'business associate' was copied directly from the Business Associates Section of the HHS Website.)

The term "covered entity," under HIPPA, does *not* mean the actual human **person** who is "covered" by insurance or a health plan. "Covered Entities" are *only* the entities involved in managing the *electronic, protected health information ("PHI") records* of a person's health history and status.

In Defendant's Response to Plaintiff's First Motion, the Attorney General cited *Baker v. Wellstar Health Sys., Inc.*, and, specifically, Judge Hunstein's note that "*HIPPA requires that a party seek an appropriate qualified protective order before protected health information may be disclosed in a judicial proceeding.*" [emphasis on "appropriate" added by Plaintiff].

Respectfully, Plaintiff submits to this Court that *Baker v. Wellstar* has absolutely **no bearing or relevance** in any way, shape, **or** manner to these Protective Orders. Because, **while** Wellstar Health Systems, Inc. **is** categorized as an actual "**Covered Entity**," neither the individuals themselves nor **their** depositions (nor affidavits) held under the Court's Protective Orders in *Caldon v Board of Regents* fits **any** category of what constitutes a "Covered Entity" according to 45 C.F.R. 160.103.

Furthermore, lest the Court rely strictly on Plaintiff's interpretation of federal law, a case decided on March 26, 2012 in the U.S. Western District Court for Tennessee, *Johnson v. Kuehne & Nagel Inc. (W.D. Tenn., 2012)* may help provide this Court with some guidance.

Plaintiff offers a cite from this Tennessee case to only support her argument regarding what kinds of "entities" must abide by HIPPA, and not anything regarding the actual substance or subject matter of the Tennessee District Court Decision. There is absolutely no relationship between *Caldon v. Board of Regents* and *Johnson v. Kuehne & Nagel Inc.* other than this specific legal cite from the District Court. On Page 11 of the Western District Court of Tennessee Decision, Line 1, the District Court states that:

"In general, HIPPA governs confidentiality of medical records and regulates how 'covered entities' can use or disclose 'individually identifiable health (medical) information (in whatever form) concerning an individual.' "

This Tennessee District Court appears to understand that HIPPA is a law written only to control how "**Covered Entities**" can **use or disclose medical records** concerning an individual.

Although HIPPA contains provisions for the imposition of civil and criminal penalties for "improper handling or disclosure of health information," only **covered entities** are subject to following the Privacy or Security Rules of HIPPA. Therefore, only "covered entities" who violate HIPPA are subject to 'civil and/or criminal penalties.'

By comparison, how can the Defense argue that Plaintiff Denise Caldton (or her deposition) is a "covered entity?" Plaintiff is **not** a "health plan." Plaintiff is **not** a "healthcare clearinghouse." Plaintiff is **not** a "health care provider." Plaintiff is **not** a "business associate." Plaintiff's deposition also does **not** fit **any** of these four categories of covered entities as defined by HIPPA.

Plaintiff would also argue that **not even** Dr. Bell's **own** depositions would fit **any** category of what is considered to be a "covered entity" according to **45 C.F.R. 160.103**.

On the University System of Georgia's ("USG") Website, there is a section titled "HIPPA" that details who the "privacy officers" are for each school, a notice of privacy practices, and an extensive sub-section of policies and procedures the USG states that they follow with regards to keeping protected health information ("PHI") confidential.

Based on this information on USG's website, Plaintiff will assume that USG considers itself a "covered entity." Whether or not the USG or the BOR or each of the universities within the umbrella of USG do, actually, constitute "covered entities" is **irrelevant** to the argument in this Motion.

Because, even *if* these entities are considered to all be “covered entities,” **under** the “business associate” rules of HIPPA, there is a specific exclusion written under HIPPA that provides that “A *member of the covered entity’s workforce is not a business associate.*”

So, since Plaintiff was a member of the “workforce” for Macon State College, even if Macon State College is, itself, considered to be a “covered entity” under HIPPA, HIPPA will *not* consider the Plaintiff who worked for a “covered entity” to *be* a “covered entity.”

Which, also means that *none* of the following individuals are “covered entities” under HIPPA:

1. **Mary Edenfield Gibbs**
2. **E. Denise Caldon**
3. **Doreen Stiles Poitevint**
4. **Levy Youmans**
5. **John Cole**
6. **David Bell**
7. **Claudia Pecor**
8. **Letitia Langley**
9. **Joann Whatley**
10. **David Bell**
11. **Caroline Keller**

Furthermore, since these aforementioned individuals are not “covered entities” under HIPPA, then *their Depositions or Affidavits cannot be* considered to be “covered entities” under HIPPA either.

Therefore, there is *no* “legal authority,” federal HIPPA-protection or otherwise, that this Court has to continue to keep the Depositions and/or Affidavits as so specified in this Third Motion under the Court’s Protective Order(s).

Plaintiff hereby respectfully requests that the Court **release** the listed Depositions and Affidavits placed under any Orders in this case.

Respectfully submitted,

Elizabeth Denise Caldon

Elizabeth Denise Caldon
1055 Ashford Chase Court
Macon, GA 31210
H: 478.757.0870 C: 478.731.5576
Email: cotn712@aol.com

Encl.: EXHIBIT 1

CC: Attorney General Sam Olens, Defendants’ Attorney

For Covered Entities

The Privacy and Security Rules apply only to **covered entities**. Individuals, organizations, and agencies that meet the definition of a covered entity under HIPAA must comply with the Rules' requirements to protect the privacy and security of health information and must provide individuals with certain rights with respect to their health information. If an entity is not a covered entity, it does not have to comply with the Privacy Rule or the Security Rule.

A Covered Entity is one of the following:

A Health Care Provider

This includes providers such as:

- Doctors
- Clinics
- Psychologists
- Dentists
- Chiropractors
- Nursing Homes
- Pharmacies

...but only if they transmit any information in an electronic form in connection with a transaction for which HHS has adopted a standard.

A Health Plan

This includes:

- Health insurance companies
- HMOs
- Company health plans
- Government programs that pay for health care, such as Medicare, Medicaid, and the military and veterans health care programs

A Health Care Clearinghouse

This includes entities that process nonstandard health information they receive from another entity into a standard (i.e., standard electronic format or data content), or vice versa.

Web Source for Above Chart:

<http://www.hhs.gov/ocr/privacy/hipaa/understanding/coveredentities/index.html>

Web Source for “Business Associate” Definition:

<http://www.hhs.gov/ocr/privacy/hipaa/understanding/coveredentities/businessassociates.html>

CERTIFICATE OF SERVICE

**IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA**

ELIZABETH DENISE CALDON,

*

PLAINTIFF,

*

*

V.

*

*

*

**BOARD OF REGENTS OF THE
UNIVERSITY SYSTEM OF GEORGIA,**

*

*

*

DEFENDANT.

*

**Civil Action File No.:
2009-CV-165267**

I, hereby, certify that I have this day served the foregoing

THIRD MOTION TO LIFT PROTECTIVE ORDERS

by depositing a copy of same in the United States mail in a properly addressed envelope with adequate prepaid postage, thereon, to ensure delivery to the following:

Fulton County Superior Court

Attn: Civil Division

136 Pryor Street

First Floor, Suite C-103

Atlanta, GA 30303

404.612.5344

DEFENDANTS' ATTORNEYS

Georgia Department of Law

Samuel S. Olens, Attorney General #551540

Dennis R. Dunn, Deputy Attorney General #234098

Annette M. Cowart, Senior Asst. Attorney General #191199

Christopher A. McGraw, Senior Asst. Attorney General #493177

40 Capitol Square, SW

Atlanta, GA 30334-1300

404.656.3393

solens@law.ga.gov

ddunn@law.ga.gov

acowart@law.ga.gov

cmcgraw@law.ga.gov

This 2nd DAY OF MAY 2012

Elizabeth Denise Caldon

Elizabeth Denise Caldon

1055 Ashford Chase Court

Macon, GA 31210

H: 478.757.0870 C: 478.731.5576

Email: cotn712@aol.com