

Date: 20 Feb 2018

To: Federal Communications Commission

Re: Docket 17-344:

Reply to the Comments filed by Steve Waterman:

<https://ecfsapi.fcc.gov/file/10123298305905/%2017-344.pdf>

Summary:

The claim made in those Comments that there is a requirement for encrypted / obscured data transmission by amateur radio operators during a natural or man-made emergency based on the "HIPAA"[*] privacy rules is TOTALLY WITHOUT MERIT.

Thus, if there is no requirements for encrypted / obscured transmissions in such circumstances, it follows that there is no need for systems using encrypted /obscured data such as WinLink / PactorX in the amateur radio bands.

The brief sections below will demonstrate, using material from official (Federal) Health and Human Services (HHS) web-pages, that, indeed, the HIPAA Rules and Regulations do NOT require such encrypted / obscured communications by amateur radio operators.

This is regardless of whether the communications occurs
from individual radio operator to a hospital, shelter, etc,
or
radio operations between hospitals, shelters, etc,
or
radio operations within a hospital, shelter, etc.

[*] "HIPAA", not otherwise defined in the Comments, is an acronym for the (Federal) Health Insurance Portability and Accountability Act.

Several proposals are made in the Conclusion to assist the Commission in its decisions regarding this matter.

Section One.

The Federal Communications Commission asked for input regarding communications during the 2017 Hurricane Season. In the response to the FCC question (2),

"Going forward, should efforts be made to increase the use of Amateur Radio services in connection with the planning, testing and provision of emergency response and recovery communications?",

the Comments cited above contain two paragraphs with inaccurate claims regarding the requirement for obscured / encrypted amateur radio communications based on "HIPAA" privacy rules.

The first paragraph referencing HIPAA in the Comments is (with the sentences separated and numbered for discussion purposes):

"(A.1) (Also) under FCC Part 97.113, HIPAA and other non-public data transfer is not allowed due to the inability of the control operator to obscure data.

(A.2) Most information sent during any casualty event is such data. Only health and welfare data is left for public observation.

(A.3) If the Commission wishes to increase the capabilities of the Amateur operator to provide emergency communications, this is an important issue."

The second paragraph (similarly separated and numbered):

"(B.1) Part 97.113(a)4 also restricts agencies using Amateur radio when they have no other reliable local communications infrastructure because it will not allow these agencies to obstruct the data that is being sent. Such data can be sensitive and need obscuring.

(B.2) HIPAA information exchanged between ICS Shelters, hospitals and others can not be legally sent.

(B.3) Data between agencies and Intra - agency information may not be protected from the public.

(B.4) This severe restriction certainly limits the ability of a Communications Unit Leader to utilize Amateur radio, even though it may be his only option."

Each of these paragraphs contain claims arguing for permitting obscured / encrypted communications in the amateur radio bands; these claims are utterly deceptive.

Section Two.

First, we need to know what "HIPAA" is (as it is not defined in the Comments cited above). HIPAA is an acronym for the Federal Health Insurance Portability and Accountability Act, which, among other items, provides for protection for individually

identified health data from improper disclosure by *covered entities*.

From the US Government Health and Human Services (HHS) web pages relating to HIPAA and emergency preparedness,

<https://www.hhs.gov/hipaa/for-professionals/special-topics/emergency-preparedness/index.html>

we find,

"The Privacy Rule protects individually identifiable health information from unauthorized or impermissible uses and disclosures. **The Rule is carefully designed to protect the privacy of health information, while allowing important health care communications to occur.** These pages address the release of protected health information for planning or response activities in emergency situations. In addition, please view the [Civil Rights Emergency Preparedness](#) page to learn how nondiscrimination laws apply during an emergency."
[my emphasis]

In the context of "emergency-preparedness", note the ". . . **while allowing important health care communications to occur.**" That is, permitting transmission of unprotected data transmission in some circumstances.

Second, that web page goes on to provide a "decision tree" to elaborate on the general issues in the paragraph above.

"Question 1: Who is the source of the information to be disclosed?
Possible answers:
A. A covered entity?
B. The individual consumer?
C. Other agency or organization that is not a *covered entity*?"

Taking (B) first:

"The Privacy Rule does not apply to individual consumers. Individuals may disclose information to any person without regard to the Privacy Rule."

The answer to (A) or (C) depends on the definition of "*covered entity*". The clearest and concise definition is from

https://privacyruleandresearch.nih.gov/pr_06.asp,

"Covered entities are defined in the HIPAA rules as (1) health plans, (2) health care clearinghouses, and (3) health care providers who electronically transmit any health information in connection with transactions for which HHS has adopted standards. Generally, these transactions concern billing and payment for services or insurance coverage. **For example, hospitals, academic medical centers, physicians,**

and other health care providers who electronically transmit claims transaction information directly or through an intermediary to a health plan are covered entities. Covered entities can be institutions, organizations, or persons."

An amateur radio operator is **NOT** a *covered entity*.

So, the answer is (C), "Other agency or organization that is not a covered entity". The applicable rule for a non-covered entity from the same website is

"NO, the source of the information is *not* a covered entity. The disclosure may be made.

The Privacy Rule applies only to covered entities!"

[my emphasis]

Therefore, an amateur radio operator (especially in an emergency) is permitted to disclose individually identifiable health information.

Finally, in a bulletin issues by HHS after the Katrina disaster,

<https://www.hhs.gov/sites/default/files/katrinanhipaa.pdf>,

it is explicitly stated that,

"Of course, the HIPAA Privacy Rule does **not** apply to disclosures if they are **not** made by **entities covered** by the Privacy Rule.

Thus, **for instance**, the HIPAA Privacy Rule does **not restrict** the **American Red Cross** from sharing patient information."

[my emphases]

Hence, there is nothing in the HIPAA regulations to prevent amateur radio operators from transmitting emergency health-related information in clear, plain, non-encrypted / non-obscured messages.

Section Three:

Individual sentences in the two paragraphs of the Comments cited above variously imply the needs for obscured / encrypted transmission due to HIPAA requirements; these sentences mandate only a few words of rebuttal.

Sentence (A.1) "(Also) under FCC Part 97.113, HIPAA and other non-public data transfer is not allowed due to the inability of the control operator to obscure data.

We all know that FCC Part 97.113 states that,

"No Amateur station may transmit ... for the purpose of obscuring their meaning, except as otherwise provided herein". (The except clause deals with control signals to satellites and the like.)

Sentence A.1 implies that a) since an [amateur] control operator is prohibited from sending encrypted / obscured messages, then b) it follows that HIPAA related data may not be transmitted.

That would be true *IF* HIPAA confidentiality rules *APPLY* to amateur radio operators in disaster zones. They *DO NOT* APPLY.

To repeat, **there is nothing in the HIPAA regulations to prevent amateur radio operators from transmitting emergency health-related information in clear, plain, non-encrypted / non-obscured messages.**

Sentence (A.2) "Most information sent during any casualty event is such data. Only health and welfare data is left for public observation."

Indeed, *much* - though perhaps not *most* - data transmitted during a casualty event is health related but, once again, the HIPAA rules do NOT prevent such data to be sent in clear, plain, non-encrypted / non-obscured messages.

Sentence (A.3) "If the Commission wishes to increase the capabilities of the Amateur operator to provide emergency communications, this is an important issue."

It is an important issue, but it does not follow that the solution is to permit obscured transmission in the amateur radio bands in contravention of FCC Part 97.113 prohibiting such transmission.

Sentence (B.1) "Part 97.113(a)4 also restricts agencies using Amateur radio when they have no other reliable local communications infrastructure because it will not allow these agencies to obstruct (sic) the data that is being sent. Such data can be sensitive and need obscuring."

[Instead of the word "obstruct" the author probably meant "obscure".]

This sentence appears to reference communications internal to a covered entity, such as an Hospital. However,

<https://www.hhs.gov/hipaa/for-professionals/faq/196/can-health-care-providers-have-confidential-conversations/index.html>,

states that,

"The Privacy Rule recognizes that oral communications **often must occur freely and quickly** in treatment settings. Thus, **covered entities** are free to engage in communications as required for quick, effective, and high quality health care. . . **and allows for these incidental disclosures.**"

Yes, such (medical) data can be sensitive, but it does not need to be obscured under the conditions found within, say, a Hospital, during a natural or man-made emergency. Indeed, the rule explicitly allows for ". . . quick, effective . . ." communications such as those provided by radio amateurs stationed with a Hospital or other covered entity

Sentence (B.2) "HIPAA information exchanged between ICS Shelters, hospitals and others can not be legally sent."

As exhaustively detailed above, HIPAA information CAN be exchanged between (implied) covered entities by amateur radio operators in plain, clear, non-obscured messages.

Sentence (B.3) "Data between agencies and Intra - agency information **may** not be protected from the public."

Not sure what this sentence intended to convey, but it appears to literally say that (HIPAA) data between covered entities **may** not be protected from the public; that is, it has to be sent in plain, clear, non-obscured messages.

Sentence (B.4) "This severe restriction certainly limits the ability of a Communications Unit Leader to utilize Amateur radio, even though it may be his only option."

To repeat once again, **there is nothing in the HIPAA regulations to prevent amateur radio operators from transmitting emergency health-related information in clear, plain, non-encrypted / non-obscured messages, either to, between, or within covered entities.**

Conclusions:

1. As demonstrated above, the claim that there is a requirement for encrypted / obscured data by amateur radio operators during a natural or man-made emergency based on the HIPAA privacy rules is TOTALLY WITHOUT MERIT.

This is regardless of whether the communications occurs
from individual radio operator to a hospital, shelter, etc,
or
radio operations between hospitals, shelters, etc,
or
radio operations within a hospital, shelter, etc.

We urge the Commission to dismiss any and all Petitions, Filings, and Comments which purport claim otherwise with prejudice - especially RM-11708 and FCC WT 16-239.

2. Since most of the argument for permitting obscured / encrypted protocols such as WinLink / PactorX in the amateur radio bands is fallaciously based on the HIPAA privacy rules, all present and future requests for permitting such operations should be summarily denied, and the FCC Part 97.113 prohibiting obscured transmissions be upheld and rigorously enforced.

3. Recognizing that one of the major reasons for the existence of the amateur radio service is the ability to provide fast, reliable transmission of health-related data in emergencies, I propose the following:

a. That the FCC encourage the amateur radio community to develop one or more fast, reliable, narrow-band, open-source, digital communication protocols for use in emergency situations, similar to the very narrow-band, open-source protocols recently developed and now widely used, and

b. That for a very short interim period - say 6 months to one year - the FCC permit protocols such as WinLink / PactorX - to be used for emergency purposes only on limited amateur frequencies conducive to local area disaster communications, such as 3.600 - 3.625 MHz.

Respectfully submitted by

/s/

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(Extra Class) Amateur Radio License W3IDT

ARRL Life Member (for many decades: 40 years?)