OSHA RECORDS AND PRIVACY: COMPETING INTERESTS IN THE WORKPLACE

INTRODUCTION

As a part of its program to improve workplace conditions, the Occupational Safety and Health Administration (OSHA) has begun to impose extensive medical recordkeeping requirements on employers. These records will contain the information obtained from periodic medical surveillance examinations OSHA requires employers to provide, and from the "workplace logs" documenting employees' exposure to known disease-causing substances.

The creation of such an extensive system of medical records containing highly personal information creates a unique privacy problem. Medical records in general are subject already to disclosures that patients probably do not contemplate when they seek medical care. The recordkeeping requirement proposed by OSHA, however, presents a new privacy hazard. Employers will keep these records, rather than physicians and

1. The Occupational Safety and Health Administration (OSHA) was created pursuant to the Occupational Safety and Health Act of 1970, §§ 6(b), 8(c), (g), 29 U.S.C. §§ 651-678 (1976), to regulate working conditions for the benefit of workers. Id. § 651(b).

2. These regulations are one aspect of OSHA's broader power to regulate working conditions. In its six-year history, OSHA has completed rules governing workplace exposure to only a few substances. These are the asbestos standard, 29 C.F.R. § 1910.1001 (1977); the carcinogen standard, concerning thirteen selected carcinogens; 29 C.F.R. §§ 1910.1003-.1016 (1977); the vinyl chloride standard, 29 C.F.R. § 1910.1017 (1977); and the coke oven emission standard, 29 C.F.R. § 1910.1029 (1977).

OSHA, however, is undertaking a new rulemaking procedure to regulate all known and suspected carcinogens. It has proposed rules to prescribe standard handling procedures and recordkeeping requirements for all such substances, leaving the specific substances covered by the rule to be determined later. 42 Fed. Reg. 54,148-247 (1977) (to be codified in 29 C.F.R. § 1990). Once these rules are promulgated, whenever a substance is suspected or found to cause cancer, OSHA will need only to add it to its list of substances regulated by these rules. It no longer will have to go through an entire rulemaking procedure whenever another substance is discovered to have cancer causing effects. OSHA already has a large backlog of known and suspected carcinogens that it plans to regulate by use of these proposed rules.


hospitals that have a traditional ethical obligation, if not always a legal one, to keep information about patients confidential. Additionally, the records are to be kept for a long period of time and the federal government may see and copy them whenever it wishes.

OSHA’s stated purpose for requiring employers to make and keep these records is threefold. First, like all records pertaining to regulated activities, they will serve as an objective check that an employer actually has complied with the OSHA rules for minimizing workers’ exposure to cancer causing substances (carcinogens). Second, the records will be available to the employee or his physician to help diagnose illness. Third, the medical records, together with the exposure monitoring records OSHA also requires, will provide valuable data for research into the cause and prevention of diseases related to toxin exposure. Whatever their intended effect, such vast and neatly packaged quantities of medical information present a real danger of misuse by employers and by unauthorized outsiders—a result OSHA clearly did not intend.

These records are intended to be used by the National Institute for Occupational Safety and Health (NIOSH) to study occupational diseases. NIOSH was created by the same statute that established OSHA. Although OSHA is an agency of the Department of Labor, NIOSH is one of the federal government’s National Institutes of Health and is part of the Department of Health, Education, and Welfare.

OSHA has the authority to make rules to protect workers’ health and safety. NIOSH has the authority to make inspections to insure compliance with OSHA rules and to perform research into occupational diseases. It is for this latter purpose that NIOSH will use the medical records required by OSHA regulations.

Some of these rules already are in force; a larger number are proposed rules in various stages of the rulemaking process. This comment, however, will refer to all these rules, both proposed and final, as OSHA rules and to the medical records the rules require as OSHA records.

The consequences of misuse of these OSHA records are serious because medical record information is often used to determine whether individuals should be allowed to enter into certain social, economic, and

6. The proposed rules require the employer to maintain these records for forty years, or the duration of the worker’s employment plus twenty years, whichever is longer. 42 Fed. Reg. 54,179 (1977).
7. Id. at 54,180.
10. Id. § 655.
11. Id. §§ 669(a), (b), 671(c), (d).
political relationships and, if so, under what circumstances. In this sense, medical record information performs a "gatekeeping function." For example, marriage licenses may be denied to those with venereal disease; life insurance may be denied to persons with heart disease. The gatekeeping function of such records can also be more subtle. Some employers use medical record information in making assignment and promotion decisions, as well as in making hiring and firing decisions. Medical records are required when starting school, going into the armed forces, travelling abroad, applying for a business license or driver's license, applying for a security clearance, or applying for welfare. Use of medical information in these contexts, often called "secondary uses," frequently can have a drastic impact on the life of an individual, and there is a definite risk of misuse of OSHA information by people who were never intended to have access to it.

This comment will consider the individuals and entities that could have access to OSHA-required medical records, possible misuse of the information, and the consequences of such misuse. Legislation will be recommended to remedy some of the privacy problems the records create.

I. Social Justification for the Medical Recordkeeping Requirements

The OSHA rules requiring workplace logs of toxin exposure and extensive medical surveillance records serve a dual medical purpose. They not only provide the worker with accurate information to aid his physician in diagnosing any illness that should ensue, but also can provide medical researchers with invaluable data for the study of the causes of occupational diseases. Many diseases, including cancers, appear only after long latency periods that tend to obscure cause and effect. As a result, epidemiological studies, in which the long-term medical records of large populations are compared, are the only satisfactory way to learn what causes these diseases and which precautions most effectively prevent them.

12. The report of the Privacy Protection Study Commission, a body created by the Privacy Act of 1974, § 5(b)(1), 5 U.S.C. § 552a (1976), uses the term "gatekeeping function" to describe certain social-entry uses of information contained in medical records. PRIVACY PROTECTION STUDY COMMISSION, PERSONAL PRIVACY IN AN INFORMATION SOCIETY 281 (1977) [hereinafter cited as PERSONAL PRIVACY].

13. A. Westin, supra note 5, at 60.


15. See the discussion of the nature of cancer in 42 Fed. Reg. 54,173 (1977) and the discussion of epidemiological studies of populations exposed to suspected carcinogens in id. at 54,155-56.

16. Direct experimentation with humans is ethically and morally impermissible. This principle has been affirmed by the District of Columbia Circuit when, speaking in regard to exposure to lead,
The OSHA records offer other advantages to the medical researcher. Epidemiologic inquiry depends on the availability of the medical and vital records of large numbers of people, both for the date they contain and for ascertaining and identifying individuals for later study.\textsuperscript{17} The large size of the population covered by OSHA records provides a splendid basis for research. Moreover, since individual OSHA records can be correlated readily with workplace logs that show which substances workers have been exposed to and in what amounts, they are far preferable to studies of the population at large that use only vital statistics for a data base. The general population's mobility and the complexity of the mixture of toxins to which everyone is exposed make it almost impossible for unfocused studies to isolate the single variables that OSHA records will show. Since the OSHA records identify individual workers, researchers will be able to correlate a record with other records on the same individual and perform long-range studies otherwise impossible.

There are some advantages to the OSHA rules from the worker's point of view as well. Regular medical surveillance will monitor an employee's health\textsuperscript{18} and will show that he should be transferred to less hazardous work if he begins to suffer ill effects from toxin exposure. The proposed rules will allow workers access to their own medical records and to the workplace exposure logs.\textsuperscript{19} In addition, a recently proposed amendment to the recordkeeping requirements allows employees and their representatives, as well as former employees, access to logs of occupational ill-

\textsuperscript{17} Gordis, Gold & Seltser, \textit{Privacy Protection in Epidemiologic and Medical Research, A Challenge and a Responsibility}, 105 \textit{Am. J. Epidemiology} 458, 458-60 (1977) [hereinafter cited as \textit{Privacy Protection and Medical Research}].

\textsuperscript{18} E.g., 29 C.F.R. § 1910.1017(d) (1977) (medical surveillance program provided for workers exposed to vinyl chloride in concentrations in excess of .5 ppm averaged over an 8-hour period). Each rule or standard discussed in this comment requires employers to make examinations available at the employer's expense, but does not require workers to submit to them.

nesses and injuries. This change recognizes that workers should have a right to know about workplace hazards to which they are exposed, and that they need this information about their health to make informed choices about which occupational health risks to take.

Making this exposure data available to workers is more revolutionary than it may seem. Even quite recently, employers often have deliberately concealed from their employees the risks of handling toxic substances. In one incident, two major chemical companies failed to conduct further research when studies indicated probable harmful effects on workers and consumers from one of their products, and they did not place warnings in the product's data sheets. The companies' express reason for the failure to conduct further research was that the federal government did not require it.

Researching the toxicity of substances, providing medical surveillance of workers, and protecting workers from toxic substances represent major expenses which industries are understandably, if not forgiveably, reluctant to undertake unless the government requires them to do so. Thus, there is a need for government intervention in the industrial hygiene area. Even when research shows that a substance used in industry is hazardous, economic incentives may dissuade some employers from undertaking expensive precautions: it may be cheaper for an employer to pay occasional


21. In an address given to the National Conference on the Confidentiality of Health Records, Dr. Finklea, the Director of NIOSH, pointed out that many workers are unaware of the fact that they are being exposed to toxic substances, and that there may be several reasons for this. One, the employer may be unaware that a new substance is dangerous. This is due partly to the long time lag between exposure to the substance and the resulting damage to health, and partly due to the inadequate reporting system. These factors combined with individual mobility of workers, often have obscured the cause and effect relationship. Two, employers are extremely reluctant to report deaths and serious illnesses that are work related for fear of incurring liability. Thus, they may fail to report deaths from diseases such as leukemia or liver cancer as work related, even though a state statute may require reporting of deaths from occupational diseases. Three, some employers actively oppose access by anyone to their medical records. Address by Dr. John Finklea, former Director of NIOSH, at National Conference on the Confidentiality of Health Records (Oct. 14, 1977), excerpts reprinted in National Commission on the Confidentiality of Health Records, Report of the National Conference on the Health Records Dilemma 34 (1978) [hereinafter cited as DILEMMA].

22. Hearings before the California Department of Industrial Relations revealed that Shell Chemical Company ignored adverse research results on a pesticide. The studies, one of which was jointly funded by Dow Chemical Company, were performed in the late 1950's and early 1960's. Both studies recommended that greater attention be given to possible sterility problems, but Shell declined to perform further studies because the government did not require it to do so. Furthermore, the data sheets distributed to consumers and workers failed to recommend safety precautions. Wash. Post, Oct. 19, 1977, § A, at 17, col. 1.
court-awarded damages or to bear the cost of higher insurance premiums than to initiate costly hygiene measures. How high a price should be set on protecting human beings from health hazards that are as yet undefined is a decision best made by those who do not profit from ignoring the hazards. The National Institute of Occupational Safety and Health (NIOSH), OSHA's medical research branch, is responsible for the technical background studies underlying OSHA rules and is in a better position to make this judgment than industry. Additionally, NIOSH's judgment on medical record needs for research and compliance monitoring purposes is subject to judicial review. Although OSHA has not included cost-benefit analysis in the statement of basis and purpose given for its rules, it may be required to do so in the future.

II. POTENTIAL MISUSE OF OSHA RECORDS
UNDER THE PRIVACY ACT AND OTHER FEDERAL STATUTES

To determine whether a particular record may be disclosed to the public by a federal agency, two statutes must be considered—the Privacy Act of 1974 and the Freedom of Information Act (FOIA). The Privacy Act seeks to prevent improper disclosure of individually identifiable records kept in federal record systems. It stipulates that no record about an individual may be disclosed to a member of the public unless the disclosure is required by the FOIA. The FOIA's primary purpose is to allow citizens' access to government documents. It permits an agency to

23. NIOSH, the simultaneously created twin of OSHA, is authorized to conduct research into the causes of work-related diseases. 29 U.S.C. §§ 669(a)(4), (5), 671(c)(2) (1976). For this purpose, NIOSH has access to reports and records kept and filed by other federal agencies unless national security considerations indicate otherwise. 29 U.S.C. § 668(c) (1976).

24. In E.I. DuPont de Nemours & Co. v. Finklea, 442 F. Supp. 821 (S.D. W. Va. 1977), an employer challenged NIOSH's subpoena of workers' health records when some workers had not consented to release. The court ordered DuPont to turn over the records, but ordered NIOSH not to disseminate them to any other agency and to return them to DuPont at the end of the study. In General Motors Co. v. Finklea, No. C-3-77-339 (S.D. Ohio Oct. 10, 1978), a majority of employees objected to the NIOSH subpoena of their medical records. The court held that NIOSH has the right to obtain the records, but that names and information must be deleted before this information is released.

25. The Fifth Circuit recently struck down the OSHA benzene standard because it did not include a cost-benefit analysis in its statement of basis and purpose. American Petroleum Inst. v. Occupational Safety & Health Admin., 581 F.2d 493 (5th Cir. 1978). This decision is of particular note because the OSHA Act does not stipulate that OSHA rules must require a cost-benefit analysis.


28. 5 U.S.C. § 552a(b)(2) (1976). The Privacy Act, however, permits disclosure of such a record to any person who shows "compelling circumstances affecting the health or safety of an individual," id. § 552a(b)(8), and permits disclosure pursuant to a court order. Id. § 552a(b)(11). Disclosure to various government officials and agencies also is authorized. Id. § 552a(b).
withhold from disclosure "personnel and medical files . . . the disclosure of which would constitute a clearly unwarranted invasion of personal privacy . . . ." The courts have interpreted this exemption to mean that there are no defined categories of records that may be withheld and that any determination regarding disclosure must rest on a balancing of the private and public interests involved. Thus, a certain amount of protection is given to OSHA records requested by the public, albeit on a case-by-case basis.

As an agency of the Department of Health, Education, and Welfare (HEW), NIOSH is subject to regulations issued by HEW to implement the Privacy Act. These regulations do not require NIOSH to remove data disclosing an individual's identity (identifiers) from the records it uses for research. No distinction is made in either the Act or the regulations between data kept for scientific and research purposes and that kept for administrative purposes, such as personnel files, where there is a clear need for the individual to be identified.

The Privacy Protection Study Commission has studied intensively the problem of research record confidentiality and has recommended that researchers keep data in individually identifiable form "only so long as it is necessary to fulfill the research or statistical purpose for which the record or information was collected, unless retention . . . is required by Federal statute or agency regulations." Thus, although the ability to identify individuals may remain necessary, there is no reason not to code the identifying information and to file the key under stringent safeguards when the identifiers are not being used for record correlation.

Well-known epidemiologists have published detailed and highly practical recommendations for safeguarding research subjects' privacy. These stress removing identifiers when the records are not actively being used, keeping them out of computer programs, and destroying them once a

31. See notes 9-10 & accompanying text supra.
32. The regulations are codified at 45 C.F.R. §§ 5b.1-.13 (1977).
34. The Privacy Protection Study Commission was created by Congress in the Privacy Act of 1974, § 5, Pub. L. No. 93-579, 88 Stat. 1897 (1974) (codified at 5 U.S.C. § 552a note (1976)), and was directed to "make a study of the data banks, automated data processing programs, and information systems of governmental, regional, and private organizations, in order to determine the standards and procedures in force for the protection of personal information . . . ." Id. § 5(b)(1).
35. PERSONAL PRIVACY, supra note 12, at 584.
36. Privacy Protection and Medical Research, supra note 17, at 462.
study is complete. 37 Neither the Privacy Act nor its implementing regulations take into account the special needs and circumstances of research data.

The confusion of individually identifiable research data with data that is intended primarily for administrative use theoretically allows NIOSH records to be made available under the Privacy Act and guidelines issued pursuant to it for a variety of uses that were never intended. The various agencies are allowed under the Privacy Act to establish certain "routine" inter- and intra-agency uses for which the transfer of records is permissible. 38 The "routine uses" allowed by Appendix B to the HEW regulations permit disclosure

[t]o a federal, state, or local agency maintaining civil, criminal, or other relevant enforcement records or other pertinent records, such as current licenses, if necessary to obtain a record relevant to an agency decision concerning the hiring or retention of an employee, the issuance of a security clearance, the letting of a contract, or the issuance of a license, grant, or other benefit. 39

The records also are to be made available in response to a subpoena issued by agencies such as the Internal Revenue Service and the Civil Rights Commission. 40 This provision raises the possibility that the Internal Revenue Service could use workplace exposure logs and medical records to verify statements on an income tax return. Further, the provisions that such records be disclosable for quality assessments, medical audits, or utilization review or in the course of employee discipline or competence determination proceedings 41 are far removed from the research and worker protection purposes for which the records were originally required. Although their use in these contexts seems unlikely, any possibility of such use should be foreclosed. The Privacy Act regulations should be amended to exempt data kept in individually identifiable form for research purposes from other "routine" uses within the HEW and from the interagency exchanges allowed by Appendix B of HEW's Privacy Act regulations.

37. Id.
38. 5 U.S.C. § 552a(b)(3) (1976). A "routine use" is defined as "the use of such record for a purpose which is compatible with the purpose for which it was collected." Id. § 552a(a)(7). In spite of this "compatible purpose" requirement, the implementing regulations permit a grab-bag of routine uses, some of which are arguably far from compatible with the original purpose for collecting the data.
40. Id. § 5b app. B(6).
41. Id. § 5b app. B(102), (103).
The second statutory basis for medical information sharing can be found in the Health Services Research, Health Statistics, and Medical Libraries Act of 1974. This statute requires the Secretary of Health, Education, and Welfare to assist federal, state, and local health agencies "in the design and implementation of a cooperative system for producing comparable and uniform health information and statistics at the Federal, State, and local levels . . . ." The Secretary is required further to review HEW's statistical activities to assure that they are consistent with this cooperative system.

The National Cancer Institute also has a legislative mandate for information sharing, both to obtain information from other agencies and to cooperate with them in assuring the exchange of information among researchers regarding the incidence and causes of cancer. In addition, the Occupational Safety and Health Act of 1970 provides that the Secretary of Labor is authorized to enter into "agreements, or other arrangements with appropriate public agencies . . . for the purpose of conducting studies relating to his responsibilities [of research into the incidence and causes of occupational diseases] . . . . [T]he Secretary [of Labor] shall cooperate with the Secretary of Health, Education and Welfare in order to avoid any duplication of efforts under this section." The clear implication of this provision, as well as of the Health Services Research, Health Statistics, and Medical Libraries Act of 1974, and the National Cancer Institute provisions for polling and sharing of information, is that information relevant to incidence and causes of diseases is to be shared not only with other federal agencies, but with state public and occupational health departments as well. As this information need not have the individual identifiers removed, these laws and regulations per-

44. Id.
45. Id.
47. Id. § 669(c) (emphasis added).
mit, and to some extent require, that highly personal information contained in OSHA records be distributed throughout federal and state agencies.

III. POSSIBLE MEANS OF PROTECTING CONFIDENTIALITY OF FEDERALLY-HELD MEDICAL RECORDS

A. Statutory Protections

The Privacy Act and its implementing regulations are not the only federal statutory protection for research subjects. All research programs conducted under the auspices of the Department of Health, Education, and Welfare, including those of NIOSH, are subject to institutional review under the National Research Act. This Act codifies an elaborate system of safeguards currently in use within the scientific community to prevent violation of patients' rights in the name of research. A researcher wishing to expose a human subject to risk must demonstrate to an Institutional Review Board that such risk is justified. It is not clear, however, whether an invasion of privacy constitutes a "risk" under the statute. Although the regulations issued under the statute include social injury as a "risk" and noted epidemiologists have stated that they believe "risk" could include risks to privacy, the interpretation issued by


49. The regulations provide that:
   (a) No activity involving human subjects to be supported by DHEW grants or contracts shall be undertaken unless an Institutional Review Board has reviewed and approved such activity. . . .
   (b) This review shall determine whether these subjects will be placed at risk, and, if risk is involved, whether:
      (1) The risks to the subject are so outweighed by the sum of the benefit to the subject and the importance of the knowledge to be gained as to warrant a decision to allow the subject to accept these risks;
      (2) The rights and welfare of any such subjects will be adequately protected. . . .
       . . .
       (d) Where . . . risk is involved . . . the Board shall review the conduct of the activity at timely intervals.

45 C.F.R. § 46.102(a), (d) (1977).

50. The regulations define "subject at risk" as:
   any individual who may be exposed to the possibility of injury, including physical, psychological, or social injury, as a consequence of participation as a subject in any research, development, or related activity which . . . increases the risks of ordinary life, including the risks inherent in a chosen occupation or field of service.

45 C.F.R. § 46.103(b) (1977).

51. Privacy Protection and Medical Research, supra note 17, at 461.
the Secretary of Health, Education, and Welfare focuses only on physical, not privacy, risks.\textsuperscript{52}

Another possible legal means to protect the privacy of research subjects exists in a subsection of the Controlled Substances Act\textsuperscript{53} that permits the Attorney General to authorize researchers to withhold names and other identifying characteristics of individuals who are the subjects of research.\textsuperscript{54} Here, too, the protection offered the subjects of OSHA-mandated records may prove illusory. Although the text of the subsection implies broad coverage, the language is embedded in a section pertaining to drug research programs, and it has been interpreted in the implementing regulations as applying only to drug research.\textsuperscript{55}

\textbf{B. Court-Ordered Privacy Protections}

The Supreme Court has adopted the position that an individual does not have an unqualified right to preserve the privacy of his health records and that any such right is limited by state needs for this information to be used in the public interest. In \textit{Whalen v. Roe},\textsuperscript{56} a unanimous Court upheld the constitutionality of a New York statute that required pharmacists to report to the state health department the name, address, and age of patients using certain scheduled drugs, and the name and dosage of the drug. The statute also required the reporting of the identity of the prescribing physician and of the pharmacy that filled his prescription and prohibited disclosure of the patient’s identity by the state. The Court discounted the small possibility of public disclosure of medical information in contravention of the statute, stating that “the remote possibility that judicial supervision of the evidentiary use of particular items of stored information will provide adequate protection against unwarranted disclosures is surely not a sufficient reason for invalidating the entire patient identification program.”\textsuperscript{57}

\textsuperscript{52} The Secretary’s interpretation lists various risk situations that the regulations were designed to protect against. They include the use of drugs, psycho-surgery, biomedical research, and experimentation with fetuses and with pregnant women. 41 Fed. Reg. 26,572 (1976). The published interpretation of “at risk” is not as broad as Dr. Gordis assumes it to be. See note 51 & accompanying text \textit{supra}. It is concerned primarily with physical risks. The interpretation neither mentions risk from disclosure of private medical information nor expressly excludes it. Accordingly, the question remains open whether the institutional review provisions of the National Research Act provide protection to OSHA records.


\textsuperscript{55} 21 C.F.R. § 1316.21 (1978).

\textsuperscript{56} 429 U.S. 589 (1977).

\textsuperscript{57} \textit{Id.} at 601-02.
The Court concluded that the record showed no basis for assuming that the statute's security provisions would be administered improperly.\textsuperscript{58} It found that the plaintiffs' fears of public disclosure of private information and the ensuing damage to their reputations were unjustified.\textsuperscript{59} Even without public disclosure it is, of course, true that the statute required disclosure of private information to the New York Department of Health. The Court, however, found this disclosure indistinguishable from other invasions of privacy that are associated with many facets of health care. The Court noted that disclosure of private medical information to public health agencies is often an essential part of modern medical practice and that requiring such disclosure to state public health officials does not automatically amount to an impermissible invasion of privacy.\textsuperscript{60} Accordingly, the Court held that the record did "not establish an invasion of any right or liberty protected by the Fourteenth Amendment."\textsuperscript{61}

The Court in \textit{Whalen}, however, did not reach the question whether an individual has a right to keep medical data private.\textsuperscript{62} \textit{Whalen} thus does not resolve whether the lack of security inherent in possible widespread dissemination of the federally-collected data and in OSHA's requiring medical records to be kept by employers who may not have the knowledge, capacity, or desire to keep such records totally secure,\textsuperscript{63} could unconstitutionally impair a right.

In \textit{E.I. DuPont de Nemours & Co. v. Finklea},\textsuperscript{64} a federal district court examined the statutory privacy protections for medical data subpoenaed by NIOSH and found them wanting. This was the first challenge to NIOSH's subpoena power over medical records of individual patients who had not consented to the release of their records. In this case,

\textsuperscript{58} Id. at 601.
\textsuperscript{59} The New York statute provided that state drug-use records were to be expunged after five years. Thus, the fears of parents of hyperkinetic children who were treated with amphetamines that a "drug record" would remain to haunt their children's future were found by the Court to be unjustified. \textit{Id.} at 600. Yet, prescribing physicians and pharmacists are required to retain their copies of records for five years, and they are not required to destroy them. N.Y. PUB. HEALTH LAW §§ 3331(6), 3332(4), 3333(4) (McKinney 1976). Thus, the parents' fears may not be groundless after all.
\textsuperscript{60} Whalen v. Roe, 429 U.S. at 602.
\textsuperscript{61} Id. at 605-06.
\textsuperscript{62} In his concurrence Justice Brennan stated that "[T]he Court recognizes that an individual's 'interest in avoiding disclosure of personal matters' is an aspect of the right of privacy . . . ." \textit{Id.} at 606. He felt that broad dissemination of the data collected would implicate a constitutional right. \textit{Id.} Justice Stewart, in his concurrence, took exception to this conclusion and expressed his understanding that the Court's opinion was not contrary to the proposition that the protection of a general right to privacy is to be left largely to the individual states. \textit{Id.} at 608.
\textsuperscript{63} See notes 112-17 & accompanying text infra.
NIOSH sought to study the medical records of employees at DuPont's Belle, West Virginia plant in order to determine whether there was an unusually high incidence of job-related cancer among workers. The records involved were not kept pursuant to OSHA regulations, but were general health records from the plant's medical department. DuPont requested 3,000 of its past and present employees to indicate on a waiver form whether they consented to the release of their medical records. Of those who responded, 1,717 consented and 631 refused. DuPont declined to submit to NIOSH the records of the 631 who withheld their consent to disclosure, and sought a declaration of whether it was required to comply with the Agency's subpoena duces tecum.

Unlike the Supreme Court in Whalen, the district court in DuPont found, in dicta, that the medical records were protected by a constitutional right to privacy. The record of the case, however, showed that NIOSH was subject to federal statutes and rules requiring it to keep medical records confidential. Accordingly, the court held that Whalen controlled, that the record did not show that the employees' rights would be abridged, and that the NIOSH subpoena duces tecum was valid and enforceable.

Yet, the court obviously felt that the existing privacy protections were inadequate. Its judgment order required NIOSH to take more stringent precautions for maintaining confidentiality than those required by departmental regulations. NIOSH was ordered not to make copies of any

65. Id. at 822-23.
67. See notes 60-62 & accompanying text supra.
68. 442 F. Supp. at 824.
69. Id. at 824-26.

In another case, a majority of employees objected to NIOSH's subpoena of their medical records. The court held, however, that NIOSH had the right to obtain the records, but that names and addresses must be deleted before the information is released. General Motors Co. v. Finklea, No. C-3-77-339 (S.D. Ohio Oct. 10, 1978).

On July 21, 1978, OSHA proposed a new rule that would circumvent the holdings in General Motors and DuPont. The rule would apply to any employer that "makes, maintains, or has access to . . . [records that] contain information concerning the health status of an employee or employees exposed or potentially exposed to toxic materials or harmful physical agents." 43 Fed. Reg. 31,374 (1978) (to be codified in 16 C.F.R. § 1910.20(a), (b)). Coverage is thus very broad; the proposed rule would cover almost all employers' records containing any information about employees' health.

The proposed rule does not require the creation of new records; instead, it: (1) opens existing medical records to inspection by OSHA and NIOSH without subject consent, id., (to be codified at § 1910.20(d)(3)); (2) requires employers to keep all employee medical records until five years after the end of the record subject's employment, id., (to be codified at § 1910.20(c)); and (3) makes medical records available directly to the subject employee, his designated representative, and other employees.
information supplied by DuPont "except for purely statistical purposes." The court also ordered that the Agency maintain its records in a form identifiable only to those government officials charged with administering the program, and that when the Agency is not using the records, it keep them secured in a locked vault. None of the information obtained by the subpoena is to be disclosed pursuant to the Freedom of Information Act.

The court prohibited any other disclosures by ordering that none of the information obtained by the subpoena be "disseminated to any other governmental agency or personnel pursuant to any agreement or understanding between [NIOSH] and any other federal, state or local governmental entity without the further order of this court." This is significant because it eliminates one of the main hazards inherent in federal government possession of this kind of information for research purposes, namely, its susceptibility to requests from other federal agencies, and from state and local public health departments.

Although the Court in Whalen held that a state's legitimate interest in public health can outweigh the individual's privacy interest in his medical records, the Fourth Circuit's holding in DuPont shows that the government nonetheless is obligated to protect the confidentiality of such records. In addition, the Fourth Circuit found that the protections offered by NIOSH were inadequate.

IV. STATE USES OF OSHA RECORDS

By prohibiting all information-sharing without a further court order, the decision in DuPont forestalls one of the greatest hazards likely to follow...
from NIOSH’s possession of OSHA medical records that are useful for cancer research—the widespread dissemination of the records pursuant to information-sharing statutes. These statutes permit records to flow from employers to NIOSH, to other federal agencies, and ultimately to state government agencies.\textsuperscript{76}

The transfer to state agencies increases the potential for disclosure. Although the federal statutes and regulations protecting the privacy of OSHA records are inadequate, they offer more protection than that offered by some states. Each state has its own statutes regarding the confidentiality and public availability of information in state government files.\textsuperscript{77} The following summary provides examples of state practices that could affect the confidentiality of OSHA records in states’ possession.

Seven states have omnibus privacy statutes, called “privacy acts” or “fair information practices acts,” regulating collection, use, and disclosure of information by state agencies.\textsuperscript{78} Six of these seven states have statutes that allow awarding of damages for injury resulting from an agency’s failure to comply with the statutes’ confidentiality provisions.\textsuperscript{79} Four of the omnibus statutes have criminal penalties for certain violations.\textsuperscript{80} Arkansas, on the other hand, makes willful violation of the statute or its implementing regulations a misdemeanor, punishable by a civil penalty of $500.\textsuperscript{81}

States also differ markedly in the protection they give individuals in other ways.\textsuperscript{82} Some have specific privacy protections for certain kinds

\textsuperscript{76} Id.


\textsuperscript{82} Only two state statutes attempt to restrict the sources from which information about individuals can be gathered. Only one state mandates that an individual have the opportunity to quash a subpoena for personal records. Methods of enforcement also differ among the seven states. State Privacy Law, supra note 77, at 4-5.
of government records. For example, the state of Washington forbids the submission of confidential or privileged information to a common data bank, and an Ohio law makes confidential the information given for research and statistical purposes to the state’s Cancer Registry. In the absence of broad scale privacy acts, such provisions should be adopted by more states to protect OSHA records.

Most states have open public records acts that approximate the provisions of the Federal Freedom of Information Act of 1974, but there is no consistent definition of a “public record.” Some states follow the narrow, common law definition of public records as the records states are required by law to keep. Others define the term more broadly and also include any records government agencies make or receive in the course of official business. Still others are even more comprehensive and include all information relating to the conduct of government or in the possession of the state.

If a record is characterized as a public record under an open records act, it must be disclosed to anyone who asks for it unless there is a statutory provision allowing or requiring it to be withheld. Many state “open records” statutes, like the Federal Freedom of Information Act, allow an exemption for records where disclosure would result in a clearly unwarranted invasion of personal privacy as defined by common law. Others exempt only medical and related public health records.

85. State Privacy Law, supra note 77, at 5.
89. State Privacy Law, supra note 77, at 6.
92. See, e.g., Alaska Stat. § 09.25.120(3) (1973). Some states with mandatory venereal disease reporting requirements for physicians make these records confidential.

See, e.g., Mont. Rev. Codes Ann. § 69-4604 (1970) (physicians required to report venereal disease); id. § 69-4610 (confidentiality for venereal information). Nevertheless, the Privacy Commission observes that a significant number of states make venereal disease reporting mandatory, but over half of these provide no statutory protection for these records. Personal Privacy, supra note 12, at 311. One state that has such a reporting statute leaves it to local health departments to decide whether these reports are to be open to public inspection. Mass. Ann. Laws ch. 111, § 111 (Michie/Law. Co-op. 1978). Another state gives citizens the right to examine public records, including required reports of communicable diseases. Neb. Rev. Stat. § 84-712 (1976).

Of course, such records also would be covered by general health records or privacy exemptions in states that have these generic exemptions. At least one state, Texas, has an open records act that has
The Kentucky open records law\textsuperscript{93} stands alone in combining privacy and open records legislation in one statute that deals not only with public access to state records, but also with an individual's access to records containing information about himself.\textsuperscript{94} The statute also authorizes interagency information sharing for legitimate government purposes.\textsuperscript{95} This act makes records containing information of a personal nature, where their disclosure would constitute a clearly unwarranted invasion of personal privacy, available only pursuant to a court order.\textsuperscript{96} It also exempts records made nondisclosable by federal or state law.\textsuperscript{97} A few states have addressed the problem of state agency use of electronic data processing and telecommunications technologies by enacting statutes that assign high priority to the preservation of privacy in the development of state information systems.\textsuperscript{98}

Obviously, state protection for medical record privacy varies widely. While some states have admirable constitutional and statutory protections, there are some curious omissions. A recent Texas case, \textit{Industrial Foundation of the South v. Texas Industrial Accident Board},\textsuperscript{99} exemplifies some of the privacy problems that can ensue when state laws provide no protection for certain records of a personal nature, either through oversight or as a deliberate legislative policy choice.

The Texas Open Records Act\textsuperscript{100} expressly exempts only personnel files, student records, birth and death records, and records deemed by other laws or judicial decisions to be confidential.\textsuperscript{101} Unless a law specifically

\textsuperscript{93} KY. REV. STAT. & RULES SERV. §§ 61.870-.884 (Baldwin Supp. 1977).
\textsuperscript{94} Id. § 61.884.
\textsuperscript{95} Id. § 61.878(4).
\textsuperscript{96} Id. § 61.878(1)(a).
\textsuperscript{97} Id. § 61.871(1)(j).
\textsuperscript{98} California has enacted the Information Practices Act of 1977. CAL. CIV. CODE §§ 1798-1798.70 (West Supp. 1978). The state legislature made a specific finding that "[t]he increasing use of computers and other sophisticated information technology has greatly magnified the potential risk to individual privacy that can occur from the maintenance of personal information." \textit{Id.} § 1798.1(b).
\textsuperscript{99} 540 S.W.2d 668 (Tex. 1976).
\textsuperscript{100} TEX. REV. CIV. STAT. ANN. art. 6252-17a (Vernon Supp. 1978).
\textsuperscript{101} Id. art. 6252-17a, §§ 3(1), (2), (14), (15).
prohibits doing so, medical records may be disclosed freely and the Texas Workmen’s Compensation Act\textsuperscript{102} contains no provision for confidentiality of records. The case arose when the Texas Industrial Accident Board\textsuperscript{103} attempted to deny access to its records by an employers’ organization, the Industrial Foundation of the South,\textsuperscript{104} by alleging that the Foundation intended to use this information for discriminatory purposes. The Texas Supreme Court held that the requester’s motive was irrelevant. Even though there is danger of abuse when workmen’s compensation claim records kept by the state are disclosed, the court presumed that the legislature balanced the public’s right of access against potential abuses when it passed the Open Records Act.\textsuperscript{105} The Open Records Act, however, did not supersede common law privacy protection and the court held that highly intimate or embarrassing facts should be removed from the records to be released.\textsuperscript{106} A possible financial barrier to release of the records was erected when the court stated that the Act required the party seeking the records to pay in advance the costs incurred in providing the records, including the costs of deleting information, the release of which would be a violation of privacy at common law.\textsuperscript{107}

This financial barrier may prove to be a considerable one and it probably will serve as a temporary stopgap until the Texas legislature can reconsider the problem. The case is also notable for its concurring opinion which cites the need for legislative clarification of the scope of the Open Records Act to prevent abuses like the one threatened in this case. The concurring judge stated that the risk of discrimination that workmen’s compensation claimants would now run would have a chilling effect on the exercise of not only this statutory right, but also on other statutory schemes that require a degree of confidentiality in order to function.\textsuperscript{108}

\textsuperscript{102} Id. arts. 8306-8309 (Vernon 1967 & Supp. 1978). A bill S.B. 476, making claims filed under the Act confidential, was reported favorably by the Texas Senate Judiciary Committee in the 64th Legislative Session, but it was never presented for passage and died at the end of the session.

\textsuperscript{103} The Industrial Accident Board is a government body charged with adjudicating workers’ compensation claims. TEX. REV. CIV. STAT. ANN. art. 8307 (Vernon 1967 & Supp. 1978).

\textsuperscript{104} The Industrial Foundation of the South is a nonprofit corporation that gathers information relating to workmen’s compensation claims and distributes it to its member employers. See Texas Indus. Accident Bd. v. Indus. Foundation of the South, 526 S.W.2d 211 (Ct. Civ’ App. Tex. 1975), rev’d, 540 S.W.2d 668 (Tex. 1976).

\textsuperscript{105} 540 S.W.2d at 675.

\textsuperscript{106} Id. at 682-85.

\textsuperscript{107} Id. at 686-88.

\textsuperscript{108} Id. at 690-91 (concurring opinion of Johnson, J.). The Justice quoted the statement of a member of the Texas Industrial Accident Board who stated that:

\ldots I have also been told of some employers discharging their own employee if he makes a claim for workmen’s compensation benefits. I have spoken to employee orga-
The principle of Industrial Foundation of the South is not limited to workmen's compensation. The Texas Open Records Act presents no barrier to release of OSHA-type information on occupational health. Moreover, there is statutory authority for Texas to acquire this information. Given the provisions of Texas law, together with the information pooling policy embodied in the federal government's Health Services Research, Health Statistics, and Medical Libraries Act of 1974 it is clearly possible for the Texas Bureau of Labor Statistics to acquire OSHA records from NIOSH, or directly from employers, with the permission of NIOSH.

Should this happen, OSHA records would be no more exempt from discovery than workmen's compensation claims proved to be, and given the possibility of employment discrimination on the basis of OSHA records, the possible disclosure could have an equally chilling effect on workers' willingness to submit to medical examinations. If workers are discouraged from submitting to employer-provided medical surveillance examinations, the ultimate research purpose underlying the records requirement may be thwarted. In addition, workers' knowledge of their own health will be diminished, because it is unlikely that a worker would undergo physical examinations at his own expense as regularly as the OSHA rules provide for them. For these reasons, it is imperative that Texas reconsider its Open Records Act and enact appropriate privacy exemptions for medical records. Other states also need to examine their laws to determine whether a similar situation requiring remedial legislation exists.

Id. at 690 n.1.

109. Texas law commands the state's Commissioner of Labor Standards to "collect, systematize, and present in biennial reports to the Governor, statistical details relating to all departments of labor . . . , and especially as bearing upon . . . the protection of life and health in factories and other places of employment . . . ." TEX. REV. CIV. STAT. ANN. art. 5145a (Vernon Supp. 1978). Moreover, he is authorized on "a written complaint of two or more persons, or upon his failure otherwise to obtain information in accordance with any provision of this chapter . . . , to enter any factory . . . or place . . . for the purpose of gathering facts and statistics, such as are contemplated by this chapter . . . ." Id. art. 5148a. OSHA records easily could be considered "facts" for purposes of the Act.

110. The Act requires the Secretary of Health, Education, and Welfare to assist in the implementation of a cooperative system for producing uniform health information and statistics among federal, state, and local agencies. See notes 42-44 & accompanying text supra.

111. See notes 112-17 & accompanying text infra.
V. PRIVATE SECTOR USES OF OSHA RECORDS

A. Employer Use of OSHA Records

The danger of a breach of confidentiality exists not only when the federal or state governments are in possession of OSHA records; it exists also, and perhaps in its most acute form, while such records are in the hands of the employer who is required to maintain them for long periods of time. Although physicians provide the information in medical surveillance records, the confidentiality of such information is not protected by physicians’ traditional ethical obligation of confidentiality because the connection with the physician is attenuated when these records become a part of the employer record system. The connection may be broken entirely if the physician leaves the employer, a likely occurrence at some point as employers must keep the records for forty years.

Another serious danger is that putting this information in the hands of an employer makes it available for use in personnel decisions. The inevitable result is that workers whose health has suffered from workplace contact with toxic substances may find themselves penalized. OSHA is aware of this problem, and plans to remedy it by eventually including so-called “rate retention” amendments in its rules that will forbid depriving a worker of seniority or pay on the basis of information contained in the records. Meanwhile, of course, the problem persists.

Yet another problem is that employers may exchange these records among themselves. It would be unrealistic to attribute purely altruistic motives to employers who trade records. The possibility exists that the prospective employer may discriminate against a worker because it fears that previous hazardous exposure may lead eventually to partial or complete disability. A union authority contends this is already a real problem.

112. Although physicians still take the Hippocratic Oath, which requires them not to disclose information given to them in confidence, the ethical code of the American Medical Association requires them to disclose information about a patient when the law orders them to do so, and also whenever they believe they must do so to protect the community’s or the patient’s welfare. Generally, the physician has discretion whether or not to disclose medical information and there is no recorded case in which a physician has had to compensate a patient for injuries suffered as a result of a breach of confidentiality. PERSONAL PRIVACY, supra note 12, at 283-85.

113. Dr. Eula Bingham, Assistant Secretary of Labor for Occupational Safety and Health, expressed her concern about the rate retention issue and her intention to remedy the problem in her address to the National Conference on Confidentiality of Health Records, Oct. 14, 1977.

114. The Privacy Commission reports that employers have established procedures for exchanging medical records of workers known to have been exposed to hazardous environments or substances. PERSONAL PRIVACY, supra note 12, at 273.

115. Anthony Mazzocchi, Legislative Director, Oil, Chemical, and Atomic Workers International Union, AFL-CIO, contends that employers regularly discriminate on the basis of these records. He
As hiring decisions are usually of the "black box" variety, consisting of a multitude of subjective factors in addition to a worker's present ability to perform a job, unjustified discrimination on the basis of medical records is almost impossible to prove and thus to remedy. The dilemma is that to deny these medical records to prospective employers might result in serious health risks to a worker arising from exposure to a series of toxins. It appears that exposure to more than one carcinogen, whether sequentially or simultaneously, causes the risk of cancer to increase in an exponential, not an additive fashion. Thus, medical records may arguably give an employer a legitimate reason for not hiring a worker if the employer is a small company with few or no "safe" jobs available that do not involve risk of further toxin exposure. The problem lies in identifying the use of medical records to discriminate in situations where the job in question is a "safe" one.

Where the worker's health already has suffered, even though only in a minor way, a related problem appears. Many industrial physicians customarily recommend against hiring persons with mild, non-disabling illnesses, even when the illness would not interfere with the worker's ability to perform a job. As the extent and seriousness of medical problems with toxins are not well known, employers may be even more inclined to discriminate on the basis of toxin-caused illnesses than on the basis of more familiar diseases, such as mild heart disease, diabetes, or hypertension, whose course and controllability are well known.

B. Possible Remedies in the Private Sector

Clear guidelines are needed for employer use of medical information. The Privacy Protection Study Commission has issued several recommendations on fair information practices in the employment relationship; one deals specifically with OSHA records. The Commission advised Congress to investigate the extent to which medical records made to protect individuals exposed to hazardous substances in the workplace are or

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116. Examples of this type of synergistic, or risk-multiplying effect are the impact of cigarette smoking on asbestos workers' lung cancer risks and the increased risks of heart attack or stroke in women taking birth-control pills. See generally 42 Fed. Reg. 54,149-50 (1977).

117. A. Westin, supra note 5, at 64.

118. The Commission is discussed at note 34, supra.
may be used to discriminate against them in employment. It advised Congress to consider the feasibility of restricting the availability of these records so they cannot be used unfairly in employment decisions. It also suggested considering the feasibility of establishing mechanisms to protect employees whose health has been affected by exposure to workplace environmental hazards from the economic consequences of employers' decisions concerning their employability. Congressional action is urgent not only for humane reasons, but also for economic ones, as society must bear the cost of supporting a worker who cannot find a job.

The Commission recommended that Congress legislate goals rather than mandate the procedures to achieve them so that employers would have maximum flexibility in developing guidelines best suited to their situations. Nevertheless, the Commission recognized the possibility that a voluntary approach may be inadequate, and that compulsory measures ultimately may be required. The problem, of course, with compulsory measures is that they would limit flexibility in the employer-employee relationship and add the burden of regulatory costs.

Another aspect of the OSHA record problem that merits consideration is the possibility that extraneous medical information will find its way into the records. The Commission pointed out that one way to keep such information from being disclosed is to prevent its entry into the record in the first place. Apparently in response to this recommendation, OSHA has modified its requirements between the first regulations, issued in 1972, and the new proposed rules, by specifically providing in the latter that the employer is to instruct the examining physician not to include in his opinion findings or diagnoses unrelated to exposure to the

119. PERSONAL PRIVACY, supra note 12, at 274.
120. Society as a whole bears the cost of illness resulting from exposure to occupational hazards. Even though some employers clearly profit from products whose manufacture endangers their workers' health, accurately transferring the burden to employers by apportioning liability for occupational diseases is almost impossible. The general population runs some risk of contracting many of these diseases outside the workplace environment since everyone is exposed to a wide variety of environmental risks. In addition, employees often work for several employers over a lifetime. If one could apportion liability among employers for their workers' occupational diseases and require them to compensate their past and present workers who have become ill, not only would justice be done, but employers would have an incentive to develop safer industrial processes. The practical problems with this approach are great, however. Employers, for example, who go out of business cannot compensate workers. Some workers change jobs frequently, and cause and effect thus may be impossible to establish, much less to apportion.
121. The Commission stated that "[u]nless each employer has a conscientious program on which applicants and employees can rely to safeguard the records the employer keeps about them . . . ," compulsory measures will have to be considered. PERSONAL PRIVACY, supra note 12, at 274.
122. Id. at 30.
particular hazardous substance. Whether this requirement will be successful remains to be seen. Many employers who already provide medical care for their employees may be reluctant to keep an entirely separate set of medical records. Moreover, the quality of some employers' record-keeping is appallingly low and it may be unreasonable to expect that a set of congressionally-prescribed rules can change it.

The American Civil Liberties Union (ACLU), an organization with a strong interest in privacy, has addressed this problem. The ACLU's privacy committee contends that "the employer's legitimate interest in an employee's health extends only to the employee's present ability satisfactorily to perform the job sought," and states that this interest must be satisfied by the least intrusive means available. Some companies have in fact altered their pre-employment health questionnaires and conduct their hiring policies in accord with the ACLU's recommendations. IBM, for example, reports that it rejects less than two percent of its applicants for medical reasons. The corporation's medical doctor observes that five percent of its employees are handicapped by United States Department of Labor standards, and that about twenty percent of its employees are subject to medical restrictions. The results of pre-employment physicals given by IBM physicians or outside consultants are kept confidential. The physicians are not allowed to tell IBM managers of the specific health reasons for any work restrictions set by the company medical department for employees, and an employee's health condition is not included in the company's personnel data system.

This corporation has achieved a functional separation of medical data from other personnel data, not only in the initial hiring decision, but also in subsequent personnel decisions. It, like other large corporations with similar practices, is large enough to have sizeable medical and personnel departments and each department keeps separate sets of records.

125. A union official has stated that "[i]f you have gone into plants as I have, and said, 'Where do you keep your medical records?' and you're shown a box where the stuff is just piled and where the clerk has difficulty finding it, you know there isn't any such thing as privacy . . . ." Address of Sheldon Samuels, Director of Health and Safety, Industrial Union Department, AFL-CIO, at the National Conference on the Confidentiality of Health Records (Oct. 14, 1977), excerpts reprinted in National Commission on the Confidentiality of Health Records, Report on the Health Records Dilemma Conference: Workshops Set Priorities, Define Needs, Rx [CONFIDENTIALLY], Fall 1977, at 5.
126. DILEMMA, supra note 21, at 41.
127. IBM Medical Department, IBM Medical Department Manual—Section: Privacy 2 (June 15, 1975), reprinted in A. WESTIN, supra note 5, at 357.
though physicians working for these corporations give routine preplacement physical examinations, they observe the formal code of ethics recently adopted by the American Academy of Occupational Medicine. Physicians' membership in the Academy is dependent on their adhering to the code, which requires that:

1. Medical information about employees is to be treated as confidential unless an overriding public health interest exists.
2. Employers are entitled to know only that an employee is fit for a job, and any occupational restrictions that apply—for example, the employee should not lift heavy weights, or should not climb heights. These restrictions are to be stated in this kind of conclusory form, and are not to state the underlying health reason—has a hernia, or is subject to epileptic attacks.
3. Physicians may release medical information on employees to the government for public health purposes.

Smaller enterprises may be unable to achieve a total functional separation of medical and other information. Clearly, the way health records are now kept and used varies among employers. A NIOSH inspector reports that companies' records often have mixtures of medical and personnel information in them. Thus, the danger of collateral use of medical information by employers is an existing one, to which the present and proposed OSHA recordkeeping requirements only contribute. Although it is imperative to include a rate retention provision in the proposed generic rules and to amend existing OSHA rules to include rate retention, clearly such provisions would not solve the whole problem. Nonetheless, they would at least help to prevent the additional medical records gener-

130. Id.
131. Telephone conversation with Theodore W. Thoburn, M.D., Medical Officer and Acting Chief, Medical Section of Hazard Evaluation and Technical Assistance Branch, NIOSH, Cincinnati, Ohio (Nov. 3, 1977). Dr. Thoburn, who has conducted hazard evaluations by inspecting workers' general health records (not OSHA records) that employers already had, reports that these records usually have a variety of information in them. They include entries regarding regular patient treatment, medical reasons for work restrictions, and medical reasons for absences from work. Where the employer has no medical department of its own, the personnel department often keeps the records.
132. See note 113 & accompanying text supra.
ated by OSHA from being used to the detriment of workers in decisions about wages, promotions, and transfers.

Noting the difficulty of trying to force optimal recordkeeping practices, a union spokesman has proposed an alternative solution. He believes that there is no way to keep employers from discriminating on the basis of medical information when they have it. He therefore recommends that workers' organizations, not employers, keep the records. This solution certainly warrants consideration. Its only clear disadvantage is that it might be arranged to benefit only organized labor, and to exclude non-union members.

A further risk to which employers' keeping OSHA records subjects workers is the illicit use of such information for commercial purposes. There is a ready market for this kind of information, and many employers, especially small ones or small branches of large employers, are not sophisticated about methods of securing confidentiality. It is likely that some smaller employers will contract with independent data processors for handling OSHA records on a shared computer time basis. This information could be sold to dealers in purloined medical information. Modern photocopying machines also simplify illicit copying of conventional paper files.

C. State Statutory Privacy Protections

The lack of security of private sector records is complicated by the lack of state laws that penalize information theft or misuse. Only one state, Michigan, imposes criminal sanctions for the dissemination or pro-


134. A firm called “Factual Service Bureau” specialized in acquiring medical records from hospitals and physicians. Its employees pretended to be physicians, often wearing white coats and name tags and checking records out of the hospital’s records section whose personnel suspected nothing amiss. An alternative method was to make telephone requests, pretending to be from a hospital's emergency room. By these and similar methods, the company was able to get all the records it set out to obtain.

The firm then supplied this information to insurance claim investigators and lawyers, who used it for a variety of purposes, including assuring that claimants had not exaggerated the severity of an injury or inflated their lost earnings. In one instance, the information reportedly was used to force a worker to settle his claim for less than it was worth by threatening to publicize the worker's prior history of venereal disease. PERSONAL PRIVACY, supra note 12, at 174, 285; address by Dale Tooley, District Attorney of Denver, Colorado, at National Conference on the Confidentiality of Health Records (Oct. 13, 1977), excerpts reprinted in DILEMMA, supra note 21, at 4.

135. A. WESTIN, supra note 5, at 134.

136. See STATE PRIVACY LAW, supra note 77, at 29-85.
curement of medical record information without the patient's written permission. The Michigan statute expressly applies to information in the files of medical care facilities, health providers, and insurance companies, but it does not protect such information kept in other places.\textsuperscript{137} It offers no protection to OSHA records.

Existing theft and larceny laws, as interpreted by the courts, are not very useful because of the difficulty of establishing the value of the information. Although Denver, Colorado, successfully is using existing larceny laws to prosecute thefts of medical records, it has been able to bring these actions only because the company offering the records for sale specified their asking prices, thus establishing a value for the information. In one case, the firm conveniently raised its price to larceny level when it found out that the individual whose records it was selling worked in the Denver District Attorney's office.\textsuperscript{138} Some jurisdictions, however, have ruled that the value of the information stolen is only the value of the ink and paper, making theft prosecutions impossible.\textsuperscript{139} The value is even more difficult to establish when the information is not sold but voluntarily exchanged, borrowed, or copied.

States could alleviate this problem by enacting laws to criminalize information theft, establishing a statutory value for information so that if there were no other measure of its value, the crime could be treated as larceny and penalized accordingly. Criminal penalties alone, however, are not sufficient; they do not provide the injured person with a remedy.

The present outlook for civil damage actions as a remedy for improper disclosure is not encouraging either. Both time and money are needed to litigate, and the publicity of a trial would proclaim the very information a plaintiff would wish to conceal. Moreover, the difficulty of fitting many kinds of medical data disclosures into traditional privacy categories may have led to the assortment of theories that have been used by patients in privacy-invasion actions against doctors. Such damage actions have been based upon an implied contractual obligation of silence; a fiduciary duty imposed on the doctor as a result of his power over the patient; implied private rights of action under licensing or testimonial privilege statutes applicable to physicians.\textsuperscript{140} None of these theories is useful against an employer or a thief.

\textsuperscript{139} Id.
\textsuperscript{140} PERSONAL PRIVACY, supra note 12, at 284 n.29.}
As yet, the courts have focused only on the dissemination of information about an individual, not on improprieties in data collection.\textsuperscript{141} Although a recent Massachusetts statute recognizes a cause of action for "unreasonable, substantial, or serious interference" with a person's privacy,\textsuperscript{142} the comment following the statute notes that it is "so general that the scope of the tort of invasion of privacy in Massachusetts is, as it was before the statute, a matter of judicial law."\textsuperscript{143} The potential exists in Massachusetts for the fabrication of a tort by judicial law to protect informational or recordkeeping privacy. So far, however, in the context of common law, no court in the United States has specifically held that the improper collection of recorded information about a person could be actionable.\textsuperscript{144}

Although state courts have not acted in this area, probably because the concept of information theft involves too great a divergence from existing common law, state legislatures are bound by no such constraints. It is within their power to create private rights of action for substantial interference with one's privacy by collection or dissemination of private information. Some such remedy seems urgently needed to compensate those who have suffered.

CONCLUSION

The OSHA medical recordkeeping requirements are a striking instance of a federal regulatory agency's ability to create a problem that it cannot solve by itself. Legislation is necessary to protect the confidentiality of OSHA records in federal and state record systems.

To some extent, Congress can alleviate these problems by amending the Privacy Act to forbid the widespread interagency transmission of OSHA records and to provide the type of protections mandated by the Fourth Circuit in \textit{E.I. DuPont de Nemours & Co. v. Finklea}.\textsuperscript{145}

Although an amendment to the Department of Health, Education, and Welfare rules implementing the Privacy Act would accomplish the same result at the federal level, a statutory amendment is preferable as it is a stronger expression of policy on the subject. An amendment to the Privacy Act is more likely to influence state legislatures to improve their

\begin{footnotes}
\item[141] \textit{State Privacy Law}, supra note 77, at 21.
\item[143] \textit{Id.} at 21 n.128.
\item[144] \textit{Id.} at 21-22.
\item[145] These protections are discussed at notes 70-74 & accompanying text supra.
\end{footnotes}
statutory provisions for handling medical information than is a change in the implementing rules of HEW.

No congressional or federal agency action, however, can effect the necessary changes to protect OSHA medical records kept by employers. To deal with problems created by employers’ possession of such records, states must draft information privacy legislation to penalize the misuse of private information. A private right of action also should be created to allow a worker to recover damages for any losses he suffers as a result of such misuse.

These changes at both the federal and state levels can minimize or eliminate the threat to privacy posed by the rules OSHA is promulgating to protect workers. OSHA, however, also should act to cure the problem it has created. It should reconsider its medical recordkeeping requirements and consider alternative ways to keep records that would provide greater assurances of confidentiality.

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