

2008

## Loose Standards, Tight Lips: Why Easy Access to Client Data Can Undermine Homeless Management Information Systems

J.C. O'Brien  
*Fordham Law School*

Follow this and additional works at: <https://ir.lawnet.fordham.edu/ulj>



Part of the [Law Commons](#)

---

### Recommended Citation

J.C. O'Brien, *Loose Standards, Tight Lips: Why Easy Access to Client Data Can Undermine Homeless Management Information Systems*, 35 Fordham Urb. L.J. 673 (2008).

Available at: <https://ir.lawnet.fordham.edu/ulj/vol35/iss3/5>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Urban Law Journal by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact [tmelnick@law.fordham.edu](mailto:tmelnick@law.fordham.edu).

# LOOSE STANDARDS, TIGHT LIPS: WHY EASY ACCESS TO CLIENT DATA CAN UNDERMINE HOMELESS MANAGEMENT INFORMATION SYSTEMS

*J.C. O'Brien\**

## INTRODUCTION

Although homelessness emerged as a widespread and widely recognized social problem nearly three decades ago, researchers, politicians, and homeless service providers nationwide still lack a reliable source of data on the size and demographics of the homeless population.<sup>1</sup> The Department of Housing and Urban Development (“HUD”) has undertaken the Homeless Management Information System (“HMIS”) initiative, designed to address this absence of information by collecting and aggregating data from homeless service providers across the country.<sup>2</sup> The success of HMIS is contingent upon the cooperation and sincere participation of the consumers of homeless services, the homeless themselves. The sincere participation of the homeless, however, is threatened by the current standards for disclosure of Protected Personal Information (“PPI”) to law enforcement officials, which present consumers of homeless services with a strong disincentive to participate. In order to encourage the highest level of participation, and therefore the most accurate HMIS information, HUD should remove permissive disclosure of PPI based on an oral request from its Data and Technical Standards. Part I of this Comment discusses the history of homelessness, homelessness policy, and the HMIS initiative. Part II discusses the importance of accu-

---

\* Fordham Law School, J.D. Candidate 2008, Boston College, B.A. 2005. This Comment is the product of the George C. McMahon Fellowship awarded through the Feerick Center for Social Justice and Dispute Resolution and the *Fordham Urban Law Journal*. Thanks to Heather Lyons and the staff of the Portland, Oregon, Bureau of Housing and Community Development for their support during the research process. Special thanks to Professor Elizabeth Cooper for her helpful comments in writing this Comment.

1. ALPHONSO JACKSON, *Foreword* to U.S. DEP'T OF HOUS. & URBAN DEV., THE ANNUAL HOMELESS ASSESSMENT REPORT TO CONGRESS (2007) [hereinafter AHAR].

2. See OFFICE OF CMTY. PLANNING & DEV., U.S. DEP'T OF HOUS. & URBAN DEV., HUD'S HOMELESS ASSISTANCE PROGRAMS: ENHANCING HMIS DATA QUALITY 4 (2005) [hereinafter ENHANCING HMIS DATA QUALITY].

rate data to HMIS and the privacy standards which threaten to undermine it. Part III addresses competing interests with regard to disclosure of PPI. This Comment proposes that disclosure of PPI in HMIS based on the oral request of a law enforcement official should be prohibited.

## I. HOW WE GOT TO HMIS

### A. Historical Context of Today's Homeless

Homelessness is not a new phenomenon in the United States.<sup>3</sup> It has taken a variety of forms from post-Civil War transient workers,<sup>4</sup> to the shantytowns of the Great Depression,<sup>5</sup> to the urban skid rows of the 1950s and 1960s.<sup>6</sup> In the 1970s and 1980s, however, a new form of homelessness emerged,<sup>7</sup> characterized by increasing numbers of literally homeless individuals living in public spaces.<sup>8</sup>

---

3. See PETER ROSSI, *DOWN AND OUT IN AMERICA: THE ORIGINS OF HOMELESSNESS* 17 (1989). Rossi traces homelessness back to a class of transient homeless unwelcome by local communities in colonial America. *Id.*

4. See *id.* at 18.

5. Todd Depastino, *Great Depression*, in 1 *ENCYCLOPEDIA OF HOMELESSNESS* 183 (David Levinson ed., 2004) (describing homelessness as reaching "crisis proportions" in 1930: "Depression-era homelessness increased dramatically not only in number, but also in variety."); see also ROSSI, *supra* note 3, at 22 ("With the advent of the Great Depression in the 1930s, local and transient homelessness increased drastically.").

6. See ROSSI, *supra* note 3, at 27.

7. See Kim Hopper & Jim Baumohl, *Redefining the Cursed Word: A Historical Interpretation of American Homelessness*, in *HOMELESSNESS IN AMERICA* 3, 10 (Jim Baumohl ed., 1996) ("[T]he largely invisible, sequestered homelessness of skid row was transformed beginning in the 1970s into the intrusive sort that has become a staple of urban life in the 1990s.").

In the 1980s, the nature of homelessness changed again. Growing economic inequality, racism, a permanent decrease in the number of well-paid unskilled jobs, and a lack of affordable housing combined to make several million people—many of them African-American women and their children—homeless on America's streets, in shelters, in motels, and in substandard temporary apartments. This pattern continues in 2004.

David Levinson, *Introduction*, in *ENCYCLOPEDIA OF HOMELESSNESS*, *supra* note 5, at xxi.

8. ROSSI, *supra* note 3, at 34.

Homelessness began to take on new forms by the end of the 1970s . . . . [L]iteral homelessness began to grow and at the same time to become more visible to the public. It became more and more difficult to ignore the evidence that some people had no shelter and lived on the streets.

*Id.*; see also JAMES WRIGHT ET AL., *BESIDE THE GOLDEN DOOR: POLICY, POLITICS, AND THE HOMELESS* 1 (1998) ("Homelessness emerged as a significant social problem in the early 1980s.").

Not only did the shape of homelessness change, but the number of homeless individuals grew steadily in the 1980s.<sup>9</sup> The causes behind this new homelessness are far from clear.<sup>10</sup> Individual characteristics that increase personal vulnerability to homelessness such as disability, education, and addiction, as well as structural societal factors, like the economy and prevailing public policy, seem to play a role in a person becoming homeless.<sup>11</sup> Most attempts at explaining the spread of homelessness point to a convergence of some combination of the following structural factors in the late 1970s and early 1980s: lack of affordable housing; lack of income; and trends in public policy that decreased institutional support services for vulnerable members of society.<sup>12</sup>

---

9. MARTHA R. BURT, *OVER THE EDGE: THE GROWTH OF HOMELESSNESS IN THE 1980s* 4 (1992) [hereinafter BURT, *OVER THE EDGE*].

10. WRIGHT ET AL., *supra* note 8, at 8-9. Determining a cause for the homelessness of even a single individual can be difficult, if not impossible. *Id.* Wright, Rubin, and Devine illustrate the “fundamentally ambiguous” nature of the concept of “cause” with the hypothetical case of Bill:

Bill is a high school drop-out. Because of Bill’s inadequate education, he has never held a steady job; rather, he has spent his adult lifetime doing various odd jobs, picking up temporary or seasonal work when available, hustling at other times. Because of his irregular and discontinuous employment history, Bill’s routine weekly income is meager, and because his income is minimal, he is unable to afford his own apartment and lives instead with his older sister. Now, Bill drinks more than he should (this is for a dozen different reasons) and because he drinks more than he should, he is frequently abusive and hard to get along with. Bill’s sister is usually very tolerant in such matters, but because she has been having some problems at work, she comes home on Friday in a foul, ungenerous mood only to find Bill passed out on the couch. She decides that Bill’s dependency and alcoholism are more than she can continue to take, and because of her decision Bill is asked to leave. Bill spends Saturday looking for an apartment that he can afford, but because his income is so low and because there are very few units available to someone with Bill’s income, he finds nothing and heads to the local shelter for homeless people instead, whereupon Bill effectively becomes a homeless person.

*Id.* The authors go on to ask whether the “cause” of Bill’s homelessness is inadequate education, poor job history, meager income, substance abuse, shortage of available housing, or his sister’s bad week at work. *Id.* This example highlights not only the fact that there can be multiple “causes” of homelessness even in a specific case, but also that there are different conceptions of “cause.” *Id.*

11. See BURT, *OVER THE EDGE*, *supra* note 9, at 4.

12. See MARTHA R. BURT, *WHAT WILL IT TAKE TO END HOMELESSNESS?* 2 (Urban Inst. 2001) [hereinafter BURT, *WHAT WILL IT TAKE*] (discussing changing housing markets pricing more and more people out of the market, dwindling employment opportunities contributing to a widening gap between rich and poor, and the removal of institutional supports for people with severe mental illness); see also NAT’L ALLIANCE TO END HOMELESSNESS (“NAEH”), *A PLAN, NOT A DREAM: HOW TO END HOMELESSNESS IN TEN YEARS* 1 (2000), available at <http://www.endhomelessness.org/content/article/detail/585>. NAEH identifies the three systematic causes of the emer-

The homelessness that emerged in the 1980s was decidedly more visible<sup>13</sup> and seemed to break the traditional stereotypes of the homeless population.<sup>14</sup> Whereas earlier generations of homeless were itinerant travelers or were concentrated in urban skid rows, the homeless of the 1980s were in plain view of the public.<sup>15</sup> No longer isolated in run down neighborhoods, the homeless could not be written off as skid row “derelicts,” and in the early 1980s, it became increasingly clear that the homeless of the day were a diverse group, covering an array of demographics.<sup>16</sup> The “single,

---

gence of widespread homelessness as scarcer housing supplies, earnings that cannot keep pace with housing costs, and the dwindling availability of services for families. *Id.*; see also KAREN SPAR & MONIQUE C. AUSTIN, CONGRESSIONAL RESEARCH SERVICE, *THE HOMELESS: OVERVIEW OF THE PROBLEM AND THE FEDERAL RESPONSE 1* (1984), available at <http://digital.library.unt.edu/govdocs/crs/permalink/meta-crs-8869:1> (“Reasons that have been cited for the increased number of homeless are unemployment, scarcity of affordable housing . . . and social service and disability cut-backs . . .”).

13. Rossi, *supra* note 3, at 34.

The “old” homeless may have blighted some sections of the central cities, but from the perspective of the urbanites they had the virtue of being concentrated on Skid Row, which one could avoid and hence ignore. Also, most of the old homeless had some shelter, although inadequate by any standards and very few were literally sleeping on the streets. . . . The “new” homeless could be found resting or sleeping in public places such as bus or railroad stations, on steam grates, in doorways and vestibules, in cardboard boxes, in abandoned cars or in other places where they could be seen by the public.

*Id.*

14. Donna Wilson Kirchheimer, *Homeless Policy: Expansion During Retrenchment*, in ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, ASSISTING THE HOMELESS: STATE AND LOCAL RESPONSES IN AN ERA OF LIMITED RESOURCES 7 (1988).

Today’s homeless people are diverse, and they differ from the traditional so-called “Skid Row bums” and hoboes who rode the rails. The homeless are not only single men but, increasingly, are single women and heads of families and their children. They are not only the elderly but also—now predominantly—under age 40. They are disproportionately from minority groups. Some are alcoholics; some are drug abusers; some are mentally ill; some are all of these; many are none of these. Some are transients, but most are long-time residents of their locales.

*Id.*

15. See Rossi, *supra* note 3 and accompanying text.

16. SPAR & AUSTIN, *supra* note 12, at 1 (“Unlike the skid row ‘derelicts’ who comprised the typical homeless population of the 1960s, today’s street people represent many diverse groups including: the mentally ill, evicted families, the aged, alcoholics, drug addicts, abused spouses, abused young people, and cast-off children.”); see also Paul Koegel, *Causes of Homeless Overview*, in ENCYCLOPEDIA OF HOMELESSNESS, *supra* note 5, at 51 (explaining that the new homeless were “younger, more ethnically diverse, and more likely to include parents with dependent children”).

middle-aged, white alcoholic” stereotype expanded to include single women, families, and minorities.<sup>17</sup>

With increased visibility came a sudden public awareness of homelessness in America.<sup>18</sup> The media made homelessness a front page issue.<sup>19</sup> But even as the nation became increasingly conscious of homelessness as a pressing social issue,<sup>20</sup> it lacked an accurate understanding of the nature and extent of the problem.<sup>21</sup>

## B. Data on Homelessness

In class, I ask my students to select the number of homeless in the United States from the following: (a) 250,000 to 500,000; (b) 500,000 to 1 million; (c) 2 million; and (d) over 3 million. Some students usually select each category and they are told that they are all right, depending upon the author quoted, the definition of homeless used, and the counting methodology.<sup>22</sup>

The exercise described above by Professor Carl O. Helvie illustrates that throughout various iterations of homelessness in America, a standardized methodology for computing the number of homeless individuals is absent.<sup>23</sup> Numerous difficulties exist in counting the homeless or agreeing on an accurate estimate.<sup>24</sup> To begin with, the very nature of homelessness leaves those experiencing it outside the realm of traditional census methods, which operate largely on the “assumption that nearly everyone in the United States can be reached through an address.”<sup>25</sup> In the absence of any

17. SPAR & AUSTIN, *supra* note 12, at 7.

18. See CHRISTOPHER JENCKS, *THE HOMELESS* 1 (1994) (“[P]ublic interest in the homeless exploded in the early 1980s.”); see also Koegel, *supra* note 16, at 51 (describing the American people waking up “to find that masses of homeless people had appeared in their midst, seemingly overnight”).

19. WRIGHT ET AL., *supra* note 8, at 1 (“If nothing else, the rising tide of homelessness in the 1980s was a major media event.”). The authors go on to discuss the prevalence of homelessness in film, television, and print media throughout the decade, including cover stories in *Time*, *Newsweek*, *New York Times Magazine*, and *Boston Globe Magazine*. *Id.*

20. *Id.* (“With the possible exception of AIDS, homelessness was probably the social problem of the 1980s.”).

21. See ROSSI, *supra* note 3, at 46 (“[A]wareness of and concern for the homeless have far outstripped our knowledge.”).

22. Carl O. Helvie, *United States*, in *HOMELESSNESS IN THE UNITED STATES, EUROPE, AND RUSSIA* 5, 8 (Carl O. Helvie & Wilfried Kunstmann eds., Bergin & Garvey 1999).

23. See *id.* at 8-9.

24. See KIM HOPPER, *RECKONING WITH HOMELESSNESS* 60 (2003) (“Any attempt to arrive at an accurate number of homeless people in a given area is subject to a host of difficulties.”).

25. ROSSI, *supra* note 3, at 37.

consistent data collection, estimates of the number of homeless in America vary widely.<sup>26</sup>

Mary Ellen Hombs and Mitch Snyder advanced one of the first reliable estimates to gain traction in their 1982 report, *Homelessness in America: A Forced March to Nowhere*.<sup>27</sup> Hombs and Snyder posited that in 1982, 2.2 million individuals in America lacked shelter and they were “convinced that the number of homeless people in the United States could reach 3 million or more during 1983.”<sup>28</sup> Only two years later, HUD estimated that the total number of homeless individuals was between 250,000 and 350,000 nationally.<sup>29</sup> These drastically disparate estimates, neither of which was grounded in any hard statistical evidence,<sup>30</sup> set the stage for an ongoing debate over the number of homeless in America for nearly three decades.<sup>31</sup>

Arguing over numbers seemed to miss the point. Knowledge that the number of people in our society without shelter is in the hundreds of thousands is enough to identify a major social problem in need of addressing. This view, however, disregards the importance of data in adequately addressing any social problem.<sup>32</sup> According to Peter Rossi, Professor and Director of the Demographic Research Institute at the University of Massachusetts at Amherst,

26. See ENHANCING HMIS DATA QUALITY, *supra* note 2, at 4.

27. MARY ELLEN HOMBS & MITCH SNYDER, *HOMELESSNESS IN AMERICA: A FORCED MARCH TO NOWHERE* xvi (1982).

28. *Id.* But see JENCKS, *supra* note 18, at 1 (critiquing Hombs and Snyder’s estimate and noting that “[l]acking better figures, journalists, legislators, and advocates for the homeless repeated this guess, usually without attribution” and that “[i]n due course it became so familiar that many people treated it as an established fact”).

29. See AHAR, *supra* note 1, at 21.

30. In *Homelessness in America*, Hombs and Snyder provide no statistical basis for their figure, writing that “it is as accurate an estimate as anyone in the country could offer, yet it lacks absolute statistical certainty.” See HOMBS & SNYDER, *supra* note 27, at xvi. In a later interview on *Nightline*, in explaining to Ted Koppel where the estimate came from, Snyder said, “Everybody demanded it. Everybody said we want a number. . . . We got on the phone, we made a lot of calls, we talked to a lot of people, and we said, ‘Okay, here are some numbers.’ They have no meaning, no value.” RICHARD WHITE, *RUDE AWAKENINGS: WHAT THE HOMELESS CRISIS TELLS US* 3 (1992); see also JENCKS, *supra* note 18, at 2. The 1984 HUD estimate was based on a survey of experts and local providers who supplied their best guesses as to the size of the homeless population. See OFFICE OF POLICY DEV. & RESEARCH, U.S. DEP’T OF HOUS. & URBAN DEV., *EVALUATION OF CONTINUUMS OF CARE FOR HOMELESS PEOPLE: FINAL REPORT* 4 (2002) [hereinafter CoC REPORT].

31. See ENHANCING HMIS DATA QUALITY, *supra* note 2, at 4 (“The number of homeless people has been at the center of debate for as long as homelessness has been acknowledged as a social problem.”).

32. See ROSSI, *supra* note 3, at 45 (“Describing the nature of the social problem and its extent is important in developing social problems.”).

in order “to devise effective programs and policies and to allocate appropriate amounts and kinds of resources to them, it is essential to know with some confidence the total number of the homeless and how fast it is changing.”<sup>33</sup> Not only must we understand the size of the homeless population, but an effective solution requires other data as well, such as the distribution and composition of the population.<sup>34</sup>

Unfortunately, when modern homelessness entered the nation’s conscience as a social issue that demanded attention, no such data existed.<sup>35</sup> In the United States in the 1980s, “awareness of and concern for the homeless . . . far outstripped our knowledge.”<sup>36</sup> The nation’s reaction to the problem reflected this absence of a deep understanding or a commitment to obtaining the necessary data.

### C. America’s Response to Modern Homelessness

Homelessness programs and policies have evolved dramatically since the early 1980s, from exclusively local emergency measures to federally coordinated support structures.

#### 1. *Initial Response*

Early one morning, in a village located on the banks of a river, a woman walked to the river’s edge and discovered, much to her horror, that the river was filled with baskets rushing downstream and that each basket held a baby. Aware of the danger the babies faced, she quickly ran back and mobilized the village’s inhabitants. Everyone rushed to the river and began fishing as many babies out as they could. Many more slipped by than they were able to save, but they toiled on anyway, so consumed by their task that it never occurred to them to send some-

---

33. *Id.*

34. *See id.*

Knowing the distribution and social characteristics of the homeless is also crucial . . . . Since programs should probably be tailored to identifiable subgroups of the homeless—women and children present a different problem from the mentally ill—it does make a difference whether the sex ratio is 100 or 300, what proportions are substance abusers, whether the homeless are primarily long-term unemployed, and so forth.

*Id.* at 45-46.

35. *See id.* at 45 (pointing out in 1989 that “the necessary information at sufficient precision is almost totally lacking for the United States as a whole”); *see also* S. REP. NO. 106-410, at 51 (2001). In 2001, in instructing HUD to develop a Homeless Management Information System, Congress stated: “[T]here has never been an overall review or comprehensive analysis of the extent of homelessness or how to address it.”

*Id.*

36. Rossi, *supra* note 3, at 46.



one upstream in order to find out how the babies were getting into the river in the first place.<sup>37</sup>

America's immediate response to the growing numbers of homeless in the 1980s resembled the reaction of the villagers described above.<sup>38</sup> Faced with large numbers of homeless individuals, hungry and without shelter, communities reacted by establishing soup kitchens and shelters.<sup>39</sup> These early initiatives were generally local,<sup>40</sup> and designed to address the immediate needs of those on the street in specific communities.<sup>41</sup> Many viewed the unprecedented homelessness of the early 1980s as a temporary byproduct of a sagging economy<sup>42</sup> and in a reflection of this belief, the homeless assistance system that developed in the 1980s was set up to manage the problem of homelessness rather than to end it.<sup>43</sup> The primary response was to set up shelter systems, temporary by nature, designed to alleviate the immediate need for a place to sleep.<sup>44</sup> Faced with limited finances, state and local governments often looked to existing resources such as former schools and hospitals to temporarily address the growing needs of the homeless.<sup>45</sup>

## 2. *The Role of the Federal Government in Homelessness Policy*

In 1987, recognizing the importance of federal assistance in addressing the unprecedented and unrelenting levels of homelessness,<sup>46</sup> Congress passed the first major legislation directly addressing homelessness.<sup>47</sup> The Stewart B. McKinney Homeless Assistance Act, renamed the McKinney-Vento Homeless Assis-

37. Koegel, *supra* note 16, at 50-51.

38. *See id.*

39. *See id.* at 51.

40. *See* Vicki Watson, *Responses by the States to Homelessness*, in HOMELESSNESS IN AMERICA, *supra* note 7, at 172 ("Well before the federal government enacted comprehensive legislation in 1987, the states had been compelled to act, if only in emergency fashion initially.").

41. *See* Maria Foscarinis, *The Federal Response: The Stewart B. McKinney Homeless Assistance Act*, in HOMELESSNESS IN AMERICA, *supra* note 7, at 160-61.

42. *See* JENCKS, *supra* note 18, at v; *see also* Kirchheimer, *supra* note 14, at 10 ("[Homelessness] was perceived to be an acute crisis of only a short duration.").

43. NAT'L ALLIANCE TO END HOMELESSNESS, A NEW VISION: WHAT IS IN COMMUNITY PLANS TO END HOMELESSNESS? 6 (2006), available at <http://www.naeh.org/content/article/detail/1397>.

44. *See* Kirchheimer, *supra* note 14, at 10.

45. *See id.*

46. HUD Demonstration Act, 42 U.S.C. § 11301(a)(5) (1993).

47. *See* CoC REPORT, *supra* note 30, at 3.

tance Act,<sup>48</sup> created an avenue for the federal government to coordinate the allocation of public resources and to provide funding for a number of homeless assistance programs.<sup>49</sup> The Act authorized a spectrum of programs covering a variety of homeless services including emergency shelter, transitional housing, job training, primary health care, education, and permanent housing.<sup>50</sup> The Act also established the Interagency Council on Homelessness, a council within the executive branch intended to provide federal leadership for activities to assist the homeless.<sup>51</sup>

Congressional appropriations for McKinney-Vento totaled \$514.4 million in its first year,<sup>52</sup> and have grown to over \$1.5 billion in Fiscal Year 2008.<sup>53</sup> The majority of McKinney-Vento funding is distributed through the HUD Homeless Assistance Grants<sup>54</sup> competitive and formula (non-competitive) programs.<sup>55</sup> Emergency Shelter Grants (“ESGs”)<sup>56</sup> are distributed by formula to eligible

---

48. See U.S. Interagency Council on Homelessness e-newsletter, President Bill Clinton Statement on Signing Legislation to Rename the Stewart B. McKinney Homeless Assistance Act (Oct. 30, 2000), [http://www.usich.gov/newsletter/archive/07-22-07\\_e-newsletter.htm](http://www.usich.gov/newsletter/archive/07-22-07_e-newsletter.htm).

49. 42 U.S.C. § 11301(b)(2)-(3). The Act also established the Interagency Council on Homelessness (“ICH”). *Id.*

50. See NAT’L COALITION FOR THE HOMELESS, MCKINNEY-VENTO ACT: NCH FACT SHEET #18, 2 (2006), <http://www.nationalhomeless.org/publications/facts/McKinney.pdf>; see also HUD, Cmty. Planning & Dev., McKinney-Vento Act, <http://www.hud.gov/offices/cpd/homeless/lawsandregs/mckv.cfm> (last visited Mar. 23, 2008).

51. 42 U.S.C. § 11311. The ICH lost its funding in fiscal year 1994 and was revived in 2002. *Id.* According to the ICH website, the primary activities of the council include “planning and coordinating the Federal government’s activities and programs to assist homeless people, and making or recommending policy changes to approve such assistance”; “monitoring and evaluating assistance to homeless persons provided by all levels of government and the private sector”; “ensuring that technical assistance is provided to help community and other organizations effectively assist homeless persons; and disseminating information on Federal resources.” ICH, Frequently Asked Questions, <http://www.ich.gov/faq.html> (last visited Mar. 23, 2008).

52. RUTH ELLEN WASEM, CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS, PROGRAMS BENEFITING THE HOMELESS: FY87-FY89 APPROPRIATIONS TRENDS 10 (1989).

53. See Walter Leginski, *Historical and Contextual Influences on the U.S. Response to Contemporary Homelessness*, at 18 (2007), available at <http://aspe.hhs.gov/hsp/homelessness/symposium07/leginski/report.pdf> (paper presented at the 2007 National Symposium on Homelessness Research).

54. CONGRESSIONAL RESEARCH SERVICE REPORT, HOMELESSNESS: RECENT STATISTICS, TARGETED FEDERAL PROGRAMS, AND RECENT LITIGATION 10 (2005).

55. *Id.*

56. The Emergency Shelter Grant Program provides federal funding, outside of the competitive Continuum of Care system, to improve the quality of existing emergency shelters, to make additional service shelters, to meet the costs of operating shelters, to provide essential social services to homeless individuals, and to help prevent homelessness. See HUD, Cmty. Planning & Dev., Homeless Assistance Programs,

jurisdictions and do not require competitive applications. Communities receiving ESGs are not obligated to demonstrate how these funds will be used in ways that complement other federal homeless assistance dollars.<sup>57</sup> Other programs, including the Supportive Housing Program (“SHP”),<sup>58</sup> Shelter Plus Care (“S+C”),<sup>59</sup> and the Single Room Occupancy (“SRO”) Program,<sup>60</sup> are funded through a competitive grants process administered by HUD.<sup>61</sup>

From 1988 through 1993, HUD’s competitive grants process accepted applications by individual agencies providing homeless assistance throughout the country.<sup>62</sup> This process did little to foster the coordination of services within communities or to provide complete service systems for the homeless, and provided no formal mechanism to streamline or to determine gaps in the homeless services available in a given community.<sup>63</sup>

In an attempt to encourage more coordinated services within communities, HUD introduced the concept of a Continuum of Care (“CoC”) in 1994.<sup>64</sup> HUD defines CoC as “a community plan to organize and deliver housing and services to meet the specific

---

<http://www.hud.gov/offices/cpd/homeless/programs/esg/index.cfm> (last visited Mar. 23, 2008).

57. See CoC REPORT, *supra* note 30, at xi-xii.

58. SHP is designed to develop supportive housing and services that will allow homeless persons to live as independently as possible. Eligible applicants are states, units of local government, other governmental entities such as PHAs, and private nonprofits. See HUD, Cmty. Planning & Dev., Supportive Housing Program, <http://www.hud.gov/offices/cpd/homeless/programs/shp> (last visited Mar. 23, 2008).

59. The S+C Program provides rental assistance for hard-to-serve homeless persons with disabilities in connection with supportive services funded from sources outside the program. See HUD, Cmty. Planning & Dev., Shelter Plus Care Program, <http://www.hud.gov/offices/cpd/homeless/programs/splusc> (last visited Mar. 23, 2008).

60. The SRO Program provides rental assistance for homeless persons in connection with the moderate rehabilitation of SRO dwellings. SRO housing contains units for occupancy by one person. These units may contain food preparation or sanitary facilities, or both. See HUD, Cmty. Planning & Dev., SRO Program, <http://www.hud.gov/offices/cpd/homeless/programs/sro> (last visited Mar. 23, 2008).

61. ESG, SHP, S+C, and the SRO program constitute the four most common sources of funding for homeless assistance programs from the U.S. Department of Housing and Urban Development. See CoC REPORT, *supra* note 30, at 161.

62. See *id.* at 1.

63. See *id.* at xii.

Only a few communities made serious attempts to plan or structure their homeless programs and services. Most communities could not be described as having “a system,” and providers developed programs for which they saw a need and could find money, without regard to the larger pattern of services in the community.

*Id.*; see also *id.* at 5 (“Applicants were not required to document local planning or service coordination and usually little such coordination existed locally.”).

64. *Id.* at 6.

needs of people who are homeless as they move to stable housing and maximum self-sufficiency.”<sup>65</sup> In practice, the CoC system requires various service providers in a community to submit applications to HUD for McKinney-Vento funding in a consolidated package.<sup>66</sup> HUD began to weigh applications based on evidence of coordinated services within a system, and made the amount of funding contingent on the degree to which all service providers in a community developed a coherent picture of the services provided in that CoC system.<sup>67</sup> Using the power of the purse, HUD was able to shape how homeless services were delivered on the local level.

Additionally, as part of a CoC application, each community is required to present a “gaps analysis” to show the gap between “need” and the “current inventory” of programs and services that address that need.<sup>68</sup> In doing so, communities are also expected to propose projects for HUD funding that meet an outstanding need.<sup>69</sup> The goals of this gaps analysis requirement are twofold: first, the analysis provides HUD with evidence of coordination of services to inform the CoC application process; second, it serves as a tool for individual communities to plan and develop their own programs and services.<sup>70</sup>

In May 2002, HUD released its *Evaluation of Continuums of Care for Homeless People: Final Report* (“CoC Report”). The CoC Report, prepared by the Urban Institute, assessed HUD’s Continuum of Care approach.<sup>71</sup> The study focused on twenty-five

---

65. HUD, GUIDE TO CONTINUUM OF CARE PLANNING AND IMPLEMENTATION 7 (2001), <http://www.hud.gov/offices/cpd/homeless/library/coc/cocguide/intro.pdf>.

66. See CoC REPORT, *supra* note 30, at 6.

67. See *id.* (“During the FY 1995 funding cycle, HUD gave additional points in its rating of applications that showed evidence of coordination with other services.”).

An essential requirement for these applications was and still is community-wide cooperation among providers, relevant government agencies, and other community interests. Every provider wanting HUD’s competitive homeless assistance dollars had to work together to develop a coherent plan and submit a joint application. The application had to document the existing stock of different kinds of shelter and housing for homeless and formerly homeless people, and the level of need as indicated by homeless population size and characteristics. It had to use this information to identify gaps in services, and to request funding to fill the gaps following a locally-developed ranking of projects against greatest needs.

*Id.*

68. *Id.* at 87.

69. See *id.*

70. See *id.* at 88.

71. *Id.* at i.

sample CoCs<sup>72</sup> from around the country and ultimately concluded that the CoC funding process was effective in increasing communication and coordination of homeless services within communities.<sup>73</sup> The report also stated:

The consistent message we received through interviews and observations in the communities we visited is that more people get more services and participate in more programs as a consequence of the CoC approach than was true before it began. . . .<sup>74</sup> Respondents attributed changes to the requirement for a community-wide process, plan, and application, not to increased funding.<sup>75</sup>

More recently, HUD's competitive grant program was given an "Effective" rating by the White House's Office of Management and Budget's Program Assessment Rating Tool ("PART"), the highest rating the office gives.<sup>76</sup> The findings of the CoC Report and PART both indicate HUD's success in shaping local homeless services delivery through the funding process.

#### D. Homeless Management Information Systems

##### 1. *What Is a Homeless Management Information System?*

A Homeless Management Information System is a software application designed to record and store client-level information on the characteristics and service needs of homeless persons.<sup>77</sup> HMISs are typically administered at the CoC level, and create a local database of the individuals who use homeless services in a community.<sup>78</sup> HMIS system administrators are able to clean data,<sup>79</sup> re-

---

72. The study focused on twenty-five CoCs that appeared to have been successful in implementing a Continuum of Care. *See id.* at i.

73. *See id.* at xix.

74. *Id.* at 145 ("Since the new approach to CoC application requirements happened simultaneously with increased federal appropriations for homeless programs, we asked specifically about perceived effects of the CoC approach as distinct from just receiving more money.").

75. *Id.* ("Further support for this as the change mechanism comes from reports that the changes were true not just for homeless-specific programs and services, but also for services and benefits offered by mainstream programs.").

76. *See* ExpectMore.gov, Detailed Information on the Homeless Assistance Grants (Competitive) Assessment, <http://www.whitehouse.gov/omb/expectmore/detail/10001234.2005.html> (last visited Mar. 23, 2008).

77. HUD, Homeless Management Information System (HMIS) Fact Sheet, <http://www.hmis.info/ClassicAsp/documents/HMIS%20Fact%20Sheet.pdf> [hereinafter HMIS Fact Sheet] (last visited Mar. 23, 2008).

78. *See* HUD, REPORT TO CONGRESS: SIXTH PROGRESS REPORT ON HUD'S STRATEGY FOR IMPROVING HOMELESS DATA COLLECTION, REPORTING AND ANALYSIS 4 (2007), available at <http://www.hud.gov/offices/cpd/homeless/hmis/strategy/report>

move all PPI, and release aggregate data to provide better information on the extent and nature of homelessness over periods of time.<sup>80</sup> In addition to the informational benefits, the HMIS is also a valuable tool for administering homeless services on both the CoC and service provider levels by creating an infrastructure to coordinate service provision, manage operations, and serve clients in a more effective manner.<sup>81</sup>

## 2. Congressional Direction

Even as HUD encouraged comprehensive support systems for the homeless through the CoC funding process, the success of the programs remained unclear.<sup>82</sup> Despite the billions of dollars the federal government<sup>83</sup> spent on expanding the homeless assistance system,<sup>84</sup> there was still no reliable source of national data on the homeless population or programs.<sup>85</sup>

Congress took notice and in 2001 directed HUD to collect data on the extent of homelessness in America as well as the effectiveness of the McKinney-Vento homeless assistance programs, stating:

These programs have been in existence for some 15 years and there has never been an overall review or comprehensive analysis on the extent of homelessness or how to address it. The Committee believes that it is essential to develop an unduplicated count of homeless people, and an analysis of their patterns of use of assistance . . . including how they enter and exit the homeless assistance system and the effectiveness of assistance.<sup>86</sup>

---

tocongress2007.pdf [hereinafter HUD, SIXTH PROGRESS REPORT]. As of 2006, 306 of the 346 HMIS implementations in the country represented a single CoC. *Id.* Although typical, this structure is not the only option, and HMIS can include multiple CoCs or even be statewide. *Id.*

79. *See id.* "Cleaning" data refers to reviewing and fixing any errors in the data on the HMIS administration level. *Id.*

80. *See* HMIS Fact Sheet, *supra* note 77, at 1.

81. *See id.*

82. *See id.*; *see also* S. REP. NO. 106-410, at 5 (2001).

83. Not to mention all the money spent by state and local governments, as well as private sector dollars.

84. *See* BURT, WHAT WILL IT TAKE, *supra* note 12, at 4.

85. *See* S. REP. NO. 106-410, at 51.

86. *Id.*

As a result of this directive,<sup>87</sup> HUD developed HMIS nationwide,<sup>88</sup> as a means to “collect an array of homeless data, including an unduplicated count.”<sup>89</sup> The primary goal of the HMIS initiative was a better understanding of the homelessness issue in the following areas:<sup>90</sup> the extent of homelessness,<sup>91</sup> the nature of homelessness,<sup>92</sup> homeless service use patterns,<sup>93</sup> and the effectiveness of the homeless service system.<sup>94</sup> To achieve these objectives, Congress provided SHP funds for the implementation and operation of HMIS.<sup>95</sup>

In addition to opening funding avenues, Congress ordered HUD to report on the progress of the HMIS initiative.<sup>96</sup> HUD submitted its *Report to Congress: HUD’s Strategy for Homeless Data Collec-*

87. HUD points to the Conference Report on the FY 2001 Appropriations Act, House Report 106-988, which reiterates and endorses the language of the Senate Report quoted above, as the source of the directive. HUD, REPORT TO CONGRESS: HUD’S STRATEGY FOR HOMELESS DATA COLLECTION, ANALYSIS AND REPORTING 1 (2001) [hereinafter HUD, 2001 REPORT TO CONGRESS], available at <http://170.97.67.13/offices/cpd/homeless/hmis/strategy/congressreport.pdf>.

88. It is important to note that the concept of HMIS was not new; in fact several localities already had systems in place to collect uniform data on homeless service use. In 2002, HUD reported that sixteen percent of CoCs indicated they had already implemented an HMIS or were updating or expanding an HMIS. HUD, REPORT TO CONGRESS: PROGRESS ON HUD’S STRATEGY FOR IMPROVING HOMELESS DATA COLLECTION, REPORTING AND ANALYSIS 2 (2002) [hereinafter HUD, 2002 REPORT TO CONGRESS], available at <http://170.97.67.13/offices/cpd/homeless/hmis/strategy/reporttocongress2002.pdf>; see also Dennis P. Culhane & Stephen Metraux, *Where to from Here? A Policy Research Agenda Based on the Analysis of Administrative Data*, in UNDERSTANDING HOMELESSNESS: NEW POLICY AND RESEARCH PERSPECTIVES 341 (1997) (specifically listing Columbus, OH; New York City; Philadelphia; Phoenix; St Louis; and Rhode Island as examples of existing Management Information Systems that collect homelessness data).

89. HUD, 2001 REPORT TO CONGRESS, *supra* note 87, at 1.

90. ENHANCING HMIS DATA QUALITY, *supra* note 2, at 4.

91. See *id.* at 4-5. HMIS will be used to accurately estimate the number of homeless through an unduplicated count of homeless people that access services nationally. *Id.* This requires high-quality personal identifying data, such as Social Security Number, names, gender, and date of birth. *Id.*

92. *Id.* at 5. HMIS will be used to discern the characteristics of those engaged in homeless services through high-quality data on gender, date of birth, race, ethnicity, veteran’s status and disability, and household composition. *Id.*

93. *Id.* Quality information on program entry and exit dates, as well as information on residence prior to program entry is critical in determining service use patterns like average length of stay and movement among different homeless programs. *Id.*

94. *Id.* Information at program exit, such as destination and income, are important to learn if and how the system has helped to resolve clients’ housing crisis and to improve their overall stability. *Id.*

95. See AHAR, *supra* note 1, at 8.

96. H.R. REP. NO. 106-988, at 106 (2000) (“HUD is directed to take the lead in working with communities toward this end . . . . The conferees direct HUD to report to the Committees within six months after the date of the enactment of this Act on its

tion, *Analysis and Reporting* in August 2001.<sup>97</sup> Over the past several years, with the financial and technical support of HUD, the prevalence of Homeless Management Information Systems has increased dramatically.<sup>98</sup> The HMIS initiative has already begun to show results, and the data-gathering capabilities will provide a much greater understanding of the state of homelessness in America and the degree to which existing programs address the needs of the homeless.<sup>99</sup>

### 3. *Data Standards*

On July 30, 2004, HUD published the HMIS Data and Technical Standards Final Notice ("Final Notice").<sup>100</sup> The Final Notice established uniform definitions for the types of information that HUD-funded service providers are required to collect from clients receiving homeless services.<sup>101</sup>

As previously discussed, inconsistencies in definitions and methodologies led to difficulties in accurately determining the extent of homelessness in America.<sup>102</sup> Because one of the main goals of HUD's HMIS initiative is to develop an unduplicated count of the homeless nationwide, data must be accurate and uniform.<sup>103</sup> To achieve this, the Final Notice lists the universal data elements required of all HMIS providers, as well as additional program-specific data for McKinney-Vento programs which are required to submit Annual Progress Reports.<sup>104</sup>

---

strategy for achieving this goal, including details on financing, implementing and maintaining the effort.").

97. See HUD, 2001 REPORT TO CONGRESS, *supra* note 87, at 1.

98. See HUD, SIXTH PROGRESS REPORT, *supra* note 78, at 4. In 2005, seventy-two percent of CoC applications reported they were implementing an HMIS; in 2006, that grew to ninety-one percent of the 454 CoC applications. *Id.*

99. See ENHANCING HMIS DATA QUALITY, *supra* note 2, at 4-5.

100. See HUD Homeless Management Information Systems (HMIS), Data and Technical Standards Final Notice, 69 Fed. Reg. 45,888 (July 30, 2004) [hereinafter Final Notice].

101. See *id.* at 45,901; see also HUD, HOMELESS MANAGEMENT INFORMATION SYSTEM DATA AND TECHNICAL STANDARDS NOTICE: FREQUENTLY ASKED QUESTIONS, [http://www.uhmis.org/hmis\\_data\\_standards\\_faq.pdf](http://www.uhmis.org/hmis_data_standards_faq.pdf) [hereinafter HMIS FAQs] ("[T]he data standards provide clear and precise meanings for the types of information collected by local homeless assistance providers and thus ensure that providers are collecting the same types of information consistently.").

102. See Helvie, *supra* note 22, at 5, 7-8.

103. See ENHANCING HMIS DATA QUALITY, *supra* note 2, at 7.

104. Final Notice, *supra* note 100, at 45,913-14. These programs are Shelter Plus Care, the Supportive Housing Program, Section 8 Moderate Rehabilitation for Single Room Occupancy Dwellings, and Housing Opportunities for Persons with AIDS-funded programs. *Id.*



The universal data elements required are: name; social security number; date of birth; ethnicity and race; gender; veteran status; disabling condition;<sup>105</sup> residence prior to program entry;<sup>106</sup> zip code of last permanent address; program entry date; program exit date; "unique person identification number"; program identification number; and household identification number.<sup>107</sup> Program-specific data elements, required of programs that receive funding through HUD's Supportive Housing Program, Shelter Plus Care, Section 8 Moderate Rehabilitation for Single Room Occupancy Dwellings Program, and Housing Opportunities for People with AIDS ("HOPWA") include: income and sources; non-cash benefits; physical disability; developmental disability; HIV/AIDS status; mental health; substance abuse; domestic violence; services received; destination; and reasons for leaving.<sup>108</sup>

## II. EASY ACCESS AT THE EXPENSE OF ACCURATE DATA

### A. The Importance of Accurate Data

According to HUD, "to meet the HMIS goal of presenting accurate data and consistent information on homelessness, it is critical that HMIS have the best possible representation of reality as it relates to homeless people and the programs that serve them."<sup>109</sup> In other words, information entered into HMIS must be complete and accurate for HUD to draw meaningful information from the system. If client data is missing, aggregate reports may not accurately

---

105. *Id.* at 45,907.

For this data element, a disabling condition means: (1) A disability as defined in Section 223 of the Social Security Act; (2) a physical, mental, or emotional impairment which is (a) expected to be of long-continued and indefinite duration, (b) substantially impedes an individual's ability to live independently, and (c) of such a nature that such ability could be improved by more suitable housing conditions; (3) a developmental disability as defined in section 102 of the Developmental Disabilities Assistance and Bill of Rights Act; (4) the disease of acquired immunodeficiency syndrome or any conditions arising from the etiological agency for acquired immunodeficiency syndrome; or (5) a diagnosable substance abuse disorder.

*Id.*

106. *Id.* at 45,908 ("[D]etermine the type of living arrangement the night before entry into the program and the length of time the client spent living in that arrangement.").

107. *Id.* at 45,909-10. The final five universal data elements (entry date, exit date, unique personal identification number, program identification number, and household identification number) are all computer-generated elements that are not collected directly from the client and are assigned to each client record. *See* HMIS FAQs, *supra* note 101, at 3.

108. *See* Final Notice, *supra* note 100, at 45,914.

109. *See* ENHANCING HMIS DATA QUALITY, *supra* note 2, at 4.

reflect the clients served by a program.<sup>110</sup> If client data is inaccurate, particularly identifying information, it may be impossible for HMIS administrators to remove duplicate aggregate data, which results in the overrepresentation of certain clients.<sup>111</sup>

### B. Challenges in Obtaining Accurate Data

Because the homeless clients themselves provide the majority of data entered and stored in HMIS systems, the efficacy of HMIS depends on the willingness of clients to provide complete and accurate information.<sup>112</sup> In order to realize the benefits of HMIS,<sup>113</sup> therefore, it is imperative that HMIS not create excessive or unnecessary disincentives for homeless clients to provide accurate information.

There are already a variety of reasons that a client may be unwilling to share accurate information with a homeless service provider. First, those experiencing homelessness often have trouble satisfying even the basic needs of shelter and nourishment, making it unlikely that providing information to an HMIS is a priority.<sup>114</sup> In its 2005 guide to enhancing HMIS data quality, HUD also points specifically to “not wanting to be tracked, general privacy issues, vanity, embarrassment, paranoia, a desire not to qualify for a particular service, fear of being turned away, or simply not caring enough.”<sup>115</sup> In addition, the population targeted by HMIS, individuals receiving homeless services, is generally wary of the social service system in the first place.<sup>116</sup> A client’s need for homeless services likely indicates that the social service system has not been completely successful for the client. Additionally, the high inci-

---

110. *Id.* at 8.

111. *See generally id.* at 11 (noting that insufficient data can make it impossible to create a unique client ID and therefore ascertain whether two records represent the same client).

112. *Id.* at 5.

113. For comprehensive data that furthers our understanding of the extent of homelessness, the nature of homeless, homeless service use patterns, and the effectiveness of the homeless service system, see *supra* notes 97-100 and accompanying text.

114. *See* ENHANCING HMIS DATA QUALITY, *supra* note 2, at 3.

115. *Id.* at 12.

116. *See id.* at 3 (pointing to distrust of the social service system as an issue that may prevent many from disclosing personal information).

dence of mental illness among the homeless<sup>117</sup> can compound the difficulty of gaining the trust of clients.<sup>118</sup>

The issues listed above present serious challenges and highlight the importance of establishing trust between clients and service providers.<sup>119</sup> In order to create this trust, it is essential for service providers to explain how the information entered into an HMIS will be protected.<sup>120</sup> A privacy policy that is overly permissive of disclosures to law enforcement agencies could be fatal to this trust in many cases because, in addition to the litany of concerns listed above, individuals in need of homeless assistance may be particularly concerned about their personal information being easily accessible to law enforcement officials.

### C. HMIS Privacy & Security Standards

Recognizing the importance of ensuring data confidentiality,<sup>121</sup> the Final Notice provides standards for the privacy and security of personal information collected and stored in an HMIS.<sup>122</sup> These standards are designed “to protect the confidentiality of personal information while allowing for reasonable, responsible, and limited uses and disclosures of data.”<sup>123</sup> The Final Notice privacy standards regulate the uses and disclosure of PPI<sup>124</sup> by any Covered

117. WRIGHT ET AL., *supra* note 8, at 105-06. Like all information on the demographics of the homeless, there is no definitive estimate of the percentage of homeless who suffer from mental illness. *Id.* Wright, Rubin, and Devine point out that published estimates vary from ten to ninety percent before they ultimately settle on one in three as a reliable number of mentally ill individuals among the homeless. *Id.*

118. See Matthew J. Chinman et al., *The Case Management Relationship and Outcomes of Homeless Persons with Serious Mental Illness*, 51 PSYCHIATRIC SERVS. 1143 (2000). In a study that explored the connection between the therapeutic relationship and outcomes among clients who were homeless and had a mental illness, the authors discussed the difficulty of engaging this “often distrustful group.” *Id.*; see also ENHANCING HMIS DATA QUALITY, *supra* note 2, at 3.

119. See ENHANCING HMIS DATA QUALITY, *supra* note 2, at 16 (noting that HUD emphasizes “establishing a rapport with consumers”).

120. See *id.* at 17.

121. See Final Notice, *supra* note 100, at 45,927.

122. See *id.* at 45,927-33 (outlining the standards).

123. *Id.* at 45,927.

124. See *id.* at 45,928. PPI is defined as:

Any information maintained by or for a Covered Homeless Organization about a living homeless client or homeless individual that: (1) Identifies, either directly or indirectly, a specific individual; (2) can be manipulated by a reasonably foreseeable method to identify a specific individual; or (3) can be linked with other available information to identify a specific individual.

Homeless Organization (“CHO”).<sup>125</sup> A CHO is defined as “[a]ny organization (including its employees, volunteers, affiliates, contractors, and associates) that records, uses or processes PPI on homeless clients for an HMIS.”<sup>126</sup> These organizations include service providers that enter data at the client level in addition to HMIS administrators who deal with data on the CoC level.<sup>127</sup> Recognizing that institutions which maintain personal information on individuals have obligations that may transcend the privacy interests of their clients, the Final Notice identifies the acceptable uses and disclosures of PPI in certain circumstances.<sup>128</sup>

### 1. *Permitted Disclosures of PPI for Non-law Enforcement Purposes*

In addition to administrative purposes,<sup>129</sup> the Final Notice specifies other permissive disclosures of PPI. For example, a CHO may disclose PPI when required by law;<sup>130</sup> to avert a serious threat to health or safety;<sup>131</sup> to disclose information about the victim of

125. *See id.*

126. *Id.*

127. *See id.* at 45,927.

128. *See id.* at 45,928-29.

129. *See id.* at 45,928 (“(1) To provide or coordinate services to an individual; (2) for functions related to payment or reimbursement for services; (3) to carry out administrative functions, including but not limited to legal, audit, personnel, oversight and management functions; or (4) for creating de-identified PPI.”).

130. *See id.* (“A CHO may use or disclose PPI when required by law to the extent that the use or disclosure complies with and is limited to the requirements of the law.”).

State law requires that all health care providers report to the police the name of any individual found to be suffering from a gunshot wound. A CHO providing health care discloses to police the name of an individual suffering from a gunshot wound. The disclosure is consistent with the HMIS standard.

*See* HMIS FAQs, *supra* note 101, at 9.

131. *See id.*

A CHO may, consistent with applicable law and standards of ethical conduct, use or disclose PPI if: (1) The CHO, in good faith, believes the use or disclosure is necessary to prevent or lessen a serious and imminent threat to the health or safety of an individual or the public; and (2) the use or disclosure is made to a person reasonably able to prevent or lessen the threat, including the target of the threat.

*Id.*

abuse, neglect, or domestic violence,<sup>132</sup> and for academic research purposes.<sup>133</sup>

## 2. *Permitted Disclosures of PPI for Law Enforcement Purposes*

The Final Notice identifies five different circumstances under which PPI may be disclosed to law enforcement officials. In each of these cases, disclosure is permitted but not required by the HMIS standards.<sup>134</sup>

First, a CHO may disclose PPI to an authorized federal law enforcement official seeking PPI for the provision of protective services to persons authorized to receive protection from the secret services or to investigate threats against the President as long as the information requested is specific and limited in scope.<sup>135</sup> Second, a CHO may disclose PPI to a law enforcement official if the CHO “believes in good faith that the PPI constitutes evidence of

132. *See id.* at 45,928-29.

A CHO may disclose PPI about an individual whom the CHO reasonably believes to be a victim of abuse, neglect or domestic violence to a government authority (including a social service or protective services agency) authorized by law to receive reports of abuse, neglect or domestic violence under any of the following circumstances: [1] Where the disclosure is required by law and the disclosure complies with and is limited to the requirements of the law; [2] [i]f the individual agrees to the disclosure; or [t]o the extent that the disclosure is expressly authorized by statute or regulation; and the CHO believes the disclosure is necessary to prevent serious harm to the individual or other potential victims; or [3] if the individual is unable to agree because of incapacity, a law enforcement or other public official authorized to receive the report represents that the PPI for which disclosure is sought is not intended to be used against the individual and that an immediate enforcement activity that depends on the disclosure would be materially and adversely affected by waiting until the individual is able to agree to the disclosure.

*Id.*

133. *See id.* at 45,929.

A CHO may use or disclose PPI for academic research conducted by an individual or institution that has a formal relationship with the CHO if the research is conducted either: [1] By an individual employed by or affiliated with the organization for use in a research project conducted under a written research agreement approved in writing by a program administrator (other than the individual conducting the research) designated by the CHO; or [2] By an institution for use in a research project conducted under a written research agreement approved in writing by a program administrator designated by the CHO.

*Id.*

134. *See id.*

135. *See id.*

criminal conduct that occurred on the premises of the CHO.”<sup>136</sup> For example, if a shelter client assaults another client in the dining room of a shelter, the CHO is permitted to disclose the names of the individuals involved to police.<sup>137</sup> Third, a CHO may, consistent with applicable law and standards of ethical conduct, disclose PPI “in response to a lawful court order, court-ordered warrant, subpoena or summons issued by a judicial officer, or a grand jury subpoena.”<sup>138</sup>

Fourth, a CHO may disclose PPI to a law enforcement official who makes a written request that: (1) is signed by a supervisory official of the agency seeking the PPI; (2) states that the information is relevant and material to a legitimate law enforcement investigation; (3) identifies the PPI sought; (4) is specific and limited in scope; and (5) states that de-identified information could not be used to accomplish the purpose of the disclosure.<sup>139</sup>

Finally, a CHO may also disclose PPI “in response to an oral request for the purpose of identifying or locating a suspect, fugitive, material witness or missing person and the PPI consists only of name, address, date of birth, place of birth, social security number, and distinguishing physical characteristics.”<sup>140</sup> Disclosures made through this provision lack any of the supervisory or external review, limited scope, or mandatory documented justification required in the four previous provisions.

Each of the first four permissible disclosures to law enforcement officials serves either a pressing purpose or requires supervisory review and justification. Protection of the President, for example, constitutes a legitimate pressing purpose. Similarly, it is necessary to allow disclosure that constitutes evidence of a crime on the premises of a CHO so that confidentiality does not encourage clients to act with impunity. In cases of court orders, judicial review polices disclosures. Disclosures made pursuant to written requests, moreover, are subject to supervisory approval and a series of other limiting requirements.

The final permissible disclosure, made in response to an oral request by a law enforcement official, lacks the imperative nature or formality of the other four. Although the PPI disclosed in this circumstance is limited to name, address, date of birth, place of birth,

---

136. *Id.*

137. See HMIS FAQs, *supra* note 101, at 11.

138. See Final Notice, *supra* note 100, at 45,929.

139. *Id.*

140. *Id.*

social security number, and distinguishing physical characteristics,<sup>141</sup> there is neither mandatory review or approval nor a requirement that the PPI be specific and limited in scope, as with a written request.<sup>142</sup> This relaxed standard for disclosures based upon oral requests serves no purpose other than to make information more easily accessible to law enforcement officials. The ease of accessibility to client PPI through oral requests threatens to compound the already challenging task of eliciting complete and accurate information from homeless clients.

### 3. HMIS & HIPAA

In drafting the HMIS privacy standards, HUD recognized that the Health Insurance Portability and Accountability Act (“HIPAA”) established a national baseline of privacy standards for most health information.<sup>143</sup> Therefore, the HMIS standards for uses and disclosures of client information were directly based on the standards set forth in HIPAA.<sup>144</sup> In response to comments suggesting the permissible disclosures for law enforcement purposes were too lax, HUD argues that its standards are based on those that HIPAA established.<sup>145</sup> HUD points specifically to disclosures based on oral requests as a provision that is comparable to the standards that HIPAA laid out.<sup>146</sup>

#### **D. Easy Access to PPI Can Undermine Accurate Data Collection**

The preceding sections of this Comment discuss the importance of accurate data collection for the success of HMIS as well as several of the specific challenges of obtaining accurate data from the homeless population. In addition to the challenges that HUD specified, relaxed disclosure standards for law enforcement purposes pose a specific threat to the collection of accurate data because of the often tenuous relationship between homeless individuals and law enforcement officials.

---

141. *Id.*

142. *Id.*

143. *See id.* at 45,895.

144. *See id.* at 45,896.

145. *Id.*

146. *Id.*

### 1. *Living in Violation of the Law*

Often, by virtue of their homelessness, individuals seeking services from CHOs spend much of their time in violation of the law. In certain instances, the laws broken are directly or indirectly aimed at the homeless.<sup>147</sup> Although these laws vary from city to city, they generally outlaw sleeping, sitting, storing personal belongings, or panhandling in public spaces.<sup>148</sup> The National Coalition for the Homeless and The National Law Center on Homelessness and Poverty, which surveyed 224 U.S. cities in 2006, indicated that: "28[%] prohibit camping in certain public places . . . 27[%] prohibit sitting/lying in certain public places . . . 39[%] prohibit loitering in certain public . . . [and] 43[%] prohibit begging in certain public places."<sup>149</sup> These types of prohibitions essentially guarantee that a homeless individual, by virtue of being without shelter, is breaking a law that directly prohibits aspects of living in the public space.

In other cases, individuals might violate laws not necessarily directed at the homeless because of conditions that have a high incidence among homeless individuals. For example, substance abuse is a widespread problem among the homeless population.<sup>150</sup> Individuals dealing with substance abuse are more likely to violate drug laws, open container laws, and public urination laws. According to a 1996 Urban Institute survey, forty-six percent of homeless individuals surveyed suffered from a problem with alcohol in the year prior to the survey, and thirty-eight percent suffered from a problem with drugs over the same time.<sup>151</sup> Considering these numbers, it is clear that many homeless individuals are highly likely to regularly violate drug and open container laws.<sup>152</sup> Those individuals seeking homeless services are asked to share their personal in-

---

147. See NAT'L COAL. FOR THE HOMELESS & NAT'L LAW CENTER ON HOMELESSNESS & POVERTY, A DREAM DENIED: THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES 8-9, 14 (2006), available at <http://www.nationalhomeless.org/publications/crimereport/report.pdf>.

148. See *id.* at 9.

149. *Id.*

150. Similar to all statistics regarding the homeless throughout this Comment, no definitive estimate of the prevalence of substance abuse among homeless individuals exists. See *id.* That said, it is generally accepted that there is a substantially higher incidence of alcohol and drug abuse among homeless individuals than in the general population. See WRIGHT ET AL., *supra* note 8, at 111.

151. URBAN INST., HOMELESSNESS: PROGRAMS AND THE PEOPLE THEY SERVE 24 (1999).

152. It is beyond the scope of this Comment to analyze the merit of the types of laws mentioned above or how they are enforced against the homeless population.



formation with CHOs for the purposes of HMIS, yet often they live their lives in a tenuous relationship with the law and law enforcement officials. In some circumstances, these violations are virtually unavoidable for homeless individuals.

## 2. *The M35 to Wards Island*

The M35 bus runs from Spanish Harlem to Wards Island, the location of the largest men's homeless shelter in New York City.<sup>153</sup> At one time, the M35 provided the only publicly accessible route to Wards Island.<sup>154</sup> Not surprisingly, the men trying to get to the homeless shelter cannot always afford the two dollar bus fare.<sup>155</sup> Some homeless men tried to beat the fare, and boarded the bus without paying because they needed to get to the homeless shelter for a place to sleep.<sup>156</sup> In doing so, these men ran the risk of arrest by undercover police officers who sought to catch fare-beaters on their way to Wards Island.<sup>157</sup> Faced with a typical charge of misdemeanor crime of theft of services, the arrested usually spent the night in jail; the city provided a service, but one that was inaccessible to those for whom it was intended unless those people broke the law.<sup>158</sup> In a sense, the city created a "Catch-22"—a homeless individual had to violate the law to find a lawful place to sleep.<sup>159</sup>

One can easily imagine a hypothetical in which the Catch-22 plays out: a homeless individual arrives at the Wards Island shelter after beating the M35 bus fare. He has just committed a crime for which people are regularly arrested and upon his arrival he is asked to share his personal information for the purposes of an HMIS. He is told he will not be deprived of services if he chooses not to share information and, in fact, refusing to share information is preferable to giving false information. He is also told that although there are privacy standards in place to protect that information, these standards offer only limited privacy guarantees. For example, if a police officer were to come to the shelter seeking information for the purpose of identifying or locating a suspected criminal, his name, address, date of birth, place of birth, social security number, and

---

153. Sabrina Tavernise, *Lacking \$2 Bus Fare to Shelter, Homeless Get a Free Ride, to Jail*, N.Y. TIMES, May 4, 2005, at A1.

154. *Id.* (noting that a footbridge over the East River was sometimes open, but was closed at night and during winter months).

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

distinguishing physical characteristics may be disclosed to that officer.<sup>160</sup> The homeless individual knows he is a suspected criminal for riding public transportation without payment. He must decide whether to volunteer his information or simply receive the benefits of shelter without providing the information that might lead to his arrest. An individual faced with this choice is less likely to volunteer sincere and accurate information than if it were more stringently protected.

While the particular scenario described above may be limited in scope, it is representative of the tenuous relationship between the homeless and the law. To adequately consider the HMIS standards, it is necessary to consider them in the context of this relationship. When this is done, it is clear that a relaxed policy of PPI disclosure with inadequate requirements and safeguards can present a major disincentive for homeless service consumers to provide complete and truthful information.

### **III. HMIS STANDARDS FOR HMIS SUCCESS**

The privacy standards that control the disclosure of PPI entered into HMIS should be designed both to protect the privacy of the clients providing the information and to maximize the success of HMIS. The “reasonable, responsible, and limited uses and disclosures of data” should not include disclosures which create unnecessary disincentives for homeless clients to provide accurate information to HMIS and thereby undermine its success. Therefore, disclosure of PPI to law enforcement officials should not be permitted based on oral requests. The fact that the oral request provision is comparable to the standard set by HIPAA should not prevent HMIS from establishing a higher standard of disclosure.

#### **A. Competing Interests in Disclosure to Law Enforcement**

Ultimately, a discussion of permissible disclosures of PPI in an HMIS to law enforcement comes down to a balance between the benefits of law enforcement’s ability to fight and investigate crime and the interest in protecting against the disclosure of personal information. This Comment has discussed at length the importance of complete and accurate information from homeless clients for those who seek to serve the homeless community, as well as how lax disclosure of PPI to law enforcement officials threatens the collection of this information. On the other hand, law enforcement

---

160. See Final Notice, *supra* note 100, at 45,929.

has an interest in accessing any records that may help investigate a crime. By and large, the HMIS disclosure standards strike an acceptable balance between these competing interests. The provision permitting disclosure of PPI based on an oral request, however, makes PPI accessible to law enforcement officials at too great a cost to clients and without adequate incentive. Unlike disclosures that serve to protect the President of the United States, are based on crimes occurring on the premises of a CHO, or are in response to court orders, disclosures based on oral requests do not serve a pressing purpose that less destructive measures cannot otherwise satisfy.

Removing the provision allowing oral requests would enhance the protection of PPI but would not render client PPI completely inaccessible to law enforcement. A law enforcement official could still request pertinent information from a CHO, but would be required to do so under the more stringent written request provision. This provision would require the approval of a supervisory official, a statement that the information is relevant and material to a legitimate law enforcement investigation, a specification of the PPI sought, evidence that the information sought is specific and limited in scope, and that de-identified information could not be used to accomplish the purpose of the disclosure.<sup>161</sup> The importance of encouraging the sincere participation of homeless clients in HMIS outweighs any inconvenience the additional steps would incur.

## **B. Should HIPAA Hinder Greater Protection?**

Although HIPAA may have been an appropriate place to start when designing HMIS privacy standards because it established a national standard for the protection of health information,<sup>162</sup> the discussion should not end with HIPAA disclosure standards. HUD's reliance on HIPAA does not take into account the unique objectives of HMIS<sup>163</sup> and how the unique circumstances of collecting accurate data on the homeless affect these objectives. HIPAA standards were promulgated to "define and limit the circumstances in which an individual's protected health information may be used or disclosed by covered entities," not to identify situations in which

---

161. *See id.* at 45,928-29.

162. *See generally* U.S. DEP'T OF HEALTH & HUMAN SERVS., OCR PRIVACY BRIEF: SUMMARY OF THE HIPAA PRIVACY RULE ii (2003) [hereinafter OCR PRIVACY BRIEF], available at <http://www.hhs.gov/ocr/privacysummary.pdf>.

163. *See supra* notes 91-96 and accompanying text.

information should be disclosed to law enforcement.<sup>164</sup> Therefore, it would not be outside the spirit of HIPAA to provide more stringent disclosure requirements where it is the interest of HMIS to do so.

### CONCLUSION

The primary goal of HMIS is to enhance homeless services through a better understanding of the extent of homelessness, the nature of homelessness, homeless service use patterns, and the effectiveness of the homeless service system.<sup>165</sup> The success of this goal is contingent on complete and accurate data collection, which is in turn contingent on the cooperation of homeless individuals themselves. Therefore, to achieve the full potential of HMIS, CHOs must earn the trust of the consumers of homeless services through the elimination of excessively lenient and unnecessary disclosures of PPI, specifically disclosures based on the oral request of a law enforcement official.

The most complete solution would be for HUD to remove the provision allowing disclosure of PPI in response to an oral request from the HMIS Data and Technical Standards. To do so would prohibit all CHOs receiving any HUD funding through the McKinney-Vento Act,<sup>166</sup> all CHOs receiving funding through HOPWA, and any homeless service provider participating in HMIS that has adopted HUD's Data and Technical Standards from disclosing PPI based on an oral request.<sup>167</sup> Short of HUD taking action to modify its privacy standards, disclosures to law enforcement based on an oral request may be prohibited through legislation at the state or local level, or through organizational privacy rules at the CoC or provider level.<sup>168</sup>

---

164. See OCR PRIVACY BRIEF, *supra* note 162, at 4.

165. See *supra* notes 91-95 and accompanying text.

166. See Final Notice, *supra* note 100, at 45,901.

167. *Id.* at 45,901-02.

168. See *id.* at 45,927-28. The privacy requirements of the HMIS Data and Technical Standards are baseline standards. *Id.* Individual organizations are welcome to apply additional confidentiality protections and must comply with local laws that require additional confidentiality protections. *Id.*

