Cyberseminar Transcript

Date: March 14, 2019

Session: Exempt Research-Categories 1-4

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Soundia Duche: I’m Soundia Duche. I’ll be your lead presenter today. And with me in the office I have Dr. Karen Jeans and Ms. Lucindia Shouse who will be assisting with the presentation. Now today's training is a two-part series. This is going to be part one and we'll be doing part two sometime in April. We're going to be focusing on exempt categories one through four. So we ask when you submit your questions, please limit your questions to categories one through four because we will not be addressing the other categories until after.

In terms of what we're going to cover today, I'm going to go over some background on exempt research and then we're really going to go long and deep into the four exempt categories of the revised Common Rule, also known as the 2018 Rule. And we are going to be using a lot of case studies to hopefully illustrate the many nuances of these exemptions and hopefully to get you really comfortable. Okay? This is going to be a long lecture. We're going to be going about an hour and 15 minutes. Because we started late, we will push this off to two o'clock, a little shy of two o'clock so that we can hopefully get about 30 minutes of questions in. All right, with that settled, let's begin.

All right, so what do we mean when we say exempt, right? Well what we're talking about is research that's exempt from the Common Rule. Not just exempt from everything. But exempt from the Common Rule. And generally speaking what this means is that the research is not subject to the majority of the requirements of the Common Rule. We used to be able to say almost all, but with the revised Common Rule we now have a new review, which is called Limited IRB Review which does require the IRB specifically to have some involvement in the exempt determination. But generally speaking, the requirements, for example of informed consent, that all non-exempt human subjects research has to meet. Either you need informed consent from a subject or you need an IRB approved waiver of informed consent. Those are the types of things that exempt research is not subject to. Certain reporting requirements to OHRP, we’re not subject to if your research is exempt. But again like I said, it doesn't mean you're exempt from everything. So there are reporting requirements to ORO that still apply. The IRB approval requirements. The 38 CFR 16.111 approval criteria. That's required for non-exempt human subject research. That's not required for exempt research with the exception of the specific categories that require limited IRB review. And even then, the IRB review is limited to exactly what is specified in the regulations for that limited IRB review requirement for that category. All right?

Again, exempt research, I want to really drive home this point. It does not mean you're exempt from everything. So we are governed by the Privacy Rule and the Privacy Act because we're a covered entity here at the VA. What that means is all of our research is subject to the requirements of the Privacy Rule and the Privacy Act and that includes exempt research. So this is critically important, because while we're going to be spending most of our time talking about the Common Rule today. There is still HIPAA, there is still the Privacy Act and both of those govern when protected health information and individually identifiable information is being used for non-permissible purposes. What's required when it's being disclosed for non-permissible purposes, what's required? Again, I'm not going to spend too much time on that, but just want to remind folks that if you're dealing with protected health information, if you're dealing with identifiers and you're using it for research purposes, there are requirements. Sometimes that involves a HIPAA waiver, sometimes it doesn't. Sometimes it involves a specific written authorization that's required. So you really want to make sure that you consult with your privacy officer when you're starting to deal with identifiable information, even for exempt research, and particularly when you start talking about sharing or disclosing identifiable information outside of the VA.

Dr. Karen Jeans: Yeah, and this is Karen. Just wanted to add, why is this important? It is that we see a lot of, a common area we see, area we see here in the Office of Research and Development is the word exemption being taken too far in that there's a belief that it's exempt from privacy law, exempt from privacy policy, exempt from privacy regulations. So again, if there's one thing that you get out of today, it is this. It Is that privacy laws, regulations and policies still apply to this human subjects research activity that is exempt.

Soundia Duche: Thank you Karen. The Privacy Act, we're governed by the Privacy Act, that's talking about disclosing information outside of the VA to individuals for non-permissible purposes. When you're disclosing identifiable information, generally speaking, you need some type of authority. And normally that authority is found from the subject's written authorization. Your privacy officer, again, would be someone you would consult when you're talking about collaborating and sending identifiable information outside the VA because they would be able to tell you what is allowable, what can be disclosed. Maybe you need to make it de-identified instead. But they would be able to work on those nuances. So we just wanted to include these slides so that everyone is aware that exempt does not mean exempt from other things. We're talking mainly, through the rest of this presentation about the Common Rule. But other things do apply to exempt research here at the VA.

So this slide you've probably seen before because we tend to use it for engagement determinations when we go all the way to the forth bullet. But really it's very important when you're trying to determine what regulatory review route applies to your research, you want to ask the questions in the order that you see above. You need to take into account all the details of your project and then you first want to ask, is the project research. Does it meet the definition of research? If it does, you'll go on to the next question. Is it human subjects research. Again, if the answer’s an affirmative, it meets the definition, then you look at, is the study exempt from IRB review. You wouldn't even get to the issue and the analysis of whether it's exempt or not if the first two questions were not answered in the affirmative. If your study does not qualify for exemption, then you continue down the list and ask the question about engagement and then whether it's eligible for expedited review. It's very important, it has always been important to ask the questions in this order, but even more so now because with the revised Common Rule where now we have expanded some of the exempt categories, what's happened is we now have overlap where we did not have before with some of the expedited review categories. So for example, category two exemption now actually overlaps with category seven expedited review. So if we did not ask these questions and you're just looking at the protocol on your desk and you're reviewing all the details, a study may equally be eligible for both exempt category two because of the nature of the study and the activities being undergone, as well as expedited review category seven. Which rules apply? By asking the questions in the correct way, you hit on the least regulatory burdensome avenue first. And that is what you would go with. So exempt would apply before expedited review despite the fact that looking at the projects independently, they could qualify for both. Now that may change as we finally get to the point where HHS reviews and revises the expedited review categories, but for now this is the environment we live in because of the revisions of the Common Rule.

Dr. Karen Jeans: And this is Karen. I just wanted to add that let's just say, in that example that Soundia just gave, that you chose it meets both of those categories. It meets exempt category. It also meets an expeditable category. So while the intent of this revision of the 2018 Common Rule is indeed to reduce the burden to the IRB and that the protections are in place in the exempt category. If your facility decided to say, no we're not going to do it under the exempt category, we're going to put it under expeditable, that's fine. It does not represent non-compliance. You are regulatory correct. So it's options, and options I don't think any of us [unintelligible 08:59] because we thought there would be a new expedited list category as Soundia has talked about. So that's a weirdness to this that needs to be recognized. I'm very glad that Soundia brought that up.

Soundia Duche: And great point Karen because the opposite does not apply folks. If your study is eligible for expedited review, normally it's eligible for expedited review and not eligible for exempt. You can't go backwards. I think that's self-explanatory, but just want to point that out. It's only going to be eligible for both exempt and expedited. It's not going to be eligible for, you get it. Anyway. All right.

So who can determine if a study is exempt? Here at the VA, and we're only speaking for VA-approved research, our VHA Directive 1200.05, that's the policy we operate under, and it specifies that the IRB chair or an experienced IRB member, or a qualified administrative staff can make the exempt determinations. It does not have to be the IRB unless limited IRB review is required and if that's the case, then the IRB is involved in only the specific requirements outlined for the limited IRB review. The key and most important thing is that the investigator is not allowed to make the exempt determinations. Now, to this point about the fact that you don't need to be an IRB member to make the determinations, you do need to be qualified right. So you should have some experience with research. You should have some experience with research oversight to be able to evaluate the exempt categories to make sure the project is eligible for the exemption. ORPP&E in the process of exploring the potential use of an electronic determination aid. Now we're still in the early process, but we've given some specifications to potential contractors. The system would be called VAEDA, pretty nifty name. The VA Electronic Determination Aid. How exactly it will be employed at the facility, that still remains to be determined. But the hope is that this will be something that will assist the research offices in making exempt determinations.

So you've gone through your list. You've asked your questions in the right way. The project involves research, it involves human subjects research. You're at the exempt question now and you're trying to determine, does the study qualify for exemption. In order to qualify for exempt review the study has to meet one or more of the eight categories for exemption. All activities that are being conducted at your facility that's associated with that project have to fit into one or more of the eight categories. If one of those activities does not fit into the category then that study is no longer eligible for exemption. And this is facility specific. You have two options. At this point you bump it up to the next regulatory review route and you evaluate it to determine if it's eligible for expedited review. Alternatively, you could, if it doesn't negatively impact your research, if it's so critical that that study be approved by the exempt route or not approved, I'm sorry but be reviewed by the exempt route, you could take that component right out of the research. You can remove that component, that research activity that would bump you out of the exempt categories. Take it out and maybe conduct it under a second study, another study or we determined we really don't need that information right now. We won't proceed with it.

I think I've already mentioned the thing about if limited IRB review is required, the IRB determines that the criteria are met and then the exempt determination official continues to evaluate to determine whether all the research activity meets one or more of the eight categories.

Now, if you're involved in a multi-site study it could very well be the case that one of your collaborating institutions, their institution reviews the study and determines that the activity being conducted at their facility do qualify for exempt review. And that's perfectly reasonable. You're not necessarily doing the same activities. So in a multi-site study, different institutions may make different determinations based on the activities being conducted at each site. At your site through you must evaluate all the activities being done for that research study. And again, if one activity does not fall into the exempt categories, that study cannot be reviewed by the exempt route at your facility.

Limited IRB review. I've mentioned this a few times. Limited IRB review is new to the revised Common Rule and it's very specific to four instances. There are four instances when in order to be eligible for an exemption, the study first has to be reviewed by limited IRB review. And so it's specific to exemptions two, option three, three one C, exemption seven and exemption eight. And what this means is the limited IRB review, the IRB does not perform the full review. They don't have to look at all the 111 approval criteria. Instead they look at specific things. And so for exemptions two and three they will look at whether there are adequate provisions in place to protect the privacy of subjects and maintain the confidentiality of their data. And only for exemptions two, option three and exemption three option one C. For exemptions seven and eight they're going to look at a few additional things that you can see on the screen, but we'll touch on those things in part two of the training. Limited IRB review, while it has to be done by the IRB, it can be done by the expedited review route. It doesn't have to be done by the convened IRB. So one thing to keep in mind.

In terms of oversight of exempt research. If the exempt research requires limited IRB review, the only role of the IRB is to make that limited IRB review determination. After that it's an exempt study. It's no different than any other exempt study provided it meets the criteria. So the VA Research and Development Committee will oversee the study unless there's another subcommittee of the R&D who's overseeing the study. If the study is a regular exempt research that doesn't require limited IRB review, once the exempt determination is made, the VA Research and Development Committee oversees that research. They are responsible for the initial approval.

Continuing review. They are also responsible for the continuing oversight of the study. So VHA Directive 1200.5, 1200.01 I'm sorry, stipulates that for exempt research, continuing review is required no less than every 365 days. We're going to be moving, oh, Karen is going to comment.

Dr. Karen Jeans: So I want to comment on this because one of the most common questions we receive and we're on slide 11 right now, is that okay, according to 1200.01 the Research and Development Committee continuing review is required for exempt research. But if it's not exempt human subjects research and it meets one of three categories for which continuing review is not required, those activities which are under IRB oversight, they don't require continuing review. And what gives with that? And that's a very legitimate question. And the reason is that you're seeing a discord between when the different policies went through. It's not an excuse, it's just a, this is just what occurred. Will we be dealing with this with revision of 1200.01? That is actually an active process right now. The answer is yes. So I wanted to call that out as part of this presentation to say we do recognize that and there is a discrepancy between the two. But yes, continuing review is required for exempt research if it's not under the oversight of another subcommittee.

Soundia Duche: Thank you Karen. Moving on to slide number 12. Remember we said exempt from the common rule does not mean you're exempt from all things. So there are some additional VA requirements for exempt research and these are actually new. In the new VHA Directive 1200.05, you will see that now for exempt research that involves interactions with subjects or where you're obtaining information by educational tests, surveys or interview procedures or you're conducting behavioral interventions, subjects must be provided with certain information. This is not informed consent, right, but it is making sure the subjects are aware that they're participating in research and that you're seeking their permission. So this information can be provided either orally or through a written document. The information is limited to making sure that you inform subjects that the activity involves research, that their participation is voluntary and that they are allowed to, that their permission to participate can be withdrawn. Also letting them know that the permission for use of the data can be withdrawn for exempt research studies that involve the collection of identifiable data. If it's deidentified data we're not able to, if information is recorded in such a manner that's not identifiable, we won't be able to identify them to withdraw that information. And then finally to provide the contact information for the VA investigator. So again, this is not informed consent. Does that mean you can't use the information sheet or come up with a nice brochure to provide this information? Sure you can. It's not necessary though. The key thing is, when you submit your protocol, you're going to explain to, in your protocol you're going to describe how you're going to convey this information and whoever is going to be reviewing this, R&D committee or whoever, would be able to say okay yes, this criteria was met.

Dr. Karen Jeans: And I know I'm butting in a lot.

Soundia Duche: It's all good.

Dr. Karen Jeans: And some of you may be asking, well why? Why specifically are we doing this? Well, first of all as Soundia will be talking to you later in category three, when you're doing a benign intervention, the new exemption category requires that the subject prospectively agree. And so we wanted to give some parameters about what that agreement should look like. As well in the expansion of these categories one and two, we're now doing something we never did before as part of this new revision. We're now doing surveys involving identifiable information. That used to be only eligible to be able to be done under expedited review under IRB approval under a consent. Now this is exempt, but instead of relying on, well let's just say it's a best practice to say by the way you're in a research study, we wanted to make sure that we honored what Veterans have been voicing concerns to us about here is let us know what you're doing. Let us know that we're in a research study. So that is why we put these minimum requirements in place for these exempt activities.

Soundia Duche: Thank you for that [unintelligible 21:20] information. [Inaudible 21:21-21:23]. So I borrowed this slide from a presentation that Dr. Kristina Borror did back in September. Excellent presentation that really gives the foundation and great overview of the changes in the revised Common Rule for all the exemptions. She covers exemptions one through eight and really goes into a lot of detail on limited IRB review. And so you can find that presentation on our web page, the link is here. But I really would encourage people to revisit that because it gives a nice foundation and overview.

We're moving on to slide number 14. One additional thing is there have been some changes in terms of when we're dealing with potentially vulnerable populations. Do the exemptions apply? And there have been some changes from the pre-2018 rule to the current revised Common Rule that we're operating under. So just want to summarize. For pregnant women, research studies involving pregnant women can enroll exempt, can enroll pregnant women for all exemptions. All exemptions apply. If your study involves prisoners, previously exempt research could not include prisoners. But now if the research is aimed at a broader subject population and it only incidentally includes prisoners, then prisoners are eligible to be enrolled in the exempt research. And then finally for children, there are certain categories of exemptions that children are not allowed to participate in. Specifically exempt category three. And then also for exempt category two there are some exceptions in enrolling children and you can see those on the chart.

All right. So before we get into our long and deep dive, we wanted to get a sense, if we just asked you to choose one and only one category, which of the four exemption categories that we're going to talk about today concerns you the most when making your determinations? The options you're going to be able to choose from are exempt category one, which is research in established or commonly accepted educational settings. Exempt category two, which involves education tests, surveys, interviews or observations of public behavior. Exempt category three, that's our new exempt category that talks about benign behavioral interventions. And then exempt category four which involves secondary research for which consent is not required. So Erica, if you can bring up that poll, we'd love to hear from the audience and see.

[Pause 23:58-24:22]

Erica: All right [unintelligible 24:22-24:23] poll.

Soundia Duche: How are we looking Erica with results?

Erica: They're still coming in. Let's give five more seconds.

Soundia Duche: All right.

Dr. Karen Jeans: Okay. Yes, it's a hard decision ya'll.

Soundia Duche: You only get one.

Dr. Karen Jeans: You only get one.

Erika: I can’t believe it. They're still coming in. Okay. Let's close the poll. And this is what it looks like.

Soundia Duche: Interesting.

Dr. Karen Jeans: Fascinating.

Soundia Duche: So 6% of you selected exempt category one, 16% selected exempt category two, 41% said exempt category three with a close follow up exempt category four, 36% of you. So that's good. All right, so we know where we need to spend our attention today.

So let's start with exempt category one and two, all right? We're going to kind of go through exempt category one quickly as it doesn't seem to be that concerning. And it really shouldn't be because it hasn't changed all that much. Exempt category one involves research conducted in established or commonly accepted educational settings that specially involves normal educational practices that are not likely to adversely impact students' opportunity to learn required educational content or the assessment of educators who provide instruction. So in red you'll see what's new. That's what's been added. Everything else is the same. And essentially the key thing, and I'm actually very glad that they included this new clarification or new requirement or restriction. They're looking really at research activities that are just looking at the normal common practice of providing education, assessing education. This is not for anything abnormal. And because the key is that if this research is being conducted on students, it should not negatively impact the time they spend and their opportunity to learn the required content. And so by adding that, they've made it very clear that if your study will adversely impact their opportunity to learn, or the assessment of the educators providing the instruction, well then it's not eligible, at least not under exempt category one, okay? And this is critical because exempt category one involves children. It allows for children. And so again, in thinking through the type of research that's being conducted on children and it can also be adults, but making sure that those who are there to learn are not negatively impacted by the research activity. All right.

Let's move on to exempt category two. Again, this category didn't concern you all that much. So I'm glad to hear that. I really want to just focus on a few things about exempt category two and I thought the best way to do that is to revisit our friend exempt category two under the pre-2018 rule. And I feel we're all very comfortable with that exemption. That was the exemption that involved surveys, educational procedures, educational tests, interviews, right? And we could conduct research under exempt category two in the pre-2018 rule if the information was recorded in such a manner that human subjects could be identified as long as we didn't place those subjects at any risk. Okay? When you're looking at this, that unless is the limitation. So what we see here, under the unless, or after unless, is the one instance when you cannot use exempt category two, right? So if your research activity involves identifiable information, recording it in such a manner that subjects could not be identified, you were fine. If your research involved identifiable information that was not sensitive, you were fine. Where you aren't okay, and where then you had to look at the expedited review is if your research involved identifiable information that could possibly place subjects at risk, okay? I'm going to use the word sensitive sometimes interchangeably when I talk about that. But I'm referring to them in the same manner. Things that could place the subjects at risk would be sensitive.

Let's look at exempt category two under the 2018 rule. If we look at the initial description of the exemption, it's very similar. There's very little red. Red indicates what's new. And so it still involves research activities that include interactions involving educational tests, survey procedures, interview procedures or observation of public behavior. They've included in brackets, parentheses there that you can audio record or video record this activity which was not a limitation before anyway, but they've clarified that you can do that. So the activity is the same in terms of the types of things that qualify for exempt category two. But now we go into specific options, okay? You can qualify, a research activity can qualify for exempt category two if it meets the first part and at least one of the following criteria is met. And there are three options. Unlike before where we just had one exclusion, we now have three options where if one is affirmative, you can use one. If your research meets option two, you can meet option two. And if your research meets option three, you can meet option three. Options one and two for the most part are exactly the same as what was allowed under the pre-2018 rule. Want to make sure because sometimes when we see these ors it kind of, you know, we're not used to seeing that. We're not familiar. Option one, let's talk about that.

Option one says, the information obtained is recorded by the investigator in such a manner that the identity of the human subjects cannot readily be ascertained directly or through identifiers. So that's our deidentified data. All deidentified. Notice there's no mention of whether it's sensitive or not. Whether it will place the subjects at risk or not. It just says information is recorded by the investigator in such a way that you can't ascertain the identify which was what was allowed under the pre-2018 rule. So we're fine there.

We go to option two. Option two is just talking about risk. Sensitivity. It says, any disclosure of the human subjects' responses outside the research would not reasonably place the subjects at risk of criminal or civil liability or be damaging to a subject's financial standing, employability, educational advancement, that's new and a nice clarification, or reputation. Again, the second option, remember these are each independent options. The second option isn't talking about, there's no mention of whether the information is identifiable or not. It just says, any disclosure of the risk would not reasonably place the subjects at risk. So I'm going to say, see my little bubble there, I'm going to say this captures all non-sensitive information all right? Which was a lot, right? Remember, under the pre-2018, if the information was identifiable but would not place the subjects at risk, that was allowable. So options one and two we're comfortable with. We've dealt with them. What's new is option three.

Option three is what was not allowed under the pre-2018 rule. As written what it says is, the information obtained is recorded by the investigator in such a manner that the identity of the human subjects can readily be ascertained, directly or through identifiers, and an IRB conducts a limited IRB review to make the determinations required. This one talks about identifiability. And so one would think it covers any identifiable information. But remember, these are all independent options. So we've already said in option two, that that covers all non-sensitive data. Whether it's identifiable or not. Okay? And so therefore then what we are left with with option three is when your research activity involves identifiable data and sensitive information that would place the subjects at risk, that is when the IRB must conduct a limited IRB review. Why did they not just state it like that? It would have been so much cleaner, honestly. But I think it's because they tried to make each of these independent, okay? Think about it, right? What does the limited IRB review require in this instance? For this specific exemption two option three, limited IRB review says the IRB has to make sure that adequate provisions exist to protect the privacy of the subject and maintain the confidentiality of their data. This is what would normally be reviewed under expedited review in the past because we weren't allowed to do this option under the pre-2018 rule. But now limited IRB review is required. I know this is a bit tricky so I'm going to try this one more time in one more way. Because sometimes it can help people to see things presented differently.

We're going to break down the options for exempt two and three. And I'm spending time on this because these same exact options are found under exempt category three. So this is my way of trying to depict it for illustrative purposes to help you try to make sense of what they are saying independently. Let's start with option one. Option one again is talking about information obtained, recorded in such a manner that the identity of the subjects cannot be ascertained. That covers all deidentified information. There's no mention of whether it's sensitive or not. So we're going to check deidentified here, we're going to check sensitive and non-sensitive because remember, this is an independent category. So this is for illustrative purposes. Option two talked about as long as the disclosures would not be damaging to the subject's financial standing, employability, education or reputation. Again, independently. That's what it said. It did not talk about or restrict it from being identifiable or de-identifiable. Now we already covered all deidentified in option one, but we'll check it here anyway. So what we're saying is, we're going to check identifiable data here too because option two does not limit. There's no limitation on option two in terms of the identifiability of the subject. If you read it, it only talks about the fact that it does not place the subjects at risk. So I'm going to call that non-sensitive, all non-sensitive whether it's identifiable or de-identifiable. What that leaves then in option three is, we're told the information obtained is recorded in such a manner that the identity of the subjects can be readily ascertained. So identifiable. We check that. What is left? The only thing that's left is sensitive data. Why? Because option two remember, covered non-sensitive data that's either identifiable or deidentified. All right? I know this might be tricky and maybe some of you are like, oh we already covered this or we already understand this. And if that's the case, great. But because we see this in the categories two and three, I want to make sure. And one thing I do want to point out, and I did use the word deidentified and I probably should have said not readily identifiable. In the VA, if we have an identifier, unlike the Common Rule which is a bit more liberal with identifiers, but in the VA if we have an identifier, then that information is readily identifiable. Karen wants to make a comment.

Dr. Karen Jeans: Yeah. Oh, I want to talk about this for just a minute, because we see a lot of areas between when something is exempt versus when it's not human subjects research. And so a great example is when we are doing for example administration of surveys. We see them in front of us, identifiable. But then we record it in such a way that we don't know that Karen Jeans did that survey. But we do know that Karen Jeans did. So that's exempt. But if I get a bunch of survey responses and I have no idea, I've never seen the name and the person on it, that I can't associate with it, then that's not human subjects research. And that's something that's very, very important in here to reinforce.

Soundia Duche: Absolutely.

Dr. Karen Jeans: And maybe what I may do is we'll change that\_

Soundia Duche: Let's change [unintelligible 37:28]

Dr. Karen Jeans: \_and say, we'll change the blue part to say not recorded in such a way that it's identifiable. So there's no confusion. But I hope that this depiction helps you understand how each of the exemption options because they're independent, how they really fit in. And then that would make sense of why limited IRB review is required for option three because it's really there to ensure that there are adequate protections for the privacy of the subject and maintaining the confidentiality of their data when you're dealing with sensitive data. That's when it matters.

Soundia Duche: I'm sure there will be questions about this, so we can go on. So let's get into some of the cases. And we're hoping this will help illustrate some of these points. So for case one, we have this VA study team that would like to conduct the study to explore the different methods by which medical residents receive training during their residency programs. The study is going to be conducted at five VA facilities and will involve the study team observing the way morning report sessions and morning rounds are conducted among various departments. Metrics will be collected on the way the sessions are conducted without any interference by the study team. So they're just going to be observing for this part. No patient information will be recorded during the observations. At a later time however, residents will be invited to take part in interviews scheduled during their downtime to gather their opinions on the optimal format for delivering training. They will be collecting identifiable information from the residents such as their names, their date of birth, their current residency rotation. So our question is, would this study qualify for exemption. We're on slide 22. And the options are, yes, category one. Yes, category two. Yes, category one and two. Or no, it would not quality. And Erika, if you could launch the poll.

Dr. Karen Jeans: And think carefully. Break it down in terms of thinking about, you've got someone who's sitting there watching them. Fill this out and they're doing interviews.

Soundia Duche: No more hints Karen.

Dr. Karen Jeans: No more hints.

[Pause 39:57-40:01]

Erica: Okay. Let's see what everybody thought.

Soundia Duche: You might have to read the poll results Erika because we're not able to see them. We have a computer that went down.

Erica: Oh, okay. It said, would this study qualify for exemption. Five percent of the people said yes, category one.

Soundia Duche: Okay, 5%.

Erica: Forty percent said yes, category two. Forty percent said yes, categories one and two. That's equal, category two and one and two. And then the last group, 15% said no, this does not qualify.

Soundia Duche: Okay, great. Thank you. So the correct answer is yes. Forty percent of you got it right which is huge actually. It's yes, category one and two. And what's interesting is that because we have two components going on here, right? We have an educational research study going on. Remember, even though we're talking about residents and even though we're talking about what would be considered, what one might initially think, oh but they're on the job. Residency is a training program. So when they go and are doing morning reports and morning rounds, that's part of their training. That's part of an education and that is a common practice done all across the U.S., all across in different countries. This is a way that residents, future clinicians, get their experience. And so this is considered a commonly accepted educational setting. Remember we were told there was no interference. The surveys that would be completed were going to be completed after hours and so because it's surveys, that's where category two comes in. So in this case, it's both category one and two. But let's talk about this a little bit more.

Our next question is, since we've established that category two is involved, would the study require limited IRB review? The options are yes or no. And Erika if you can launch that poll, that'd be great.

[Pause 42:17-42:48]

Unidentified speaker: [Unintelligible 42:49] Soundia.

Erica: Sure. Would the study require limited IRB review? Seventy-two percent of the people said yes, it will. And 28% percent said no.

Soundia Duche: Okay, interesting. All right. The correct answer is no. And I understand why 72% of you thought maybe and this is why I tried my best to spend a lot of time on looking at those three options. Remember, limited IRB review is required for the third option of category two. If the information collected was both identifiable and sensitive. And I can understand, maybe some of you are still not comfortable with that concept. What I would suggest is you think about it. What is the purpose of conducting limited IRB review. It's to ensure that there are adequate provisions in place to protect the privacy of subjects and the confidentiality of their data. In this case, while there is identifiable information being collected, there's nothing per se that's particularly risky or sensitive to the resident when they're just sharing their opinions about the optimal format for delivering training. We would argue that those opinions would not place the subjects at risk of criminal or civil liability or be damaging to their educational advancement. And so again, I think it's important to really, we're starting to hone in and really try to understand what those options are. Limited IRB review is not a blanket that just because there’s identifiable information being collected we have to conduct limited IRB review. So we're going to go on.

So we’re going to continue on this case saying that due to the difficulty scheduling the interviews, because of the residents' busy schedules, the study team proposes having subjects complete a survey instrument about their opinions on the optimal format of morning reports during 50 minutes of the 60 minute scheduled morning report session. All right? This is critical information. The program director is also interested in this information and so permission has been obtained from the program director to allow this one-time administration of the survey during the time allotted for morning report. All right? Our question is, does the study qualify for exemption? Now we're going to be using some time, but we have permission. The program director is in support because this is great information for them. Our options are yes, category one. Yes, category two. Again, yes, category one and two or no. And Erika, if you can launch the case that would be great.

[Pause 45:37-45:54]

Erica: Okay, a couple more seconds. All right, here come the results. Does this study qualify for exemption. Eighteen percent said yes to category one. Thirty-three percent said yes to category two. Twenty-eight percent yes, categories one and two. And 21% said no, does not qualify.

Soundia Duche: Very interesting. Thank you. Well that's a nice spread. All right. And the goal is that these cases were supposed to be hard and very nuanced, all right? The correct answer is yes, category two. We're still involving surveys right? So surveys are still being conducted and as long as the research meets the criteria for an exemption it qualifies. Why no longer exempt category one? Because the time that would be spent on doing the surveys during the morning report, and morning report is an educational opportunity. So now we're using almost all of the morning report's allotted time, which should be part of training, to conduct a survey and have them use the survey. So the study would not be eligible under category one. It is still eligible under category two. And remember, so long as the research activities meets one or more of the exempt categories the study is eligible for exemption. The fact that the program director gave their permission has no real bearing on the exempt determination. You have to look at the research activities being conducted. But we are still able to do the study under exemption because there's another exempt category that it fits under. That was a bit of a tricky one. But we wanted to really try and illustrate how nuanced things can get here.

Our next study, case study two. We have an investigator who wants to better understand how Veterans diagnosed with PTSD seek out treatment and what coping mechanisms they use. The research involves an in-person or telephone interview with the Veteran to explore different options for therapy and assess their receptivity to the various options. We're told that the interview will be audio recorded and will include questions about illegal drug use. Subjects will sign a written HIPPAA authorization for collection and use of their protect health information. Our question is, is the study eligible for exemption? Options are yes, exempt category two without limited IRB review. Next option is yes, exempt category two with limited IRB review. And then the third option is no. And Erica if you can launch the poll.

[Pause 48:46-49:01]

Erica: Okay. Looks like most people are done. Oh, we got a couple more thinkers joining in.

[Pause 49:07-49:13].

Erica: Okay, let's close it. Here's the results. Four percent said yes, exempt category two without limited IRB review. Fifty-three percent said yes, exempt category two with limited IRB review. Forty-three percent said no. No way.

Soundia Duche: Interesting. All right. So our answer is yes, exempt category two with limited IRB review. Now, it's a survey, or interview I'm sorry. And because it's asking questions about illegal drug use that's definitely something that would place subjects at risk. According to the way the exemption is phrased, provided you conduct limited IRB review and ensure that adequate protections in place then our study would be eligible for exempt category two. Now for those of you who said no, I understand why you said no. And it could be that really the IRB may not determine that there are adequate provisions in place. Maybe because of the nature of the population where you're asking people with PTSD about their coping mechanism I'm sure other things may come up as they talk about how they cope. They may divulge other things. And how do you ensure adequate protections. The key thing here is if the IRB while conducting their limited IRB review cannot ensure that sufficient protections are in place then that study would not be eligible for exempt category two. So the key is the IRB would have to ensure that there are adequate provisions in place to protect the subject and then it could meet the criteria. If the limited IRB reviewer says no it's doesn't, well then it wouldn't be eligible for the exemption. So again, something a bit more nuanced that we're trying to hone in on.

All right. What are some of the things the IRB should consider when performing limited IRB review? Because remember they're now assessing are there adequate protections in place. The options are A, they should look to see whether the research results will be returned to subjects. B, whether the informed consent form includes information about the session being recorded. That would be critical information. C, whether the study should have a Certificate of Confidentiality. The next option D, all the above [unintelligible 51:35] E, none of the above. And we're on slide 28. Erika, if you can launch the poll.

[Pause 51:40-52:01]

Erica: Okay. We're going to shut it down. Here I come. Two percent gave the first answer. If research results will be returned to subjects. Nine percent if the ICF includes information about recording the session. Ten percent, if the study should have a Certificate of Confidentiality. Here's the biggest group. Sixty-three percent said all of the above. Sixteen percent, sixteen, none of the above.

Soundia Duche: Excellent, wow. Thank you Erika, thank you. All right remember, for exempt category two option three, limited IRB review, the reason you're doing it is to ensure that there are adequate protections in place to protect the privacy of the individual and maintain the confidentiality of their data. That is the only thing the IRB is charged with. And so the correct option is C. Now that's not say that these other things, whether the research results would be returned, whether the informed consent form includes information, not to say these are not important things. Remember we're dealing with exempt research here, so if its qualifies for exemption, there's no regulatory informed consent. So that's one thing to be aware of. Returning research results to subjects. That's not to say that that should not be evaluated, but that's not the IRB's role in this case. That might be the R&D Committee. When we're talking about exempt from the Common Rule requirement that means exempt from IRB approval. With limited IRB review, the IRB is charged with in this case one thing. And that's ensuring the protection of the privacy of the subjects and the confidentiality of the data. So of the options, the only thing that meets that criteria is whether the study should have a Certificate of Confidentiality. I hope you guys are finding these helpful. And we know again that they're nuanced and we all know that's the world we operate in. When projects come in they're not very straight forward. And so you have to exist in sometimes areas and shades of grey and blue and all of that.

So let's move on to exempt categories three and four. Three being I think the one that caused people the most concern. So exempt category three is new to the revised Common Rule. For the first time in the exemptions we are now allowed to have research that includes certain interventions. Not all interventions, a specific type of intervention. And that intervention is described as a benign behavioral intervention. Prior to the revised Common Rule anytime you had an intervention you had to look at the next level up which was expedited review. You were bumped up to expedited review. But now, if you meet this benign behavioral intervention and your study meets all these other things, you're eligible for exemption. So what are these other things? First thing let's looks at the description right? It's research involving benign behavioral interventions in conjunction with the collection of information for an adult subject through verbal or written responses including data entry or audio/visual recording. If the subject prospectively agrees to the intervention and information collection and at least one of the following criteria is met. These are the same criteria that we saw in exempt category two. And that's why we tried to really hone in on those and spend some time there.

Category one, option one I'm sorry, is when information obtained is recorded by the investigator in such a manner that the identity of the human subjects cannot be readily ascertained. So we're going to be changing these bubbles in future slides to say the information recorded is not identifiable. Or some variation of that.

Option two is when any disclosure of the human subjects responses outside the research would not reasonably place the subject at risk. So I'm going to say all non-sensitive, research activities that are not going to place the subjects at risk are now non-sensitive.

And then finally, option three, the information obtained is reported by the investigator in such a manner that the identity of the subjects can be readily ascertained and a limited IRB review is required. And that we discussed before and I encourage you to go back to the charts, really. And even read the preamble. That's helpful too. But that is with information identifiable and sensitive. It could possibly place them at risk and limited IRB review is required in order to ensure the privacy of the subjects and the confidentiality of their data that there are adequate measures in place to ensure those two. So we're not going to talk about the options again. Let's really hone in on benign behavioral interventions.

What are they? The regulation tells us that benign behavioral interventions are brief in duration, they're harmless, they're painless, they're not physically invasive, and they're not likely to have a significant adverse lasting impact on the subjects. And the investigator has no reason to think the subjects will find the interventions offensive or embarrassing. They give some examples in the regulations. They're really benign activities. Things like having the subjects play an online game, having them solve puzzles under various noise conditions. Having them decide how to allocate a nominal amount of received cash between themselves. While these examples are good, for us where we're doing more social behavioral research, I get it. It's going to be hard for us to really figure out what would be considered a benign behavioral intervention. So the next slide we're going to talk about how we might go about making that decision based on the information we are provided in the regulations. But before that, one thing to add. Another characteristic or requirement for this category is if the study involves deception, then subjects have to prospectively agree that they will be unaware of or misled regarding the nature and purpose of the research. Now again, this is not informed consent. It's not regulatory informed consent. It's similar to exactly what Karen was getting at when she said why, in 1200.05, we added these things about having to tell, give the subjects an opportunity to agree to participate in the research. You would have to inform the subject that hey, we will be keeping certain things from you, do you still wish to participate? And that's if the research involves deception.

So what we did here, again what we're trying to do is just try to help you think, give you tools or ways of thinking through this because each case is going to be different. Each study you evaluate is going to be different. So what we've done here is we've outlined the key criteria based on what the regulations say, right? When you're looking at a benign behavioral intervention, the key criteria on the left are the things that the regulation says has to be in place. And then the characteristics, or how you meet that criteria is on the right. So it has to be brief, brief in duration. But of course you're asking, what does that mean? And brief indeed is relative. It really is relative. The intervention itself does not last long. But what is long? Are we talking minutes, hours? Usually yes. Both would actually apply. But versus continuous, something that's ongoing most likely would not be considered brief. Brief does not mean that the intervention cannot include multiple iterations. Sometimes you may need the subject to do something multiple times. However again, each iteration should be brief. Finally, does this mean that the intervention can only occur on one day? We don't believe so. The intervention could occur on more than one day. Imagine if you have an activity where you need them to do an hour one day and an hour the next day. Or two days later. The total time for that intervention is two hours. Two hours of time most people would consider definitely brief. So again, as you're thinking about brief, it is relative. But these are hopefully some parameters as you're thinking about what might meet that requirement.

The next one is behavioral intervention. It has to be a behavioral intervention. For Behavioral interventions, things to consider are your cognitive, intellectual, educational or behavioral tasks. If you're going to be manipulating the subject's physical environment or sensory environment, these are things that would be considered, would be able to qualify as a behavioral intervention. It does not include medical interventions. And specifically, when the comment period was going on for the revised Common Rule, they did not initially have behavioral, it was just intervention and it became clear that their intention was to exclude medical interventions, but as written it didn't limit it. And so they now added behavioral to clearly differentiate it from a medical intervention. We know that certain medical interventions can be benign, but the requirement here is that it's a behavioral intervention and so that needs to exclude things like medical tests, procedures or devices.

Your subject population, according to the regulations, has to be adults. Adults only. It cannot involve children for this research to fit into exempt category three.

There has to be prospective agreement. Subjects have to agree to participate in the research. That can be verbal or written. Again, you're not obtaining regulatory informed consent here.

And the method by which the information is obtained from the subject, it can be verbally, it can be written, data entry or be a recording. The information should not be obtained from medical intervention or a device. That's important.

And then we're told some characteristics that we went over before. Harmless, painless, not physically invasive, not embarrassing, not significant adverse lasting impact on subjects.

And then again, if there's deception you want to make sure that subjects are informed. So let's go into our next case study to try to illustrate this a bit more.

Case study three involves adult subjects who suffered from a stroke and they are asked to take part in two sets of one-hour non-interventional assessments of memory, attention and information processing speed before and after performing 30 minutes of cognitive enhancement exercises using an iPad. Subjects will provide verbal and written responses to the questions. The sessions will be held on two consecutive days, so over multiple days. They will take about two and a half hours each day. So total time commitment is five hours, but broken up into two days. The assessments will be conducted privately with a study team member and subjects are encouraged to take breaks when desired. Identifiable information will be recorded and the subjects have signed a written HIPAA authorization for the collection and use of their protected health information for research purposes.

So our question is, does this study meet the requirements of a benign behavioral intervention. And the options are yes or no. And I will tell you on the next slide we've broken down the characteristics if you want to look at them for this particular study. But Erica has already opened the polls.

[Pause 1:03:39-1:03:50]

Erica: Okay. I'm going to close it down. Here we go. Sixty-six percent said yes, 34% said no.

Soundia Duche: Awesome. Wonderful. Thank you Erica. And we would agree with 66% of you as presented. Okay? And again, this is just based on the information. So what are some of the factors that went into this? Brief. Would you consider this brief? Two and a half hours each day. We would consider that brief. Total time commitment is five hours. They're allowed to rest in between. That seems like a relatively brief intervention. Is it a behavioral intervention? Well we're told that the activity involves thirty minutes of a cognitive enhancement exercise and non-interventional assessments of memory, attention and information processing speed. The subject population are adults. In terms of prospective agreement, we did not specifically say that they were informed or they prospectively agreed, but we did inform you that the subjects signed a HIPAA authorization form to allow their PHI to be used for research purposes. So that tells us that a discussion was had with the subjects that they were participating in a research study and they did give their permission to participate in the form of using their information for the research purposes. Information obtained was verbally and through written tasks. So that qualifies. And in terms of the characteristics of the research, we feel for the most part it does meet all of these. There are some questions maybe someone would say well, might there be embarrassment. Might the subjects be embarrassed since that thirty minutes of cognitive enhancement exercise or even any of the other things, I mean these are subjects who have a stroke, so might they become embarrassed? We felt that by including in the description that the assessment takes place privately, that that would reduce that. But of course there are nuances you know? And so again, what we're just trying to illustrate more than anything is how to look at this as you're making these determinations.

Continuing with this case. The investigator would like to capture whether stress caused by the cognitive enhancement exercise is confounding the results. His concern is like, well could there be anything else, a confounder that I'm not aware of. And he proposes collecting blood pressure and pulse readings during the exercise, along with a saliva sample to measure cortisol levels after the game is played. Our question is, is the study eligible for exemption? And our options are yes or no.

[Pause 1:06:34-1:06:52]

Erika: Okay. I'll close this one down. Twenty-five percent say yes. 74%, no.

Soundia Duche: Excellent. Great. We're getting there. Good. We said no as well. Couple of reasons. One, now we're adding a medical intervention. Blood pressure readings, pulse readings. That is not a behavioral intervention. It certainly is benign, but it's not a behavioral intervention. So that would not qualify. Also the collection of saliva samples. There's no exemption category that allows for that. There's an expedited review category that allows for that, but not exemption. So if there's a part of the research activity that does not meet one or more of the exempt categories, the entire activity is not eligible for exemption.

All right. This is the one the rest of you have been waiting for. After benign behavioral intervention, the next one that people had concern with was exempt category four. Again, I thought it would be good. We're just going to briefly, briefly revisit the pre-2018 exempt category four again. Take a trip down memory lane. This is something for the most part we were all very comfortable with. Under the pre-2018 rule it allowed for research activities involving the collection or study of existing data, documents, records or pathological specimen, as well as diagnostic specimens if the sources were publicly available or if the information is recorded by the investigator in such a manner that subjects cannot be identified directly or through identifiers. So those were the two options, publicly available or you're accessing identifiable information but you're recording it in a manner that you cannot identify the subjects. In the pre-2018 rule the information had to be existing, all right? It couldn't be information that was being collected for your research purposes. It had to be existing.

In the 2018 rule what we see here, they've rephrased this category as secondary research for which consent is not required. Secondary research again is research on something that's not being collected for your primary purpose. So that's what we were doing under the pre-2018 rule as well. The difference is here now, there's no limitation on the information being existing. Or the specimens being existing. They don't have to be existing. So these first two options again are very similar to how we operated under the pre-2018 rule. One, if the identifiable private information or identifiable biospecimens were publicly available they can qualify for the exemption. That was the case before. Option two is the information, and they've now clarified which may include information about biospecimens, is recorded by the investigator in such a manner that the identity of the human subjects cannot readily be ascertained directly or through identifiers linked to the subjects. Similar to what we saw before. They've added some additional caveats though, or clarifications. The investigator cannot try to contact the subjects and the investigator will not re-identify the subjects. So options one and two are very similar to how we operated before. Where the angst comes in is now we have these option three and four which are very new and very different. And really completely applicable to us as a federal agency who is also a covered entity. So this makes us really, it makes it so that we really have to understand this because a lot of the research that we review may be eligible for one of these two other exemption, particularly exempt three. We're going to have Karen talk about the option four. Exempt category four, option three.

So exempt category four, option three involves research involving information collection or analysis involving the investigator's use of identifiable health information when that use is regulated under 45 CFR parts 160 and 164. That is, so parts A and E. That's our HIPAA privacy regulation. So when that information is regulated under that for the purposes of healthcare operations, research or public health activities. This covers a lot of our secondary research conducted here at the VA because any information that resides in our system in CPRS, any information that we receive into the VA is protected by the HIPAA privacy regulations. So identifiable information conducted by VA investigators using VA data. Identifiable data, many of of that when you're talking about secondary analysis, would meet category three. What's the issue here and why the angst? Well it's because one, we're not used to being able to conduct research using identifiable information under this exempt category, so this is new. And this is really limited to information that's protected by HIPAA. While the information is protected by HIPAA, there is still another level whereby if you're using it for research purposes now, conducting your secondary analysis, you still have to either obtain the subject's written authorization to use it for that purpose or a waiver from the privacy rule that allows you to use it. That again is not unique to this category. That always is the case when you're using protected health information for research purposes barring certain exceptions. Research on [unintelligible 1:12:40] and other types of things. So that's really exempt category three.

Now exempt category four looks like a beast of an exemption. And it is. And Karen is going to chime in on this one because there's a lot going on here.

Dr. Karen Jeans: So this is Karen. I want to talk briefly about category 4(iv). And again we're not really pushing using this category because it is a complicated category. When regulations were made there are a variety of different agencies that are involved in the creation of this. And the genesis of 4(iv) was the Office of Management and Budget, OMB. And so there is, it's a very complicated exempt category in which the E-Government Act is an act that was put in place in 2002. It is law, which requires us as a federal agency or any federal agency to have a very secure system for how we will store electronic data, how we will transfer electronic data. It requires privacy impact assessments, a specific type of document that's publicly available regarding the information system that we use. And so as I'm talking just about this in a very brief narrative, this is not something that you're going to know off the top of your head. And so we can go into this in-depth later in another discussion at a later time, but it was put in place by the Office of Management and Budget for a very specific type of research category. At this point, in the interest of time, I don't want to get into all the nuances of it. If you have an activity that would qualify under this system, this category, this indeed is going to need consultation with privacy. But at this point we are going to give a recommendation that this is not a category that you should be using until we get very firm guidance out there because it is complicated by the very nature of it.

Soundia Duche: Thank you Karen. So let's go into our last set of case studies. Case study four involves a VA investigator, Dr. See, who submits a protocol to the Lexington VA IRB to conduct human research on patients treated for hepatitis at the hospital over the next five years. Aim one of the study will be to understand clinical disease progression. Subject medical record numbers will be recorded and used to cross reference patient's microscopic images, lab reports and information from subject's medical records. Aim two involves detection of certain biomarkers indicative of early stage hepatitis disease. And for Aim two they're going to be getting identifiable biospecimens with accompanying data from a for-profit repository. They have to purchase those. The specimens obtained will not be related to the subjects included in Aim one of the study. The question is, does this study qualify for exemption? You can check all that apply. Yes, category 4(i), yes category 4(ii), yes category 4(iii), yes category 4(iv) or no.

[Pause 1:16:10-1:16:13]

Dr. Karen Jeans: And let me give you a hint. This is Karen. It's not 4(iv), okay?

Unidentified speaker: I like that.

[Pause 1:16:20-1:16:28]

Erica: Okay, we have a few people voting, what about the rest of you?

[Pause 1:16:32-1:16:35].

Erica: Here we go.

[Pause 1:16:36-1:16:40]

Erica: [Unintelligible 1:16:40] they're thinking. Okay. I'm going to shut it down. Here we go. Twenty-two percent said 4(i). Thirty percent 4(ii). Forty-eight percent 4(iii). Karen, 2% didn't listen to you and said 4(iv) and 26% said no.

Soundia Duche: Okay, very interesting. All right. Again, these are hard cases and we are using them just to illustrate certain key points. We said yes for category 4(i) and 4(iii). Why 4(i)? 4(i) is the option for publicly available information. The specimens were obtained from a for-profit company. There was a user fee involved. But that does not exclude it from being considered. Very interesting. If I can pay for it, someone else can pay for it. And that's part of being publicly available. Normally when we think about publicly available we tend to only think about online databases, going to the library. But if something can be obtained, someone on the open market, there might be limitations because you might need to have a certain license or so on to get access, but if a large number of people can meet that criteria, that would be considered publicly available. And in the case we've given, it's a for profit. They are there to make money. They are there to sell to the public.

Dr. Karen Jeans: It's commercial.

Soundia Duche: There we go.

Dr. Karen Jeans: It's a commercial entity. It's commercially buying specimens that are identifiable.

Soundia Duche: Right. There we go. Perfect. Thank you. 4(ii) involves reporting things in such a way that they are not identifiable. And I believe we said in the case that the information obtained and the specimens were identifiable. Remember, we said for Aim one, subject medical record numbers will be recorded. Subject medical records are identifiable. That's similar to the Social Security number in terms of how we use it here in the VA. 4(iii), that's our HIPAA privacy. Remember, our investigator Dr. See is at the VA. He's accessing information on the VA system and that information is regulated under the HIPAA privacy regulation. All right, 4(iv), Karen told us not to go there.

Dr. Karen Jeans: All right. So here's the big deal with this category. All these chart review studies that we used to, under the pre-2018 requirements, required IRB review and approval under an expedited category. Now all of those, now that expedited category still exists, but now there's an exempt category under 4(iii) that allows the activity to be exempt because the protections are in place under HIPAA that will restrict the collection, the use, of how that data can be used as part of this chart review research study involving human subjects.

Soundia Duche: Thank you. Our last case study, case study five. We have a VA researcher who is investigating the incidence of certain cancers on Veterans who were deployed during Operations Iraqi Freedom and Enduring Freedom. Five VAs will be involved in this chart review study. We're told identifiable information will be obtained and recorded from CPRS which is VA's electronic medical record system, and the privacy board has approved a waiver of HIPAA authorization for the study. Our question is, is the study eligible for exemption? And the options are yes, exempt category four or no.

[Pause 1:20:35-1:20:38]

Erica: Poll is open.

[Pause 1:20:39-1:20:56]

Erica: Okay. I'm going to close it down. Here we go. Almost everyone said yes, exempt category four. [Unintelligible 1:21:05] percent said no.

Soundia Duche: That's right. Okay, perfect. Yes, exempt category four. Excellent. And 4(iii) in particular because this is information that is under the HIPAA privacy regulation.

All right, should the IRB perform a limited IRB review to ensure that there are adequate provisions in place to protect the privacy of subjects and maintain the confidentiality of their data? Yes or no?

[Pause 1:21:33-1:21:56]

Erica: Okay. Couple more seconds. Closing it down. Fifty-two percent said yes. Forty-eight percent said no.

Soundia Duche: All right. Interesting. No. Okay? Remember, category four does not require limited IRB review. None of those options, one, two, three, or four require limited IRB review. And Karen actually gave you guys the answer for those who were listening.

Dr. Karen Jeans: Yeah.

Soundia Duche: Can you repeat what you just said a few minutes ago?

Dr. Karen Jeans: So here's the issue with this. And I can understand again why, but there's already been a review done in terms of whether or not the activity met the criteria for a HIPAA waiver of authorization. And so you have that law, the criteria which were evaluated for HIPAA-and therefore, HIPAA protections apply, review has been done. Those protections are adequate in order to not require a duplicative review by the IRB.

Soundia Duche: I mean keep in mind pretty much exactly what would be performed in the limited IRB review if you were looking at protections of privacy and confidentiality is what is done during HIPAA. Making sure during the issuance of the waiver.

All right, last question. The study team would like to send the identifiable data to a co-investigator at Fred Hutchinson Cancer Research Center who will analyze the identifiable data and compare it with a data set obtained from one of their repositories on age-matched cases of Civilians who were not deployed during the similar time frame. Our question is, can the identifiable data be sent to the co-investigator at the Fred Hutchinson Cancer Research Center? And the responses are yes or no. Those are the options and we're going to give you a hint. This is a tricky one.

Dr. Karen Jeans: It's not a Common Rule question.

Soundia Duche: Right.

[Pause 1:24:04-1:24:08].

Erica: I wonder if they can change the responses after they put one in.

Soundia Duche: I think so, but I'm not sure.

[Pause 1:24:18-1:24:21].

Erica: Okay, looks like we're done. I'm going to close it down. Sixty-eight percent say no. Thirty-two percent say yes.

Soundia Duche: Nice. And the correct answer is no. All right. We threw this one in there. Do you want to explain why Karen?

Dr. Karen Jeans: So this is Karen. So in this case, again you're dealing with non-consented data because it's exempt research and you have a waiver of HIPAA authorization that's been approved by the IRB or the privacy board if one was constituted. But because we are a federal agency that is under both the Privacy Rule and the Privacy Act, a waiver of HIPAA authorization alone does not give the agency the legal authority in order for us to be able to disclose outside of the agency individually identifiable information of the subject. So therefore we would need to have another type of authority. Which is why usually when, unless there is another authority that privacy has, which is there's some very few cases in which we can do that, that we have to have a written HIPAA authorization in order to do a disclosure outside of the agency. So this is more of a privacy question more than a human subject protection question regarding the answer to this question.

Soundia Duche: Thank you. All right, so that brings us to the question and answer portion. We realize folks that our cases were hard. Our goal was to teach this training at the advanced level and really get into the nuances and hopefully illustrate how to start thinking about some of these exemption. And so we hope we helped clarify something. Erica, as we mentioned, please we're restricting questions to exempt categories one through four. There will be opportunities at a future date to ask other questions.

Erica: Okay. Let me, oh. All right, I'm trying to get my screen up. Let me go to it another way.

Soundia Duche: And if it's just about reading it off, that's fine given the time.

Erika: Can you see my screen?

Dr. Karen Jeans: No, we can't.

Soundia Duche: Why don't we just read the questions.

Dr. Karen Jeans: Just read them.

Erica: Okay. The first question. Our privacy officer said the revised Common Rule allows investigators to make exempt determinations. Recognizing that VHA does not allow for this, is this correct?

Dr. Karen Jeans: ORD sets the policy. We are, this is Karen. We are very explicit in policy regarding who can make exempt determinations. So therefore, ORD policy, this is human subject protections. And this is ORD policy. It is not privacy policy and we dictate who can and cannot provide exempt determinations. So ORD policy rules. That sounds unusual, but.

Erica: Okay. For a limited IRB review, does the provision to protect privacy and confidentiality need to be reviewed by the privacy officer and the ISSO? Are these the only instances where the PO and the ISSO review is required for exempt determination, or do all requests for exempt determination need to be reviewed by the PO and ISSO?

Dr. Karen Jeans: So this is Karen. The review by an ISO and a PO in regards of their functions is different than the human subject protections of a limited IRB review. And so in 1200.01 we state that an ISO and PO review are required for all research so that is a separate type of review than that which is done as part of the limited IRB review which is required by the IRB in those four specific categories of exempt research.

Erica: Okay. Someone wants to know about slide 11. What about a leap year?

Soundia Duche: That's the continue review requirement being 365 days.

Dr. Karen Jeans: Then, it would be fine. Yeah. It's okay.

Soundia Duche: You know what they're getting at, right?

Dr. Karen Jeans: Yeah. We can revise that before the next leap year happens.

Soundia Duche: Right.

Dr. Karen Jeans: It is a good point though. Thank you. Excellent. I like it. I like that a lot.

Erica: When exempt research undergoes continuing review by the R&D committee, is the level of detail required to be the same as for the non-exempt studies undergoing continuing review by the IRB?

Dr. Karen Jeans: No. This is Karen again. In VHA directive 1200.01 we define continuing review for those activities that require continuing review by the R&D Committee. And so those are in VHA directive 1200.01.

Erica: If an IRB requires an annual check-in process which ensures the research is active, no changes etc. for exempt research, does this constitute a CR by the IRB such as an [unintelligible 1:30:00-1:30:02] is not required to perform a CR? Does the check-in demonstrate the research is still under the offices of the IRB?

Dr. Karen Jeans: So this is Karen again. If the IRB is requiring a check-in then it can only do that for research which is subject to its oversight. Which means it's non-exempt research. So ORD policy does not require any research which is under the oversight of the institutional review board to have continuing review by the R&D Committee. So therefore, that's an important, I'm really glad the question was asked because that's a very important principle that I want to reinforce. If it's under the oversight of IRB, even a check-in, check-in is not a continuing review requirement for those categories of activities that are non-exempt human subjects research unless the IRB determines that continuing review is required. A check-in is not equivalent to a continuing review. They're two different concepts. But regardless, the R&D committee is not required to conduct continuing review if the human subjects research activity is under the oversight of the IRB.

Erica: Okay. Oh, this is just a comment apparently. Slide 11 says CR of exempt research is required no less than every 365 days. 1200.01 says it may not exceed 365 days.

Unidentified speaker: I think we're saying the same thing.

Unidentified speaker: We can marry the two. Thank you very much.

Erica: Are the exemption rules different for projects involving FDA drugs or devices. For example, the project was looking at the efficacy of approved drugs.

Dr. Karen Jeans: So this is Karen. You are exactly, 100% correct. FDA has not yet, FDA has its own regulations, 21 CFR 50, 21 CFR 56 for the institutional review board, informed consent, human subject regulations. They have not yet modified [unintelligible 1:32:20] the rule making to modify the regulations. So indeed, one of the first questions that have to be asked when you're looking at an activity which is proposed to be exempt, is whether or not it is FDA regulated. If it is FDA regulated you can only use the exempt categories, which are identical to the pre-2018 requirements. And that is in 21 CFR 56.

Erica: So exempt research does require continuing review on an annual basis either by a subcommittee or the R&D Committee, but expedited research where the IRB determines continuing review is not required, does not require continuing review by any committee? Is this a correct understanding?

Soundia Duche: Right now.

Dr. Karen Jeans: Yes, it is correct. If the research is subject to the IRB and it qualifies for one of the three categories in which non-exempt human subjects research by default does not undergo continuing review by the IRB unless the IRB determines and documents while continuing review required, then you are exactly correct.

Soundia Duche: You did mention though Karen that this is something you're looking into changing.

Dr. Karen Jeans: Oh, yes. And we do recognize the discrepancy that all exempt research unless it's under the oversight of another subcommittee must undergo continuing review by the R&D committee which is a discrepancy between exempt human research and this other category of research which is under the oversight of the IRB.

Erica: Okay. Is the VA considered a normal educational setting because of our residency program, when the research is about the methods of education of residents?

Soundia Duche: When you say the methods of education, I'm not quite sure what you mean.

Dr. Karen Jeans: It's normal.

Soundia Duche: It's normal.

Dr. Karen Jeans: We're normal medical education.

Soundia Duche: Right.

Dr. Karen Jeans: We are a, that's one of our purviews. We're actually part of, in terms of the educational mission of, for example residents, rotation in VA is a required component of medical education in the United States. So we are indeed a critical component of all medical education. An important one.

[Background conversation 1:34:46-1:34:50].

Erica: Okay, for clarification, the IRB states that an exempt study expires 2022. We are still required to conduct yearly reviews in 2020 and 2021?

Dr. Karen Jeans: I can't hear.

Soundia Duche: It says the IRB states that an exempt study expires in 2022. We are still required to conduct yearly reviews in 2020 and 2021. Are you saying that the R&D committee because right, the IRB is not overseeing exempt research. Even now.

Dr. Karen Jeans: No, no. If again, this is going outside the scope of an IRB, so again, I'm going to be very literal here. In terms of the IRB stating that the exempt study expires, the IRB's scope of authority does not apply to exempt human subjects research. So it doesn't, and the limited IRB review, which is part of three of the, part of some of the categories of exempt research. But I'm a little confused here because the IRB doesn't have an ability to say that something expires for exemption.

Erica: Okay. Category 2(iii). If auditory recording is taking place, IRB can or cannot waive consent? May it alter consent, but cannot waive the general requirement for informed consent as noted at item K.

Soundia Duche. So one thing and I'll start it and let Karen continue. Category two is an exempt category. So we are not in the realm of informed consent when we're talking about exemptions, okay? What I think you are asking though is, for recordings when you're recording subjects, the VA requirement that we see to inform subjects that their recording is going to take place. I think what the question is really asking is, how can that be done? Because we're not in the whole waiving consent, granting informed consent with exemptions. Exemptions are not subject to the informed consent requirements. Now in the VA, if we're recording people, if it's exempt research or not, do we need to inform subjects of their recording and how best to do that.

Dr. Karen Jeans: And that's why we made this mandate in policy is that from the IRB side we put it as part of the informed consent process. As part of exempt research we're also telling people, in policy, you have to tell them what's going on. And so it can be\_

Dr. Molly Klote: Informational, but subject to all the requirements of informed consent.

Dr. Karen Jeans: And that's Dr. Klote by the way.

Dr. Molly Klote: Yeah, sorry. I came in late and I've got to leave early so\_

Erica: Okay. I think this next question has to do with roles. About the PO and the ISO reviewing research.

Unidentified speaker: We're not sure\_

Erica: Any, no comments on that?

Unidentified speaker: We can't see the whole question.

Unidentified speaker: Isn't that why the PO and ISO review research?

Unidentified speaker: They review it in terms of ensuring that, for the PO the privacy regulations pertaining to that research are in place. ISO the same way. They're not equivalent to human subject protections regulations the way an IRB looks at privacy and confidentiality.

Erica: Okay. I noticed you put an or. The word or between the subsections in exempt category two, one and two. The directive and [unintelligible 1:38:45] only has a semicolon between one and two. The semicolon implies that both criteria must be satisfied to not make it exempt. For example, identities recorded and it is sensitive information. If you put an or, this implies that even if the PI doesn't record identifiers but the data is sensitive then it would not qualify for exemption. This doesn't seem correct.

Soundia Duche: I'm looking at that and you're right, I did put an or, [unintelligible 1:39:19]

Dr. Karen Jeans: So this is Karen and here's what's interesting is that, and I absolutely agree with you, the slide says or, but the regulation itself states if at least one of the following criteria is met and the criteria is one, two or three. It's not one, two slash three. And you're asking a very important question because when this went through rule making that is exactly what all the different agencies discussed. So it is separated and this is the way policy language is written. I do want to go back though because it gives me a shot at this, because in one of the cases there was discussion, there was one of the cases it was about whether or not a limited IRB review was required. And it was, the answer was that was put on there was that it was, a limited review was not required. But the issue is whether or not one of the criteria were met. So anyone who said that, it met the criteria, that both you know, it met criteria two. It met criteria three. So in answer to that case, if you put a limited IRB review is required, you were correct. So I wanted to take that shot right now.

Erica: Case study number one failed to address conflict of interest by researchers, management of which could require limited IRB review.

Unidentified speaker: Okay, I've got to see [inaudible 1:40:49].

Unidentified speaker: Case study one should have been our one about the residents I believe. Conflict of interest \_ When you're looking at the exemptions, issues about conflict of interest I believe would be looked at from the institutional perspective in the R&D committee. And so I'm not quite sure how that would play in.

Unidentified speaker: Yeah. The limited IRB reviews are tied to the different categories so this is one where we would probably ask you to follow up with us because conflict of interest in and of itself, it's not a category, but this is one I will ask to defer and would you follow up with us [so we can\_

Unidentified speaker: \_make sure we get you the right answers.

Unidentified speaker: Yeah. We're just not getting the context.

Erica: Okay. I [unintelligible 1:41:50] PO consider identifiable information could be [inaudible 1:41:54] sensitive information. So this is not true.

Unidentified speaker: I don't understand.

Erica: I'm not sure what that's referring to. Okay, note in poll number five. I think you misspoke about answer B. There should be no informed consent in exempt research, correct?

Unidentified speaker: You're exactly correct. Absolutely.

Erica: Did I read the answer off wrong?

Unidentified speaker: Yeah, that'd be great.

Erica: It's my first day. I’m nervous people. Okay, case number two. Recording typically requires consent under a federal and state wiretapping laws. Any comments on that.

Unidentified speaker: Well, that's exactly what we're talking about. That's why we put it into 1200.05 and why indeed, as part of, when you're telling someone that it's research and you're doing a recording, you need to tell them what you're doing and they consent to allow it. If we need to issue guidance to say what level of detail needs to be put in to single it out, we can indeed do that because you cannot record somebody and not tell them about it.

Soundia Duche: Let me add though. And this is important to note. In case two, we specifically said whether the informed consent form includes information about the session being recorded. And we were trying to trick you all into thinking regulatory informed consent is required for exemptions. And that was the nuance we're trying to get at. So we're not saying to not seek permission and inform people, we're specifically talking about the informed consent form, aka what's required under regulatory informed consent. Okay?

Unidentified speaker: So you could automatically take that answer out because that way it was no informed consent is required.

Unidentified speaker: Exactly.

Unidentified speaker: So you can automatically say this is the wrong answer.

Erica: On slide 28, shouldn't the IRB also consider if research results will be returned to the subjects because it could relate to the confidentiality of the data. For example, the IRB should consider that the way the results are returned are in such a way that no one else could get a hold of the results. For example, the staff might want to use an unencrypted email to send research results to subjects.

Dr. Karen Jeans: So this is Karen. This again gets into the issue of the role of the IRB versus the role of the R&D committee because the IRB is looking at a limited IRB review, privacy and confidentiality. Now, it could, it can, it can go beyond that. And the IRB may want to look at it, but in terms of the regulatory requirement, it's not required to do so. We would expect the approval body who is responsible for approving that research to look at this issue of research results. How are they doing it? Is this meaningful? How are they going to do it? What are the logistics of it as part of the R&D committee approval of that research activity. So it is differentiating between the two groups. Does that mean that the IRB couldn't comment on it if it wished to? Of course it can. And one of the questions we got into when we were discussing the limited IRB review as an entire group of Common Rule agencies is it's going to be hard. Let's get really real here about this. As an IRB to say, this is the only things we're going to look at when you have all these different approval criteria and there is some, they're not necessarily mutually exclusive. So the answer is it can, but it's really up to the approval body for the research to look at those aspects.

Soundia Duche: And I think this next question will be our last question.

Erica: Okay. Would talk therapy to alter behavior be considered a behavioral intervention or is that a medical intervention.

Multiple speakers: Talk therapy.

Unidentified speaker: Well again, I don't know the specific type we're talking about here, but if we're talking about talk therapy that we're doing as part of recovery for strokes, that is not a benign behavioral intervention.

Soundia Duche: Okay, we're at two o'clock. We want to thank you for participating and we do apologize that we had to start late today. We try our best to have multiple computers and both of them had issues today. But thank you again. Please take a moment to complete the survey that's going to pop up on your screen when you exit and we'll be letting you know when the second part of this training where we'll be covering exempt categories five through eight will occur. Thank you again everybody and have a wonderful rest of your afternoon.

[ END OF AUDIO]