



Release of Information: Then and Now

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April 27, 2022

Disclaimer

This presentation is for informational purposes and is not intended as legal advice.



Agenda

- Refresher: HIPAA Preemption
- Access to Information
- Disclosure of Information
 - ROI
 - Summons; Subpoena; Court Order
 - Law Enforcement Disclosures
- Breach Notification
- Questions and Answers



Background

- **Access:** Patient's and personal representative's access to medical information, including protected health information ("PHI")
 - 45 CFR 164.524
 - Public Health Law § 18
- **Disclosure:** Provider disclosure of PHI to third parties (law enforcement, agency requests, legal proceedings, subpoena, etc.)
 - 45 CFR 164.512
 - Various NY rules and case law

HIPAA Preemption

- For access and disclosure, must consider **both** HIPAA and New York law.
 - For patient “access”, ask does state law or HIPAA provide the patient greater access rights?
 - *Follow the law that provides greater access*
 - For 3rd party “disclosures”, HIPAA may permit the disclosure, but if NY law prohibits/limits the disclosure, NY law prevails.
 - *Follow the law that is more protective of individual rights*

Access



Qualified Person/Personal Representative

- HIPAA: Patients and **Personal Representatives** have a right to access information
 - An individual's personal representative is someone authorized under State or other applicable law to act on behalf of the individual in making health care related decisions
 - 45 CFR 164.502(g) and 45 CFR 164.524
- New York: For licensed providers and certain facilities, access is determined under Public Health Law § 18
 - PHL § 18 defines "**Qualified Person**"
 - https://www.health.ny.gov/professionals/patients/patient_rights/access_to_patient_information.htm



New York Access Rules

- Public Health Law § 18, “Qualified Person” includes:
 - Patient
 - Article 81 guardian (MHL)
 - Parent/legal guardian of a minor
 - Article 17 guardian of a minor (SCPA)
 - Distributee of deceased patient for whom no personal representative has been appointed
 - An attorney representing a “qualified person”, provided that the attorney has a signed power of attorney authorizing the attorney to request medical records
- Executors and Administrators of Estates (EPTL)
- Health Care Agents*
- Surrogates (FHCDA)*



Access to Minor Records

- PHL § 18: A parent or legal guardian of a minor may access the minor's records when the parent or guardian consented to the care and treatment described in the record, or when the care was provided without consent in an emergency.
 - Provider may deny access if the health care provider determines that access by parent/guardian would have detrimental effect on:
 - Professional relationship with minor patient;
 - Care and treatment of minor; or
 - Minor's relationship with parents/guardian.
 - Minor 12 or older may object to the disclosure

Question:

A 16 year-old patient is treated in the emergency department after a car accident.

May his mother:

1. Have a copy of his treatment records?
2. Authorize release of the records to an attorney representing the 16 year-old in a personal injury case?

HIPAA Proposed Rule



- Timeline:
 - HIPAA Proposed Rule Making issued 1.21.21. Comment period extended until 5.6.21.
 - Final Rule. Late 2021 or early 2022?
- Themes:
 - Improving Patient Access
 - Expand information sharing (care coordination, value-based payment)
- Context:
 - Opioid Epidemic
 - Changes in health care delivery

Right of Access

- Proposed changes to 45 CFR 164.524:
 - Timeliness: 15 calendar days, with additional 15 day extension
 - In person inspection: Right to take notes, videos and photos of PHI using personal resources
 - Reduce verification burden
 - Clarification on costs, results of the *Ciox* decision.
 - Facilitating (electronic) disclosures to 3rd parties at the direction of the Individual

Directed Access – 45 CFR 164.524(c)(3)

- Currently requires a writing, signed by the Individual, clearly identifying the designated person and where to send the copy of PHI
- Three proposals:
 1. Only applies to electronic copies; Covered Entity “encouraged” to provide in electronic format requested
 2. Individual directive may be written or verbal, including through an internet-based method (e.g. portal, App)
 3. Individual may direct a Health Care Provider or Health Plan to obtain PHI in an EHR from a Health Care Provider

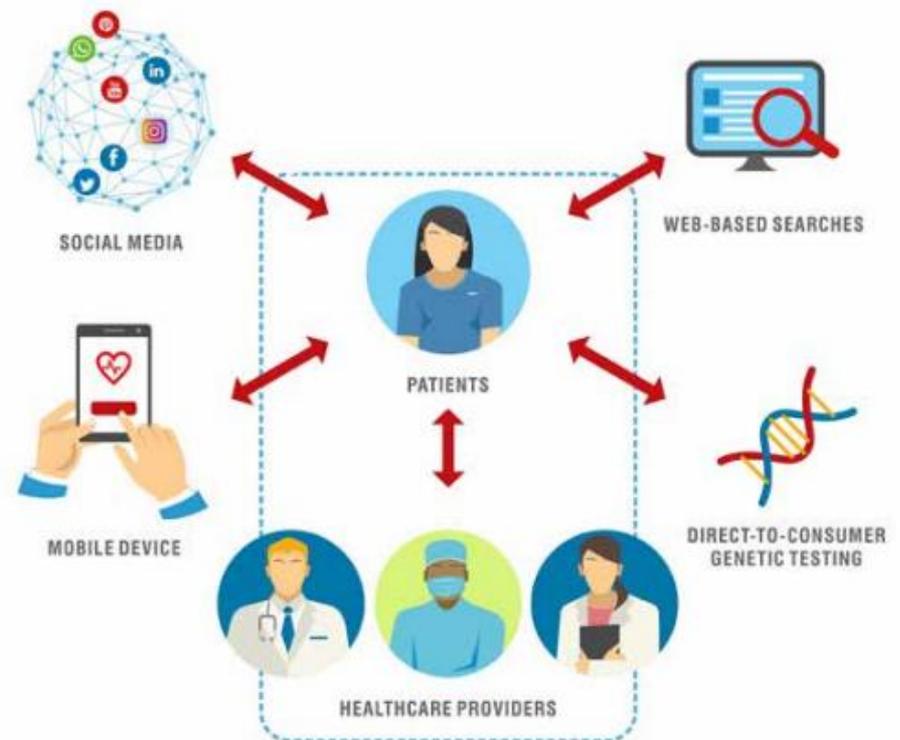


Figure Jia, Justin & Polin, Danielle & Sarin, Kavita. (2019). *Emerging technologies for health information in dermatology: opportunities and drawbacks of web-based searches, social media, mobile applications, and direct-to-consumer genetic testing in patient care. Seminars in Cutaneous Medicine and Surgery*. 38. E57-E63. 10.12788/j.sder.2019.002.

Proposal on Applicable Fees

- Clarification on OCR’s interpretation of the Ciox Decision. 86 Fed. Reg. 6446, at 6465 (Jan. 21, 2021)

Type of access	Recipient of PHI	Allowable fees
In-person inspection—including viewing and self-recording or -copying.	Individual (or personal representative).	Free.
Internet-based method of requesting and obtaining copies of PHI (e.g., using View-Download-Transmit functionality (VDT), or a personal health application connection via a certified-API technology).	Individual	Free.
Receiving a non-electronic copy of PHI in response to an access request.	Individual	Reasonable cost-based fee, limited to labor for making copies, supplies for copying, actual postage & shipping, and costs of preparing a summary or explanation as agreed to by the individual.
Receiving an electronic copy of PHI through a non-internet-based method in response to an access request (e.g., by sending PHI copied onto electronic media through the U.S. Mail or via certified export functionality) ¹²⁹ .	Individual	Reasonable cost-based fee, limited to labor for making copies and costs of preparing a summary or explanation as agreed to by the individual.
Electronic copies of PHI in an EHR received in response to an access request to direct such copies to a third party.	Third party as directed by the individual through the right of access.	Reasonable cost-based fee, limited to labor for making copies and for preparing a summary or explanation agreed to by the individual.

HIPAA Right of Access

November 30, 2021

Five enforcement actions hold healthcare providers accountable for HIPAA Right of Access

Today, the Office for Civil Rights (OCR) at the U.S. Department of Health and Human Services (HHS) announced the resolution of five investigations in its Health Insurance Portability and Accountability Act (HIPAA) Right of Access Initiative, bringing the total number of these enforcement actions to twenty-five since the initiative began. OCR created this initiative to support individuals' right to timely access their health records at a reasonable cost under the HIPAA Privacy Rule.

HIPAA gives people the right to see and get copies of their health information from their healthcare providers and health plans. After receiving a request, an entity that is regulated by HIPAA has, absent an extension, 30 days to provide an individual or their representative with their records in a timely manner.

"Timely access to your health records is a powerful tool in staying healthy, patient privacy and it is your right under law," said OCR Director Lisa J. Pino. "OCR will continue its enforcement actions by holding covered entities responsible for their HIPAA compliance and pursue civil money penalties for violations that are not addressed."

OCR has taken the following enforcement actions that underscore the importance and necessity of compliance with the HIPAA Right of Access:

- [Advanced Spine & Pain Management \(ASPM\)](#), which provides management and treatment of chronic pain services in Cincinnati and Springboro, Ohio, has agreed to take corrective actions that include two years of monitoring, and has paid OCR \$32,150 to settle a potential violation of the HIPAA Privacy Rule's right of access standard.
- [Denver Retina Center](#), a provider of ophthalmological services in Denver, CO, has agreed to take corrective actions that includes one year of monitoring and has paid OCR \$30,000 to settle a potential violation of the HIPAA Privacy Rule's right of access standard.
- [Dr. Robert Glaser](#), a cardiovascular disease and internal medicine doctor in New Hyde Park, NY, did not cooperate with OCR's investigation or respond to OCR's data requests after failing to provide a patient with a copy of their medical record. Dr. Glaser waived his right to a hearing and did not contest the findings of OCR's Notice of Proposed Determination. Accordingly, OCR closed this case by issuing a civil money penalty of \$100,000.
- [Rainrock Treatment Center, LLC dba Monte Nido Rainrock \("Monte Nido"\)](#), a licensed provider of residential eating disorder treatment services in Eugene, OR, has taken corrective actions including one year of monitoring and has paid OCR \$160,000 to settle a potential violation of the HIPAA Privacy Rule's right of access standard.
- [Wake Health Medical Group](#), a provider of primary care and other health care services in Raleigh, NC, has agreed to take corrective actions and has paid OCR \$10,000 to settle a potential violation of the HIPAA Privacy Rule's right of access standard.

Disclosure of Information



Disclosures to Third Parties

- Remember: Must consider HIPAA and NY rules
 - Permissible disclosures under HIPAA for treatment, payment health care operations
 - Pursuant to HIPAA compliant authorization
- In New York, often need permission to disclose even if HIPAA doesn't require it (can be implied, oral or written)



HIPAA Preemption Example

- HIPAA does not preempt NY rules that are more protective of patient privacy
- Grand Jury Subpoena
 - HIPAA permits disclosure of PHI pursuant to a Grand Jury subpoena. 45 CFR 164.512(f)(1)(ii)(B).
 - NY case law holds that the patient's authorization is needed, unless an exception applies. *In re Grand Jury Investigation in New York Cty.*, 98 N.Y.2d 525 (2002).
 - *NY law prevails.*



CURES Act – Information Blocking

- Where a particular access, exchange or use of EHI is prohibited by applicable federal, **state**, or tribal law, restricted access does not constitute Information Blocking and compliance with an exception is not required
 - **Information blocking rules do not preempt NY law**
- Examples:
 - Restriction under 45 CFR 164.522 for expenses paid for out-of-pocket
 - Access to certain records of a minor patient

Information Blocking - 45 CFR 171.103

- Information Blocking is broadly defined as any practice that is likely to interfere with, prevent, or materially discourage access, exchange, or use of EHI, except:

- As required by law;
- Where an exception applies;

AND

- For health care providers, such provider **knows** that such practice is unreasonable and is likely to interfere with access, exchange, or use of EHI.



Intent matters

“[F]ailure to meet an exception does not necessarily mean a practice meets the definition of information blocking. If subject to an investigation, each practice that implicates the information blocking provision and does not meet an exception would be analyzed on a case-by-case basis to evaluate, for example, whether it rises to the level of an interference, and **whether the actor acted with the requisite intent.”**

ONC Final Rule at p. 25,820



Disclosures to Law Enforcement



- HIPAA permits disclosure of PHI under certain circumstances.
- In New York, disclosure of PHI to law enforcement is often not permissible to the same extent as it is under HIPAA

HIPAA: 45 CFR 164.512

HIPAA Permissible Disclosures to Law Enforcement, without an authorization:

- As required by law, including mandatory reporting of certain wounds
- Pursuant to court order, or court ordered warrant, subpoena or summons issued by a judicial officer
- Grand jury subpoena
- Administrative process (i.e. investigative demand), in certain circumstances
- Locating a suspect, fugitive, material witness, missing person
- Crime on the premises
- Reporting crimes in an emergency (off-site)



NY Disclosures to Law Enforcement

- Mandatory reporting. For example:
 - Gunshot, firearm wounds (report to police)
 - Life threatening knife wounds (police)
 - Serious burns (office of fire prevention/control)
 - Child abuse/neglect (CPS)
 - Communicable diseases (local health officer)
 - To DOH (e.g., abuse of NH resident)
 - To Justice Center (abuse in certain facilities)

Summons; Subpoena; Court Order

- Summons: An order to appear before a judge
- Subpoena: An order to attend court (*ad testificandum*) or to produce records in court (*duces tecum*)
- Court Order: A direction issued by a judge
- Subpoena vs. Court Order
 - Who signed? Sometimes a “Judicial Subpoena” is just a subpoena signed by an attorney
 - “So Ordered!”
 - Could be a trial subpoena signed by a judge



What Kind of Court Order?

- HIPAA allows disclosure without patient authorization pursuant to a court order
- New York also allows this, but must also consider information with heightened protections:
 - 42 CFR Part 2
 - HIV-related Information (PHL Art. 27-F)
 - Mental Hygiene Information (MHL 33.13)

Mental Hygiene Law

- MHL 33.13(c)(1): Pursuant to an order of a court of record requiring disclosure upon a finding by the court that the interests of justice significantly outweigh the need for confidentiality...

HIV-Related Information

- PHL 2785: A court may grant an order for disclosure of confidential HIV-related information upon an application showing:
 - A compelling need for disclosure of the information for the adjudication of a criminal or civil proceeding;
 - A clear and imminent danger to an individual whose life or health may unknowingly be at significant risk as a result of contact with the individual to whom the information pertains;
 - Upon application of a state, county or local health officer, a clear and imminent danger to the public health; or
 - That the applicant is lawfully entitled to the disclosure and the disclosure is consistent with the provisions of this article.

42 CFR Part 2

- 42 CFR 2.64(d): An order may be entered only if the court determines that good cause exists. To make this determination the court must find that:
 - Other ways of obtaining the information are not available or would not be effective; and
 - The public interest and need for the disclosure outweigh the potential injury to the patient, the physician-patient relationship, and the treatment services.



Question:

HIM receives a subpoena from Family Court requesting records of a child alleged to have been neglected.

Can facility disclose mother's chemical dependency records?

Subpoena

- HIPAA allows disclosure pursuant to an attorney subpoena without authorization, provided notice is given or qualified protective order is obtained.
- NY CPLR 3122 requires:
 - patient authorization; and
 - certain bold-face language on subpoena.
- *New York Law prevails .*

NY CPLR 3122(a)(2)

A medical provider served with a subpoena duces tecum, **other than a trial subpoena issued by a court**, requesting the production of a patient's medical records pursuant to this rule **need not respond or object to the subpoena if the subpoena is not accompanied by a written authorization by the patient**. Any subpoena served upon a medical provider requesting the medical records of a patient shall state in conspicuous **bold-faced type** that the records shall not be provided unless the subpoena is accompanied by a written authorization by the patient, or the court has issued the subpoena or otherwise directed the production of the documents

**This is an excerpt of the rule.*



Remember

- Must consider whether HIPAA and NY law permit the disclosure.
- There are very few times when you are required to make a report to law enforcement.
- Can you make a report that does not include “health information”?

Breach Notification

- Breach Notification – Standard changed in 2013
 - No longer risk of harm – now, has PHI been “compromised”
- Breach means: the acquisition, access, use, or disclosure of PHI in a manner not permitted by HIPAA which *compromises* the security or privacy of PHI.
 - No Breach if PHI is encrypted
- Breach exceptions: limited exceptions apply to the definition of breach if based on good faith use by workforce members, or other authorized persons at the CE or where the PHI could not have been retained by the unauthorized recipient.



Breach Risk Assessment

- Breach is **presumed**, unless CE can demonstrate a low probability that the **PHI has been compromised** based on a risk assessment.
- Risk assessment – need to consider at least the following 4 factors:
 - Nature and extent of PHI involved;
 - The unauthorized person who used, or had access to, the PHI;
 - Whether the PHI was actually acquired or viewed; and
 - The extent to which the risk to the PHI has been mitigated.
- Risk assessment must be documented.



NY Shield Act; General Business Law 899-aa

- “Any covered entity required to provide notification of a breach, **including breach of information that is not “private information”** ... to the secretary of health and human services pursuant to [HIPAA] shall provide such notification **to the state attorney general** within five business days of notifying the secretary.” GBL 899-aa(10).
 - For a breach that does **not** include Private Information (e.g. SSN, bank account numbers or other financial information), notice is required to the NYS Attorney General.
- For breaches including Private Information, submission goes to 3 agencies (The NYS Attorney General, the NYS Office of Cyber Security & Critical Infrastructure Coordination, and the Consumer Protection Board. GBL 899-aa(2).



Questions



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