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TODAY

September 2016

A PUBLICATION OF THE HEALTH CARE COMPLIANCE ASSOCIATION

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Culturally appropriate compliance in rural Alaska

an interview with Michael Cruz

Director of Quality, Compliance and Privacy

Kenaitze Indian Tribe

Dena'ina Wellness Center

Kenai, Alaska

See page 16

22

A new era of laboratory fraud, Part 1: Operation LabScam redux

Douglas E. Roberts, Marc S. Raspanti, and Pamela C. Brecht

29

Reporting quality data: Getting it right

Lynn Asher

35

Medical records access: Are you following the rules?

Elizabeth A. Kastner and Jessica Hudson Bechtel

43

Creating an ambassador program for continuing compliance training

Maggie Perritt

by Elizabeth A. Kastner, Esq. and Jessica Hudson Bechtel, Esq.

Medical records access: Are you following the rules?

- » A HIPAA authorization is not required when an individual requests access to his/her own records.
- » An individual may direct records to a third party pursuant to a request for access.
- » Fees must be based on an actual, average, or flat cost approach.
- » Fees may only include labor, supplies, and postage costs.
- » HIPAA overrides a state law that authorizes higher fees.

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Many healthcare providers' compliance efforts have recently been focused on responding to Office for Civil Rights (OCR) audits and preventing cyber breaches, but an area that likely has received far less attention is the U.S. Department of Health and Human Services (HHS) OCR guidance on patient access to medical records.

In early 2016, OCR issued guidance for healthcare providers regarding an individual's right to access his/her health information¹ under the Health Insurance Portability and Accountability Act of 1996 and its implementing regulations (HIPAA).² The guidance consisted of a fact sheet and FAQs addressing patients' right to access their medical records (collectively, the Access Guidance). The Access Guidance sets forth requirements healthcare providers must follow when responding to a patient's (or a patient's personal representative's) request for access to his/her medical records. According to OCR, its hope is that the Access Guidance will "engage and empower patients to take control of their healthcare decisions"³ and put patients in the "driver's seat" regarding their health.⁴

Medical records right of access requirement

HIPAA provides patients with the right to access their protected health information (PHI) maintained by a healthcare provider in a designated record set, such as medical records, billing and payment records, and insurance information.⁵ Health plans may also maintain PHI in a designated record set and therefore are required to comply with an individual's access right.⁶ Patients have the right to request, inspect, and/or obtain a copy of their PHI, as well as to direct the healthcare provider to transmit a copy of their PHI to a designed third party or entity of the patients' choice. A patient's right of access is subject to certain exceptions, such as for psychotherapy notes and information compiled in reasonable anticipation of, or for use in, a civil, criminal, or administrative action or proceeding.

When providing a patient with a copy of his/her PHI pursuant to an access request, a healthcare provider may charge an individual:

a reasonable, cost-based fee, provided that the fee includes only the cost of: (i) Labor



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for copying the protected health information requested by the individual, whether in paper or electronic form; (ii) Supplies for creating the paper copy or electronic media if the individual requests that the electronic copy be provided on portable media; [and] (iii) Postage, when the individual has requested the copy, or the summary or explanation, be mailed; (iv) Preparing an explanation or summary of the protected health information, if agreed to by the individual.⁷

Access Guidance

The Access Guidance was issued because, according to OCR, although HIPAA has always provided individuals with a right to access their health information, healthcare providers have not always understood this right and, in OCR's experience, created obstacles for individuals attempting to exercise their rights.⁸ The Access Guidance addresses various aspects of the right to access, including, the mechanics of providing access (e.g., form, format, manner, cost, etc.), an individual's right to direct PHI to another person, and the interplay with state laws.

The Access Guidance clarifies that pursuant to a right to access, an individual can direct the healthcare provider to transmit his/her PHI directly to another person or entity designated by the patient and, importantly, such direction does not require a formal HIPAA authorization. Rather, an individual's right to direct his/her information to a third party is complete so long as it is in writing, signed by the patient, clearly identifies the designated person, and where to send the PHI.

Three aspects within the Access Guidance may be of particular interest to healthcare providers and suggest best practices for compliance.

Right of access versus third-party initiated request

OCR reiterates in the Access Guidance that a request made pursuant to an individual's right to access is different than a request made by a third party on its own behalf. OCR describes the distinction as follows:

...third parties often will directly request PHI from a covered entity and submit a written HIPAA authorization from the individual (or rely on another permission in the Privacy Rule) for that disclosure. Where the third party is initiating a request for PHI on its own behalf, with the individual's HIPAA authorization (or pursuant to another permissible disclosure provision in the Privacy Rule), the access fee limitations do not apply. However, as described above, where the third party is forwarding - on behalf and at the direction of the individual - the individual's access request for a covered entity to direct a copy of the individual's PHI to the third party, the fee limitations apply."⁹

The differences between a patient access request directing records be sent to a third party and a request initiated by a third party on its own behalf might seem immaterial on first blush, but the characterization impacts the manner in which a healthcare provider must process the requests. The characterization is significant because the HIPAA fee limitations and timeliness requirements apply only to requests pursuant to the access right. If the request is not a request for access, then a healthcare provider does not have to follow the Access Guidance (i.e., fee limitations, timeliness requirements, etc.), but is still bound by state laws that may dictate allowable fees for medical record copies.

Determining whether a request is an access request may not always be easy, because an access request may be submitted by a

patient, a patient's personal representative, or by a third party on behalf and at the direction of the individual. Where a healthcare provider has any questions regarding the nature of the request—whether it is an access request or a request from a third party on its own behalf—the Access Guidance suggests that the healthcare provider should check with the patient regarding whether the request was a direction from the individual (i.e., pursuant to the access right).

Being able to properly identify an access request is important, because the Access Guidance discusses that healthcare providers may not circumvent the rules by requiring an authorization where an individual requests access to his/her PHI. The Access Guidance

emphasizes that healthcare providers cannot create impermissible obstacles to a patient's ability to exercise his/her access right.

For example, assume a healthcare provider's policy requires a patient to sign an authorization if the patient wants the healthcare provider to send the patient's medical records to a third party for non-treatment purposes, such as a request to disclose medical records to the patient's attorney in connection with an auto accident lawsuit. This policy could be inconsistent with the right of access to the extent the patient can properly be viewed as initiating the request and directing the medical records to be sent to a third party. In this situation, requiring an authorization (which OCR points out requires more

Table 1: Access Guidance on Patient Rights

HIPAA Authorization	Right of Access
Requires a number of elements and statements, which include a description of who is authorized to make the disclosure and receive the PHI; a specific and meaningful description of the PHI; a description of the purpose of the disclosure; an expiration date or event; signature of the individual authorizing the use or disclosure of her own PHI and the date; information concerning the individual's right to revoke the authorization; and information about the ability or inability to condition treatment, payment, enrollment, or eligibility for benefits on the authorization	Must be in writing, signed by the individual, and clearly identify the designated person and where to send the PHI
No timeliness requirement for disclosing the PHI	Covered entity must act on request no later than 30 days after the request is received
Reasonable safeguards apply (PHI must be sent securely)	Reasonable safeguards apply, including a requirement to send securely; however, individual can request transmission by unsecure medium
No limitations on fees that may be charged to the person requesting the PHI; however, if the disclosure constitutes a sale of PHI, the authorization must disclose the fact of remuneration	Fees limited as provided in 45 CFR 164.524(c)(4)

information than is necessary or that may not be relevant for individuals to exercise their right to access) could be viewed as creating obstacles to the patient's ability to exercise the access right. Table 1, excerpted from the Access Guidance, differentiates between a right of access and a HIPAA authorization.¹⁰

Healthcare providers should review their policies and procedures to ensure that they are not imposing additional requirements upon individuals requesting access to their medical records and have policies in place to distinguish between a request from a third party on its own behalf and an access request directing records to a third party.

Approved ways to charge

Once a request is determined to be an access request, then the healthcare provider must comply and provide the records free of charge or at a "reasonable, cost based fee." The Access Guidance suggests that while limited fees may be charged, healthcare providers should forgo fees for all individuals, especially where the individual cannot afford the fee.

If a healthcare provider decides to charge a "reasonable, cost-based fee," then the Access Guidance identifies three methods that may be used to determine the amount of the fee (1) actual costs; (2) average costs; or (3) flat fee for electronic copies of PHI maintained electronically. Additionally, the Access Guidance makes clear that a healthcare provider may not charge a fee when it fulfills an access request using the view, download, and transmit functionality of the provider's Certified EHR Technology.

A healthcare provider may use actual costs to determine the fee for medical records. Actual costs may include labor, supply, and postage costs. Labor costs are limited to the time spent creating and delivering the electronic or paper copy in the form and format requested, including time spent photocopying

records, scanning records into an electronic format, converting electronic format into another format, or transferring (e.g., uploading, downloading, attaching, burning) electronic records. Labor costs do *not* include costs associated with reviewing the request or searching for, retrieving, segregating, or preparing the records responsive to a request. Though this is consistent with the language of HIPAA, OCR noted that it was clarifying this, because it has observed confusion regarding labor costs among healthcare providers. In calculating the cost of labor, a healthcare provider must, according to the OCR, determine the actual amount of time spent by an employee on the includable tasks and multiply the time by a reasonable hourly rate. Labor costs can be added to postage costs and supply costs, which include the cost of paper, toner, or electronic media necessary to provide the records to the individual in the requested format.

Instead of actual costs, a healthcare provider may calculate the fee based on the average cost for labor to fulfill standard access requests. In setting the average cost, the healthcare provider may only include labor costs (as described above, which only includes costs for copying, scanning, and/or converting electronic formats and not costs for searching or retrieving), supply costs, and postage. This standard rate can be calculated and charged as a per-page fee only in cases where the records are maintained in paper form.

Lastly, healthcare providers may charge a flat fee, not to exceed \$6.50, for all standard requests for electronic copies of PHI maintained electronically. This approach is available for healthcare providers who do not want to go through the process of calculating actual or allowable costs for requests for electronic copies of PHI maintained electronically.

Regardless of the method used to calculate the fee, healthcare providers are required

to provide advance notice to individuals of the approximate fee that it will charge for record requests.

Healthcare providers should review their policies and procedures surrounding charging for medical records to ensure that when they receive an access request they are: (1) using one of the three methods to determine costs associated with access requests; and (2) only charging for the allowable costs. The Access Guidance is flexible to allow healthcare providers to use more than one method to calculate fees. For example, a healthcare provider may use the average cost method to charge for records maintained in paper form and the flat fee approach for records maintained electronically. In addition, if a healthcare provider uses the flat fee approach or the average cost method, but receives an unusual or uncommon type of request that it did not consider in determining its fee structure, it may decide to calculate the fee through the actual cost method.

The Access Guidance provides answers to many questions that healthcare providers may struggle with, but some questions remain. For example, the calculation for both average costs and flat fee costs involves “standard” requests, however “standard” is not defined. Or in setting a flat fee, must the fee be related to actual or average costs, or is any fee under \$6.50 reasonable *per se*?

OCR’s Access Guidance may also signal that additional changes may be in the not-too-distant future. The Access Guidance states that:

[f]urther, while the Privacy Rule permits the limited fee described above, covered entities should provide individuals who request access to their information with copies of their PHI *free of charge*. While covered entities should forgo fees for all individuals, not charging fees for access is particularly vital

in cases where the financial situation of an individual requesting access would make it difficult or impossible for the individual to afford the fee. (emphasis added)¹¹

Based on OCR’s statements that healthcare providers should allow individuals access to their medical records free of charge and, that as technology evolves, labor costs associated with copying and transferring medical records will diminish or disappear completely, it seems reasonable that OCR may eventually no longer allow healthcare providers to charge patients for access requests.

State law

OCR also uses the Access Guidance to clarify how state law and HIPAA interact with respect to fees charged for access requests. Where state law provides individuals a greater right of access to their medical records when compared to HIPAA, then the healthcare provider must also follow state law. This includes state laws that prohibit fees to be charged to individuals for copies of medical records, requires that a free copy of medical records be provided to an individual, or requires fees less than what HIPAA allows to be charged for copies.

On the flip side, HIPAA overrides state laws that authorize higher or different fees from those allowable under HIPAA when a patient requests access to his/her records. Examples of practices that may be permitted under a state law but are prohibited under HIPAA’s right of access include: (1) fees for search and/or retrieval and (2) per-page fees for electronic records. For example, HIPAA’s prohibition on charging a per-page fee for electronic records would override Ohio law authorizing healthcare providers to charge a per-page fee, dependent on the total number of pages requested, for electronic records.¹²

The challenge faced by healthcare providers when setting fees for records requests is that the fees permitted under a state law for medical records copies may not be aligned with fees permitted under HIPAA. For ease of administration, a healthcare provider may consider implementing a uniform fee structure that is consistent with both the fee limitations under the right of access and any applicable state law requirements.

Conclusion

In light of the Access Guidance, healthcare providers should review their policies, procedures, and fee schedules relevant to granting access to

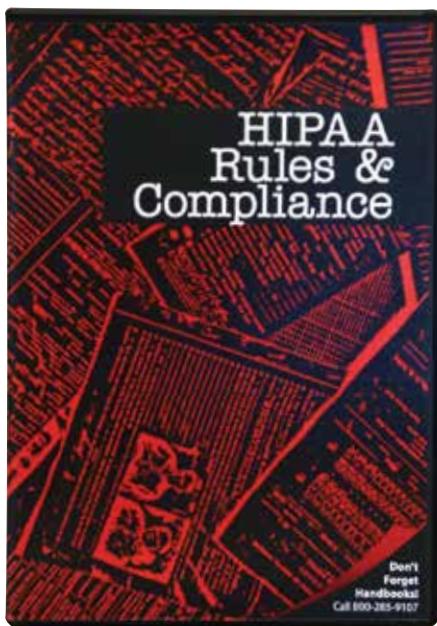
and charging fees for copies of medical records to ensure compliance with the Access Guidance. ☐

This article is of a general nature and is not intended to be, nor should it be construed or relied upon, as legal advice.

1. Department of Health and Human Services: Individual's Right under HIPAA to Access their Health Information. Available at: <http://1.usa.gov/1SzKnMD>.
2. See 42 U.S.C.A. § 1320d et seq.; 45 C.F.R. § 164 et seq.
3. See Jocelyn Samuels, Director, Office for Civil Rights: "New HIPAA guidance reiterates patients' right to access health information and clarifies appropriate fees for copies" HHS Blog, February 25, 2016. Available at <http://bit.ly/2aeUwv3>
4. Ibid, Ref #1.
5. The right of access is specified in 45 C.F.R. § 164.524.
6. Ibid, Ref #5
7. 45 C.F.R. § 164.524(c)(4)
8. Ibid, Ref #3.
9. Ibid, Ref #1.
10. Ibid, Ref #1.
11. Ibid, Ref #1.
12. Ohio Revised Code § 3701.741(B)

www.hcca-info.org/duphipaadvd

The Health Insurance Portability and Accountability Act (HIPAA) has undergone several modifications since its enactment in 1996, from the Genetic Information Nondiscrimination Act (2010) to the HITECH Act. Recently, the Department of Health and Human Services issued the HIPAA Omnibus Rule to revise, enhance, and strengthen HIPAA yet again.



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