

## SPRING 2016 NEWSLETTER

Since the Health Insurance Portability and Accountability Act (HIPAA) was passed in 1996, there have been changes and updates to both the Privacy and Security Rules. Make sure your practice remains up-to-date on the current hot topic of individuals' rights to access their protected health information (PHI) and covered entities' response to requests for PHI.

For background information on HIPAA, please see our three earlier newsletters: [Winter 2013](#), [Spring 2013](#), and [Summer 2013](#).



Margie Satinsky

### HIPAA ACCESS TO PHI – ARE YOU IN COMPLIANCE?

#### Individuals' Rights to Access Their Protected Health Information (PHI)

##### *What's the Point?*

Providing individuals with easy access to their PHI so they can be more in control of decisions regarding their health and wellbeing has always been an important component of HIPAA. Here's the reasoning. When individuals are in the driver's seat with respect to their own information, they can better monitor chronic conditions, comply with treatment plans, discover and correct errors in health records, track progress in wellness or disease management programs, and directly contribute their information to research. With limited exceptions, the HIPAA Privacy Rule provides individuals with a legal and enforceable right to inspect and receive copies of information in their medical and health records upon request to health care providers and health plans.

##### *Designated Record Set*

Let's examine the fine print. Individuals and their personal representatives can ask a covered entity or Business Associate for information contained in what is called a "designated record set." They do not need to provide a reason. Examples of a designated record set are: (1) medical records and billing records maintained by or for a covered entity; (2) enrollment, payment, claims adjudication, and case or medical management record systems maintained by or for a health plan; or (3) other records used in whole or in part by the covered entity to make decisions about individuals. Individuals' requests for designated record sets apply to existing information. They do not obligate the recipient of the request to create new information.

Individuals do not have the right to access PHI that is not part of a designated record set and that is not used to make decisions about them. Examples are quality assessment or improvement records, patient safety activity records, and business planning information.

### ***Limits on Individuals' Access to PHI***

The right of access to information expressly excludes two categories of information: (1) psychotherapy notes kept by the behavioral health provider that document the contents of a counseling session and that are kept separate from the remainder of the patient's record; and (2) information compiled in anticipation of or for use in a civil, criminal, or administrative action or proceeding.

### ***Process by Which Individuals Can Request Access to PHI***

Let's look at the process by which individuals or their personal representatives can request access to PHI in either written or electronic form. The covered entity may require that the request be made in writing, provided that it communicates this requirement. Covered entities may also give individuals other options such as a secure patient portal. It goes without saying that covered entities should make sure to verify identification prior to providing PHI.

### **Covered Entities' Obligations to Respond**

When individuals or their personal representative request access to PHI, covered entities must follow the guidelines set forth in the Privacy Rule as well as the guidance contained in the March 2016 Frequently Asked Questions (FAQs) issued by the Office of Civil Rights. Here are some of the most important ones.

#### ***No Barriers***

First, covered entities may not create barriers to individuals' access to PHI. Examples of barriers are: requiring the individual to pick up the records at the physician's office; requiring use of a patient portal to make the request (not all patients use the Internet); or requiring the individual to mail the request for access.

#### ***Form and Format***

Given the variety of methods of communication, covered entities are expected to provide the requested PHI in the requested "form and format" if it is readily producible. If the covered entity cannot comply with the request, it and the individual making the request are expected to agree upon an alternative method of communication. With respect to electronic communication, the covered entity must have some method for providing information electronically. It is not required to purchase new software every time an individual makes a request for a particular format. If the individual does not accept any of the electronic formats offered by the covered entity, the information may be provided in hard copy.

The covered entity also has the option of providing an individual with a summary of the PHI instead and/or with an explanation of the PHI, provided the individual agrees in advance.

#### ***Denying an Individual's Request for PHI***

Covered entities have the right to deny an individual's request for access to all or a portion of the PHI requested. In some but not all circumstances, the individual has a right to a review of the denial by a licensed healthcare professional designated by the covered entity who did not participate in the denial decision.

Grounds for denying a request that are not reviewable include:

- Request for psychotherapy notes or information compiled in anticipation of or for use in a legal proceeding
- Request for a copy of PHI by an inmate when the covered entity is a correctional institution or healthcare provider acting under the direction of such institution when providing the copy would jeopardize the health, safety, security, custody, or rehabilitation of the inmate or other inmates or the safety of officers, employees, and those responsible for transporting inmates
- Requested PHI is in a designated record set that is part of an incomplete clinical trial
- Requested PHI is considered protected because under control of a federal agency if the denial is consistent with the requirements of the Privacy Act
- Requested PHI was obtained by someone other than a healthcare provider (e.g. family member) under a promise of confidentiality, and providing access would likely reveal the confidentiality of the source of the information

Denials to provide PHI that can be reviewed include:

- Access is reasonably likely to endanger the life or physical safety of the individual making the request or another person
- Access is reasonably likely to cause substantial harm to a person other than a healthcare provider
- Access to a personal representative of the individual requesting the PHI is reasonably likely to cause substantial harm to the individual or to another person

### ***Time Frame***

What about timeliness? The covered entity has 30 days from receipt of a request for PHI to provide the information or to provide a written explanation for denial of the request. Most covered entities have the ability to respond very quickly. However, if meeting this deadline is problematic (e.g. records are stored off site), the covered entity may request a 30-day extension.

### ***Charges for PHI – NEW INFORMATION!***

And what about charges for the provision of paper or electronic PHI? The Privacy Rule allows covered entities to charge a “reasonable cost-based fee.” The [CMS FAQs](#) released in March 2016 provide additional guidance.

Covered entities may charge the individual for creating and delivering the electronic or paper copy in the agreed upon form. But they cannot charge for labor associated with reviewing the PHI in the medical record, searching for and retrieving the PHI, and segregating or otherwise preparing the PHI. Covered entities may also charge for supplies such as paper, toner, or electronic media (e.g. CD or USB drive), but they cannot require an individual to purchase portable media. They can charge for the labor required to prepare a summary or explanation of the PHI, provided the individual has agreed in advance. And finally, they can charge for the cost of postage, provided the individual has requested that the copy, summary, or explanation be mailed.

So much for what covered entities can charge. The FAQs also contain prohibitions on charges that are likely to impact some practices. Covered entities cannot charge patients a fee to access and view PHI. For example, if lab test results are posted on-line, there would be no charge to the patient to view the information. Covered entities cannot pass through to individuals the cost of general or administrative overhead for operating a medical records department. State-established fee schedules for copying medical records no longer serve as safe-harbors for information requested by the patient in electronic format. According to the recent FAQs, covered entities may charge a flat fee of \$6.50 (including labor, supplies, and postage) for standard requests for electronic copies of PHI maintained electronically. If the individual asks that the information be directed to his/her attorney, the covered entity cannot charge a different price for this attorney copy. This prohibition does not apply in litigation cases where the individual authorizes the attorney to subpoena the PHI.

### Need Help with HIPAA Compliance?

For assistance with HIPAA compliance, contact Margie Satinsky, President of Satinsky Consulting, LLC, at [Margie@satinskyconsulting.com](mailto:Margie@satinskyconsulting.com) or 919.383.5998. We have helped more than 100 practices and start-up companies become HIPAA compliant. A full listing is available on our website, [www.satinskyconsulting.com](http://www.satinskyconsulting.com). If you have a need for these or related services, send an email to [Margie@satinskyconsulting.com](mailto:Margie@satinskyconsulting.com), or call us at **919.383.5998**.