



HIPAA: RESPONDING TO LAW ENFORCEMENT REQUESTS

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OVERVIEW

- Rules for disclosures
 - Authorizations
 - Mandatory disclosures
 - Court orders, warrants and subpoenas
 - Disclosures to law enforcement
- Law enforcement access to patients
- Suggestions for applying the rules.

HIPAA: GENERAL RULES

- Covered entity may not use or disclose protected health information unless:
 - Written authorization from patient or personal representative;
 - Use or disclosure for treatment, payment or healthcare operations; or
 - Another HIPAA exception applies.

(45 CFR 164.502).

PROBLEM

- Person demanding info (attorney, prosecutor, officer) may not understand or care about HIPAA.
 - They are not subject to HIPAA.
 - Their job is to get the info they need, not help you comply with HIPAA.
 - They may tell you things that are not accurate.
- But you are still subject to HIPAA...

PRACTICAL APPLICATION: PATIENT CONSENT

- As a practical matter, if you get the patient's or personal rep's request or consent to make the disclosure and document it, you're likely going to be safe.
 - May be technical violation of written requirements.
 - No "willful neglect"= no penalties.
- Make sure you document it.
 - Letter or communication from or to patient.
 - Medical record.
- *Beware situations in which court or police don't want patient alerted.*

HIPAA: GENERAL RULES

- Potentially relevant exceptions
 - Disclosures to avert serious harm.
 - Disclosures required by law.
 - Disclosures in administrative or judicial proceeding.
 - Court order or warrant signed by judge
 - Grand jury subpoena
 - Subpoena if certain conditions satisfied
 - Disclosures to law enforcement.
 - Facility directory
 - Report a crime
 - Locate victim, suspect, fugitive, etc.
 - Others

(45 CFR 164.510 and 164.512)

DISCLOSURES TO AVERT SERIOUS HARM

- May disclose info if provider believes in good faith that the disclosure is:
 - Necessary to prevent or lessen a serious and imminent threat to the health or safety of a person or the public;
 - Made to a person reasonably able to prevent or lessen the threat, including the target of the threat; and
 - Consistent with applicable law and ethical conduct.
- Provider presumed to act in good faith if based on:
 - provider's actual knowledge, or
 - credible representation by someone with apparent knowledge or authority.

(45 CFR 164.512(j)(1)(i), (3))

DISCLOSURES REQUIRED BY LAW

- May disclose PHI to the extent another law requires disclosure.
 - Disclose to appropriate entity.
 - Limit disclosure to scope of the law.

(45 CFR 164.512(a) and 164.512(f)(1)(i))

- This does not apply if the other law simply permits disclosure.
 - E.g., statute allows disclosure of info to Dept. of Transportation re condition that affects driving.

(78 FR 5618)

WYOMING LAWS REQUIRING DISCLOSURE TO LAW ENFORCEMENT

- Child abuse or neglect
 - See 45 CFR 164.512(b)(ii).
- Adult abuse or neglect
 - See 45 CFR 164.512(c).
- Suspicious deaths
- DUI

DISCLOSURES REQUIRED BY LAW

Adult abuse, neglect or domestic violence (45 CFR 164.512(c)):

- Under HIPAA, may disclose info about abuse victim to govt agency:
 - If patient agrees to disclosure;
 - To extent disclosure is required by law; or
 - To extent disclosure is authorized by law, and (i) provider believes disclosure is necessary to avoid serious harm to victim; or (ii) if individual is incapacitated, law enforcement represents that info is not to be used against victim and immediate enforcement activity would be materially impaired by waiting.
- Must promptly inform patient or personal rep of disclosure unless:
 - Provider believes that informing patient would place the individual at risk of serious harm; or
 - If disclosure would be to the personal rep, provider believes the personal rep is responsible and it is not in best interest of patient to disclose the info.

VULNERABLE ADULTS

- Wyo. Stat. §§ 35-20-103:
 - Vulnerable adult: any person 18 years of age or older who is unable to manage and take care of himself or his money, assets or property without assistance as a result of advanced age (60 or older) or physical or mental disability
 - Applies to vulnerable adult who is, “abused, neglected, exploited, intimidated or abandoned or is committing self neglect”
 - Requires immediate verbal or written report if you “know or have reasonable cause to believe . . .”
 - Requires reporting of wide variety of information

CHILD NEGLECT OR ABUSE

- HIPAA does not restrict reporting of child abuse - 45 CFR 164.512(b)(ii)
- Wyo. Stat. 14-3-205:
 - Immediate report required if you “know or have reasonable cause to believe or suspect . . .”
 - Required to notify “person in charge” of hospital, and then the hospital has independent obligation to report
 - No format of data to report, but expect questions regarding the following:
 - The name, age, and address of the child and any person responsible for the child’s care;
 - The nature and extent of the child’s condition;
 - The basis of the reporter’s knowledge;
 - The names and conditions of any other children relevant to the report;
 - Any evidence of previous injuries to the child;
 - Evidence of neglect and abuse; and
 - Any other relevant information.

“CORONER’S CASE”

- HIPAA: If provider thinks that death resulted from a crime, provider may disclose info about decedent to law enforcement for the purpose of alerting law enforcement of the death. (45 CFR 164.512(f)(4))
- Wy. Stat. § 7-4-201: person “found dead” under following circumstances shall be reported to law enforcement:
 - Violent or criminal actions
 - Apparent suicide
 - Accident
 - Apparent drug or chemical overdose or toxicity
 - Apparent child abuse
 - Unknown cause
 - Public health hazard
 - Identity unknown or body unclaimed

“TITLE 25”

- Wyo. Stat. § 25-10-109:
 - Emergency detention or involuntary hospitalization when patient “mentally ill”
 - A danger to themselves or others
 - Evaluated by examiner
 - Written statement of examiner supporting detention provided to patient, guardian, county attorney, gatekeeper

THEFT OF CONTROLLED SUBSTANCES

- Registrants must notify the DEA Field Division Office in their area, in writing, of the theft or significant loss of any controlled substance within one business day of discovery of such loss or theft.
- Complete and submit to the Field Division Office in their area, DEA Form 106, "Report of Theft or Loss of Controlled Substances" regarding the theft or loss.
- Failure to report may result in adverse action against DEA registration.

(DEA Diversion Control Program; 21 CFR 1301.76(b))

WYOMING DUI TESTING (ADULTS)



- Wyo. Stat. § 31-6-102:
 - Drivers are deemed to have given consent for blood or other tests for purpose of determining alcohol concentration or controlled substance in blood.
 - Tests must be incidental to lawful arrest and given ASAP after arrest; and administered at direction of officer with probable cause
 - Officer who “requires” test may direct blood, breath or urine.
 - Person may refuse or withdraw consent except where:
 - Death or serious bodily injury has resulted; or
 - Ordered by search warrant, including remote warrant.



DUI TESTING

- Driver is entitled to full info about police-ordered test.

(WSA 31-6-105)

- Results of tests obtained at arrested person's expense shall be made available to the arresting officer and the arresting person.
 - Disclosure is not violation of doctor-patient relationship.

(WSA 31-6-102, -108)

DISCLOSURES THAT MAY NOT BE REQUIRED BY WYOMING LAW

- Dog bites
- Gunshot or stab wounds
- Traffic accidents
- Off-site criminal behavior
- Pregnant mother's use of drugs
- Sex involving minor
- Others?

HIPAA-APPROVED DISCLOSURES



DISCLOSURES TO APPREHEND PERSON

- May disclose PHI if provider believes in good faith that the disclosure is necessary for law enforcement to identify or apprehend an individual:
 - Because of a statement by an individual admitting participation in a violent crime that the covered entity reasonably believes may have caused serious physical harm to the victim, or
 - It appears that individual has escaped from a correctional institution or from lawful custody.
- Does not apply if info learned through treatment of propensity to commit the act.

(45 CFR 164.512(j)(1)(ii))

FACILITY DIRECTORY

- May disclose limited info as part of a facility directory if:
 - Informed the patient that provider would include info in facility directory and gave the patient the chance to restrict disclosures (e.g., in notice of privacy practices) and patient did not object.
 - LEO asks for the person by name.
- Disclosure limited to:
 - Patient's name.
 - Patient's location in facility.
 - Patient's general condition.

(45 CFR 164.510)

FACILITY DIRECTORY

- If chance to object not provided because of incapacity or emergency treatment, disclosure can occur if
 - Consistent with prior expressed preference of patient, if any, known to provider; and,
 - In the individual's best interest as determined by the provider in exercise of professional judgment
- Must provide opportunity to object when practicable

LAW ENFORCEMENT ORDERS

- May disclose per
 - Court order, warrant, subpoena or summons issued by a judicial officer.
 - i.e., signed by judge or magistrate.
 - Grand jury subpoena.
 - Administrative request, subpoena, summons, investigative demand or other process authorized by law if:
 - Info relevant and material to legitimate law enforcement inquiry;
 - Request is reasonably specific and limited to purpose; and
 - De-identified info could not be used.

(45 CFR 164.512(e), (f)(1)(ii))

REQUEST TO IDENTIFY OR LOCATE PERSON

- Upon request from law enforcement, may disclose limited info to help identify or locate a suspect, fugitive, witness, or missing person.
 - Name and address
 - Date and place of birth
 - SSN
 - Blood type and rh factor
 - Type of injury
 - Date and time of treatment and death
 - Description of distinguishing characteristics (height, weight, race, hair color, facial hair, scars, tatoo, etc.)
- Not info re DNA, dental records, or sample or analysis of body fluids or tissues.

(45 CFR 164.512(f)(2))

- Applies to media alerts or “wanted” posters. (65 FR 85232)
- Probably does not apply to general requests to notify them if they treat (e.g., MVA's) or when patient is released.

VICTIMS OF CRIME

- Upon request from law enforcement, may disclose limited info about patient suspected to be victim of crime (other than abuse) if:
 - Patient agrees to disclosure, or
 - Unable to obtain patient's agreement because of incapacity or emergency and:
 - Law officer represents that info needed to determine violation of law by someone other than the patient and will not be used against the patient;
 - Law officer represents info needed immediately for law enforcement activity; and
 - Provider determines disclosure in best interests of individual.

(45 CFR 164.512(f)(3))

CRIME ON PREMISES

- If provider thinks that crime has occurred on the premises, provider may disclose info that provider believes in good faith constitutes evidence of crime.

(45 CFR 164.512(f)(5))

CRIME OFF PREMISES

- If providing emergency care away from hospital, may disclose info if necessary to alert law enforcement to:
 - Commission and nature of crime (other than abuse);
 - Location of crime or of victims; and/or
 - Identity, description, and location of perpetrator.

(45 CFR 164.512(f)(6))

- Only applies to the extent you are rendering care, i.e., acting as healthcare provider.

CRIME AGAINST WORKFORCE MEMBER

- Provider not deemed to have violated HIPAA if a member of its workforce who is a victim of a crime discloses info to law enforcement if:
 - Info disclosed is about suspected perpetrator of crime, and
 - Info disclosed is limited to:
 - Name and address
 - Birthdate
 - SSN
 - Blood type
 - Type of injury
 - Date and time of treatment
 - Distinguishing physical characteristics

(45 CFR 164.502(j)(2))

PERSONS IN CUSTODY

- May disclose info about inmate or other person in custody to law enforcement or correctional facility if official represents that info necessary for:
 - Provision of health care to person;
 - Health and safety of individual or other inmates;
 - Health and safety of officers or employees at correctional facility or transporting; or
 - Safety, security, and good order of correctional institution.
- Does not apply after the person is no longer a prisoner.

(45 CFR 164.512(k)(5))

LAW ENFORCEMENT ACCESS TO PATIENTS



POLICE ACCESS TO PATIENTS

- Private entities may generally require a warrant.
 - Cooperate with terms of warrant.
- Police may be able to access public areas without a warrant.
 - Consult with your attorney if this is problematic.
- Explain to police that, like other members of public, police are not given unrestricted access to patient care areas.
- Police are usually willing to cooperate.

POLICE ACCESS TO PATIENTS

- If police want access to patient or facility:
 - Determine if access is appropriate considering:
 - Patient care concerns.
 - Provider operations.
 - Patient wishes.
 - Ask the patient if they consent to police access.
 - If patient agrees, provide access as appropriate.
 - If patient declines, explain to police.
 - Explain objections to police and work on solution.

POLICE ACCESS TO PATIENTS

- If police insist on access despite objections.
 - Do not obstruct police action.
 - Do not lie or misrepresent facts to police.
 - Document objection, including parties involved and circumstances.
 - Complain to police officer's supervisor.
 - Work with police to develop protocol to avoid future problems.

ICE POLICY ON SENSITIVE LOCATIONS

- “Sensitive locations” include “medical treatment and health care facilities, such as hospitals, doctors’ offices, accredited health clinics, and emergent or urgent care facilities.”
- Enforcement actions at sensitive locations should generally be avoided; such actions may only take place when (a) prior facility approval or (b) exigent circumstances necessitating immediate action
- Does not apply to obtaining records, documents, and similar materials.

PREPARE IN ADVANCE

- Include disclosures re: court order, subpoena and law enforcement in Notice of Privacy Practices.
- Establish policy or process for responding.
 - Identify person responsible for contacting or responding to orders and law enforcement
 - Ensure privacy officer understands applicable rules.
 - Instruct personnel to notify responsible person ASAP.
- Work out process with law enforcement in advance.
- Train personnel concerning the process.
 - Limits on disclosures.
 - Process for disclosures.

VERIFY AUTHORITY OF REQUESTOR

- Before disclosing protected info, covered entity must:
 - Verify identity and authority of person requesting info if he/she is not known.
 - E.g., check the badge or papers of officers.
 - Obtain any documents, representations, or statements required to make disclosure.
 - E.g., representations from police that they need info for immediate identification purposes, or written satisfactory assurances accompanying a subpoena.
- Does not apply to disclosures for purposes of facility directory where patient has not objected to disclosures.
- May rely on representations of officer if reliance is reasonable.

(45 CFR 164.514(h))

MAY REQUIRE WARRANT

- In most cases, you are not required to respond to a law enforcement request absent a warrant, subpoena or court order.
 - Constitution generally prohibits warrantless searches or seizures.
 - HIPAA exceptions generally allow, but do not require, disclosure.
- Be careful.
 - Usually want to cooperate with law enforcement.
 - State laws may require certain disclosures.
 - Do not physically interfere, lie to, or affirmatively hinder law enforcement if they proceed over your objection.

INFORMAL REQUESTS FOR INFO

- Generally need not respond to informal law enforcement request for info
- Ask for basis or authority for request
- Must have HIPAA exception to disclose info, e.g.,
 - Is disclosure to avert harm?
 - Is there a law that requires report to law enforcement?
 - Do we fit within one of the exceptions for disclosure to law enforcement?

OBJECT TO IMPROPER REQUESTS

- Explain HIPAA requirements
- Ask to speak with officer's supervisor
- Contact your own attorney
- Document your objections and police actions
 - Names and badge numbers
- Never physically interfere with law enforcement if they insist on acting despite your objection

MINIMUM NECESSARY STANDARD

- Even if HIPAA exception allows disclosure, you generally may not disclose more than is minimally necessary to accomplish intent

(45 CFR 164.504)

- Limit disclosures to:
 - Extent disclosure required by law
 - Scope of warrant, order or subpoena
 - As necessary to accomplish purpose of disclosure

LOG THE DISCLOSURE

- Providers must log most disclosures to law enforcement so that they may respond to patient's request for accounting of disclosures.
- Log must record:
 - Date of disclosure.
 - Name and address of entity receiving info.
 - Description of info disclosed.
 - Either a statement of purpose of disclosure or copy of the written request for disclosure (e.g., the order, subpoena, etc.).

(45 CFR 164.528)

ACCOUNTING OF DISCLOSURE

- Law enforcement may suspend person's right to obtain accounting
 - If written directive, the statement should:
 - Confirm accounting would be reasonably likely to impede agency's activities, and
 - State time for suspension
 - If oral direction:
 - Provider must document direction, identity of agency or official
 - Suspension limited to 30 days unless written statement obtained

(45 CFR 164.528)

RESOURCES

- *OCR, HIPAA Privacy Rule: Guide for Law Enforcement*
- *H&H Client Alert, Disclosures to Law Enforcement*
- *H&H Client Alert, Responding to Subpoenas, Orders, and Administrative Demands*
- *AMA Guidelines for Releasing Patient Info to Law Enforcement, available on the internet*

QUESTIONS?



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