Rocky Roads:
Patient Right of Access/Compliant and Patient-Centered ROI

HIPAA COW Fall Conference
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Tour Guides

- Panelists:
  - Amy Derlink, CIOX Health
  - Dawn Paulson, UW Health
  - Peg Schmidt, Aurora Health Care

- Moderator:
  - Meghan O’Connor, von Briesen & Roper, s.c.

Road Map

- Background: Individual Right of Access and OCR Guidance
- Right of Access vs. Authorization
- Identifying and Handling a Patient Directed vs. Third-Party Request
- Fees
- Next Steps and Best Practice
Background: Individual Right of Access and OCR Guidance

Individual Right of Access
45 CFR § 164.524

- **Right of Access** – Individual has right of access to inspect and obtain a copy of PHI about the individual in a designated record set
  - Exceptions: Psychotherapy notes and information compiled in anticipation of civil, criminal, or administrative action
- **Timely Action Required** – Must act no later than 30 days (outer limit) after receipt of request
  - Actions: accept, deny, or extend (max 30 days)
- **Form of Access** – Provide access in form and format requested by individual (if readily producible), or in readable hard copy/electronic format or other form/format agreed to by CE and individual

Individual Right of Access Cont’d...
45 CFR § 164.524

- **Written Request** – CE may require individuals to make request in writing, provided CE informs individual of requirement
  - CE may require individual to use entity’s form, provided use of the form does not create a barrier to or unreasonably delay individual from obtaining access to PHI
- **Verification** – CE required to take reasonable steps to verify identity of an individual making request
  - Type and manner up to discretion of CE, but cannot create barriers to or unreasonably delay access (e.g., phone, fax/email CE’s form, web portal, etc.)
  - Type of verification may depend on how individual is requesting and/or receiving access
Manner of Access – If individual directs CE to transmit copy of PHI directly to another person designated by the individual, CE must provide the copy to the designated person
  ◦ Request must be in writing, signed by individual, and clearly identify designated person and where to send the copy
  ◦ In its FAQ, HHS clearly articulates a difference between an authorization and a patient directed request (right of access) in not only the amount that can be charged but the scope of information to be provided

Personal Representative – May exercise right of access if consistent with the scope of representation
  ◦ Attorney of an individual may or may not be a personal representative depending on the attorney’s authority to act on behalf of the individual in decisions related to health care

Fees – CE may impose reasonable, cost-based fee, including:
  ◦ Labor for copying/scanning (in paper or electronic form), converting electronic info into format requested/agreed to by individual, transferring (e.g., uploading, downloading, burning, etc.) PHI from CE’s system to another media/delivery method
  ◦ Supplies (electronic media) and postage
  ◦ Preparing explanation/summary, if agreed to by individual
  ◦ Does not include labor associated with reviewing request, retrieving, or otherwise preparing responsive information or ROI outsourcing
  ◦ More in FAQs, including how to calculate (actual, average, or flat fee)

Documentation – CE must document and retain:
  ◦ Designated record sets subject to access by individuals
  ◦ Titles of persons or offices responsible for receiving and processing requests for access by individuals

Topic 1:
Right of Access vs. Authorization

SLOW
HHS has made clear that the written request from the individual for PHI to be sent to a designated person or party is treated differently than a third party request and authorization. See Omnibus Final Rule, 78 FR 5566, 5635 (January 25, 2013) (“This written request for protected health information to be sent to a designated person is distinct from an authorization form, which contains many additional required statements and elements (see § 164.508(c)).”). The patient has the right to direct the covered entity to transmit the PHI about the individual directly to another person or entity designated by the individual.

### Right of Access vs. Authorization

<table>
<thead>
<tr>
<th>Right of Access (Patient Directed)</th>
<th>HIPAA Authorization</th>
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<tbody>
<tr>
<td>Requires CE to disclose PHI (unless exception applies)</td>
<td>Permits, but does not require, CE to disclose PHI</td>
</tr>
<tr>
<td>In writing, signed by individual, clearly identify designated person and where to send PHI</td>
<td>Required elements and statements (e.g., who authorized to make disclosure and receive PHI, purpose of disclosure, expiration date/event, signature of individual and date, right to revoke, ability/inability to condition treatment, payment, enrollment or eligibility for benefits)</td>
</tr>
<tr>
<td>30 days outer limit</td>
<td>No timeliness requirement</td>
</tr>
<tr>
<td>Fees limited per 45 CFR § 164.524(c)(4)</td>
<td>No limitations on fees (but disclose remuneration if disclosure constitutes sale of PHI)</td>
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</tbody>
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### Topic 2:
**Patient Directed Request vs. Third–Party Request**
Identifying the Type of Request

- **Patient Directed Request**: A directive from the individual, written in the individual’s voice, to request PHI be directed to the individual or to a third party
  - e.g., letter typed or handwritten by individual and signed by individual; can be on attorney letterhead or patient letterhead
- **Third-Party Request**: A third-party initiated request for PHI on its own behalf with the individual’s HIPAA authorization form
  - e.g., attorney request letter signed by lawyer/paralegal and accompanied by individual’s valid authorization

How do you Process and Respond?

- What information does the individual have to provide?
- Did you provide notice of CE’s required form and fees?
- What verification is required/allowed?
- Do you have a template response letter?
Fees

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CRAVE FOOLE & SCHMIDT

Gren Bay Hospital
123 Green Bay Way
Green Bay, WI 54301

Re: Patient Brad Pitt

Dear Records Custodian:

I represent Brad Pitt in his divorce proceedings, and I serve as his personal representative. Please provide me with a full and complete copy of Brad Pitt’s full medical records, including all mental and behavioral health records and alcohol and drug abuse records. It is specifically requested that you provide the record in electronic format via a CD or on a DVD.

According to 164.534(c)(2), you may charge a fee of $50.00 for producing the requested electronic format. Please provide the record in electronic format within 30 days as required by 45 CFR 164.534(c)(2).

Sincerely,
Danny Crane

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Topic 3:
Fees
OCR Guidance on Fees

- February 25, 2016 OCR guidance sets forth a restrictive regime for calculating fees. If CE will charge, CE must charge:
  - Actual costs,
  - Average costs,
  - For records stored electronically and delivered electronically, a flat fee of no more than $6.50.
- The guidance limits expenses that may be included in the “cost of labor” to only labor of producing the copy. Specifically, labor can only include creating and delivering the electronic/paper copy, not labor time spent retrieving, collecting, compiling, and/or collating record for a request when records are ready to be copied or burned.
- Per page fees permitted for records maintained and delivered in paper, but not permitted for records maintained electronically.

Fees vs. State–Mandated Rates

- OCR: Labor (e.g., for search and retrieval and compliance for reviewing the request for access) or other costs not permitted by Privacy Rule may not be charged to individuals even if authorized by State law.
- OCR: CE’s fee for providing an individual with a copy of PHI must be both reasonable and cost-based, and there may be circumstances where a State authorized fee is not reasonable, even if State authorized fee covers only permitted labor, supply, and postage costs (e.g., State–authorized fee may be higher than CE’s cost to provide the copy of PHI).
- Watch out for maximum charges in state law.

Hybrid Charges

- Hybrid to Electronic Charge:
  - $6.50 flat rate for the electronic portion
  - Per page for labor cost to create and deliver the portion maintained in paper.
- Hybrid to Paper Charge:
  - Per page for labor cost to create and deliver the portion maintained in paper.
  - The lower of cost under the state regulated patient rates or your average labor cost to create and deliver the portion of the record maintained electronically.
  - Per page for supplies of paper and toner for reproduction.
**Hybrid Charges Cont’d…**

- **EMR to Paper Charge:**
  - The lower of cost under the state regulated patient rates or your average labor cost to create and deliver the portion of the record maintained electronically
  - Per page for supplies of paper and toner for reproduction

- **EMR to EMR Charge:**
  - Flat fee of $6.50

- **Paper to Electronic Charge:**
  - Per page for labor cost to create and deliver the portion maintained in paper

- **Paper to Paper Charge:**
  - Per page for labor cost to create and deliver the portion maintained in paper
  - Per page for supplies of paper and toner for reproduction

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**Fees:**

**Patient Directed vs. Third–Party Request**

OCR FAQ: When do limits on fees apply to disclosures to a third party?

- **Patient Directed:** Fee limits apply when individual directs a CE to send PHI to third party regardless of whether individual has requested copy of PHI be sent to herself, or has directed that CE send the copy directly to a third party designated by individual (and it doesn’t matter who the third party is).
- **Patient Directed:** Where a third party is forwarding (on behalf of and at the direction of the individual) the individual’s access request, fee limitations apply.
- **Third–Party:** Where a third party is initiating a request for PHI on its own behalf, with the individual’s HIPAA authorization (or pursuant to another permissible Privacy Rule disclosure), the access fee limitations do not apply.
- **Unclear:** Where it is unclear, based on form of request sent by third party, whether the request is an access request initiated by individual or merely a HIPAA authorization by individual to disclose PHI to third party, CE may clarify with individual whether the request was a direction from individual or a request from third party.

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**Topic 4:**

Next Steps and Best Practice
Next Steps and Best Practice

- Complaints
  - What is OCR asking for in complaint investigations?
  - Attorney complaints to CE
  - Confirm ROI vendor handled correctly (e.g., method of delivery, fees, was it a patient directed request)
  - Is it a patient right of access violation?

- Process
  - How have your practices changed?
  - Working with your ROI vendor
  - Next steps

Thank you. Resources

- OCR Guidance: [http://www.hhs.gov/hipaa/for-professionals/privacy/guidance/access/](http://www.hhs.gov/hipaa/for-professionals/privacy/guidance/access/)
- New OCR FAQ on access guidance: [http://www.hhs.gov/hipaa/for-professionals/privacy/guidance/access/#newlyreleasedfaqs](http://www.hhs.gov/hipaa/for-professionals/privacy/guidance/access/#newlyreleasedfaqs)
- OCR Blog Post on January 2016 guidance: [http://www.hhs.gov/blog/2016/01/07/understanding-individuals-right-under-hipaa-access-their.html](http://www.hhs.gov/blog/2016/01/07/understanding-individuals-right-under-hipaa-access-their.html)