

OCR Clarifies Policy on Medical Record Request Fees

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By Adam H. Greene, JD, MPH

In 2009, CONGRESS passed the Health Information Technology for Economic and Clinical Health (HITECH) Act, which granted *individuals* a right to have a copy of their records sent to a third party, according to 42 U.S.C. § 17935(e) of the regulation.

Unfortunately, many attorneys misunderstand this change, asserting that it now gives them the right to request records on behalf of patients and receive them at HIPAA's rate for patient requests. When healthcare providers and their release of information (ROI) service providers charge these attorneys the rate for medical records set forth under state law, the result is often litigation or complaints to the US Department of Health and Human Services' (HHS') Office for Civil Rights (OCR).

This leaves healthcare entities with a tough choice—charging the amount that they are entitled to charge under the law and risk facing the costs of litigation or an OCR investigation, or indulge the requesting attorney's misinterpretation of the law and charge the lower rate.

In response to this confusion, OCR provided a clarification in a March 2015 investigation, which OCR subsequently released in response to a Freedom of Information Act (FOIA) request. OCR's clarification states that HIPAA's right of access, which includes the fee limitations at issue, does not apply to requests by law firms and other third parties.

Difference Between Individuals, Personal Representatives, and Attorneys

Ever since the HIPAA Privacy Rule was finalized it has provided an individual the right to receive a copy of their medical record.¹ The term "individual" is defined in the HIPAA regulations 45 C.F.R. § 160.103 (2014)) as "the person who is the subject of protected health information." HIPAA (45 C.F.R. § 164.502(g) (2014))) also extends an individual's rights to the individual's personal representative, which generally is a person who has authority under applicable law to make decisions related to healthcare on the individual's behalf.

While an attorney may act on behalf of an individual, HIPAA only treats an attorney as a "personal representative" if the attorney is authorized under applicable law to make healthcare decisions on behalf of the individual. Otherwise, HHS clarified that a disclosure to an attorney requires a HIPAA-compliant authorization.²

In practice, few attorneys have the right to make healthcare decisions on a client's behalf. While you may trust your attorney to bring litigation on your behalf, this seldom means you want your attorney deciding what to do if you are incapacitated in a hospital. Accordingly, while an attorney may represent a patient, the attorney likely is not the patient's "personal representative" under HIPAA.

A Convenient Misunderstanding of HIPAA

When an individual or personal representative requests a copy of the individual's medical record, HIPAA provides that a covered entity (or its business associate) may only charge "a reasonable, cost-based fee" (45 C.F.R. § 164.524(c)(4)). What has caused confusion is a statutory and regulatory change that allows the individual or personal representatives to require the covered entity to send the copy to a third party.

The HITECH Act provides that, with respect to an electronic health record (EHR), "the individual shall have a right... to direct the covered entity to transmit such copy directly to an entity or person designated by the individual, provided that any such choice is clear, conspicuous, and specific..." (42 U.S.C. § 17935(e)).

HHS indicated that it previously interpreted the HIPAA Privacy Rule's right of access consistent with the statute, meaning that an individual could require the covered entity to mail the copy to a third party "provided the request was clearly made by the individual and not a third party." HHS revised the regulations to reflect this prior interpretation and the statutory provision under 45 C.F.R. § 164.524(c)(3)(ii) (2014) of the regulation.

There is no question that the statutory and regulatory changes permit an individual to require that the covered entity send a copy of the individual's medical record to a third party, such as the individual's attorney. But plaintiffs' attorneys went further, alleging that because they represent a patient and have a patient's signed authorization their request should be treated the same as the patient's request for purposes of HIPAA's right of access. As a result, attorneys began demanding that requested medical records be provided at the rate set by Section 164.524 of HIPAA.

OCR's March 2015 Clarification

After many covered entities and ROI business associates found their time being consumed by this misunderstanding of HIPAA, some clarification was finally obtained. OCR Region III provided a detailed response to a plaintiff's attorney in March 2015. A redacted version of the OCR response based on a FOIA request can be found at <http://tinyurl.com/ROI-charges>.

In its response, OCR explained that:

The rights under the individual access provisions at 45 C.F.R. § 164.524(a)(1) apply only to individuals (or their personal representatives under 45 C.F.R. § 164.502(g)) who request access to their medical records. In a majority of the above-referenced cases, the requests for copies of medical records are made by the individual's attorney, accompanied by a valid authorization for release of medical information signed by the individual/patient. Since there was no request made directly by the individual and the attorney does not constitute a personal representative for purposes of 45 C.F.R. § 164.502(g), the requirements under 45 C.F.R. § 164.524(a)(1) do not apply here.

Fortunately, OCR's response could not be much clearer: requests by attorneys are not entitled to the HIPAA rate. OCR has recently issued new guidance on an individual's right of access, stating that "[w]here 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."³

OCR Region III's clarification and OCR's new FAQ guidance should help to reverse the uptick in litigation and OCR complaints that the industry has seen on this issue and free up OCR to focus on bigger matters.

Notes

¹ US Department of Health and Human Services. "Standards for Privacy of Individually Identifiable Health Information (Privacy Rule) 45 C.F.R. § 164.524." *Federal Register* 65, no. 250 (August 14, 2002): 82,462, 82,823. www.federalregister.gov/articles/2002/08/14/02-20554/standards-for-privacy-of-individually-identifiable-health-information.

² Ibid.

³ US Department of Health and Human Services. "Individuals' Right under HIPAA to Access their Health Information 45 CFR § 164.524." www.hhs.gov/hipaa/for-professionals/privacy/guidance/access/index.html.

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