

# Obtaining Satisfactory Assurance for PHI Disclosure

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*by Carol Ann Quinsey, RHIA*

Obtaining “satisfactory assurance” in the privacy rule may sound like something new, but the concept has been around for a long time. Do you know what it means and how it affects your HIM department? This article will explain what obtaining satisfactory assurance means and how it can be implemented in your organization’s HIM department.

## Keeping Patients Informed

Those who have acted as records custodians in HIM departments have long had to comply with subpoenas and other discovery processes. If subpoenas do not come with clear authority of a court of the proper jurisdiction, some HIM department staff are required to contact patients or legal representatives to be sure they understand that their protected health information (PHI) has been requested as part of a legal process.

When contacting patients, there is an opportunity to inform them of their rights with regard to the subpoena. This process ensures that the patient has had an opportunity to raise an objection to the release of their PHI. Patients are generally very appreciative of this type of outreach from HIM staff. While they may choose not to object to the subpoena or other lawful process, they still view the covered entity as taking steps to protect their health information.

The HIPAA final rule refers to this same concept in Section 164.512 (e) (1) (ii). The final rule states that a covered entity may respond to a subpoena, discovery request, or other lawful process requesting the disclosure of PHI that is not accompanied by a court order if the covered entity has received satisfactory assurance that the party seeking the information has made reasonable efforts to notify the subject (patient) of the request.

## Obtaining Assurance

A covered entity can receive satisfactory assurance in three ways. If a subpoena is accompanied by a court order by a court of the proper jurisdiction, the covered entity is deemed to have received satisfactory assurance. Absent a court order, these are the steps a covered entity can take to determine if it has received satisfactory assurance:

- The party requesting the PHI may send a written statement to the covered entity with accompanying documentation demonstrating that it has made a good faith effort to contact the subject of the requested PHI. (A good faith effort is described in the rule as contacting the individual at his or her current or last known address.)
- The notice to the individual must have contained sufficient information about the legal proceedings to permit the individual to raise an objection to the release of his or her medical information.
- Enough time must have elapsed from the delivery of the notice to the individual for any objections to be raised. Or, if the individual filed objections to the release of his or her PHI, such objections must have been resolved by the appropriate court or administrative tribunal.
- The disclosures being sought in the subpoena, discovery request, or other lawful process are consistent with such resolution by the appropriate court or administrative tribunal.

The third option that may be used to provide “satisfactory assurance” to the covered entity is to obtain a qualified protective order. In the rule, a “qualified protective order” means that the parties are prohibited from using or disclosing the PHI for any purpose other than the litigation or proceeding for which it was requested. It also requires the return of the PHI to the covered entity or the destruction of the PHI (including all copies made) at the end of the litigation or proceeding.

A qualified protective order may be used to provide satisfactory assurance to the covered entity if:

- both parties of the dispute have agreed to a qualified protective order that has been presented to the court with jurisdiction over the dispute
- the party seeking the PHI has requested a qualified protective order from such a court

## Review State Laws

Individual state laws must be reviewed to determine if there are details about how notice to the individual must be delivered or the length of time an individual has to raise an objection to the proceeding. Some states may have rules about the content of notices delivered to patients.

Covered entities should be aware of these laws when determining whether satisfactory assurance has been obtained. All these details must be incorporated into the policies and procedures for the HIM department staff charged with the disclosure of the PHI.

## Proceed with Disclosure

A covered entity is deemed to have received satisfactory assurance if the requirements for one of the three options above have been met. Once satisfactory assurance has been documented, the covered entity may proceed with disclosure of the requested PHI in accordance with its standard procedures.

If the covered entity has not received documented satisfactory assurance, disclosure pursuant to the subpoena should not be made. A decision not to disclose should be made in conjunction with legal counsel. Covered entities should develop form letters to inform all parties involved of a decision not to release PHI.

## Reference

“Standards for Privacy of Individually Identifiable Health Information; Final Rule.” 45 CFR Part 164.512 (August 14, 2002). Available at <http://aspe.hhs.gov/admnsimp/>.

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