# On the Line (October 2004)

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*by Beth Hjort, RHIA, CHP*

**Q:** We are concerned about listing reported abuse cases on the accounting of disclosures (AoD) due to potential retaliation against an alleged victim or one who accompanies a victim for treatment. Is it acceptable to exclude abuse cases from the AoD?

**A:** Abuse cases pose special HIPAA challenges in regard to the AoD and protection of victims or other at-risk individuals. Generally, state authorities investigate abuse cases immediately. The alleged abuser would know of the allegation soon after treatment and submission of a report.

If a nonabuser brings a child in for treatment and fears identity exposure, protection could be thwarted if a parent abuser legitimately requests record copies under section 164.524. When a covered entity's (CE) designated record set and medical record are devoid of this information, the likelihood of exposure is more remote. CEs can consider documentation practices affording the greatest amount of protection. For example, procedures could entail retention of report copies and submission records separate from the medical record if state laws do not direct otherwise.

A CE should also take into account state laws allowing anonymous abuse reporting and any more stringent state laws that would pre-empt the privacy rule.

Several sections of the privacy rule address abuse cases but do not address the AoD:

- 164.512(b)(1)(ii) permits a CE to disclose personal health information (PHI) to a "public health authority or other appropriate government authority authorized by law to receive reports of child abuse or neglect."
- 164.512(c)(2)(ii) states a "covered entity that makes a disclosure permitted by paragraph (c)(1) of this section [interpreted to pertain to adult victims of abuse, neglect, or domestic violence] must promptly inform the individual that such a report has been made or will be made, except if: The covered entity would be informing a personal representative and the covered entity reasonably believes the personal representative is responsible for the abuse, neglect, or other injury, and that informing such person would not be in the best interests of the individual as determined by the covered entity, in the exercise of professional judgment." Can it be inferred that the same protections can be honored if a similar threat would be created by listing abuse reporting on the AoD? If yes, this is helpful to the patient, but it doesn't protect a nonabuser who accompanies the patient for treatment and wishes not to be identified.
- 164.524(a)(2)(v) states, "An individual's access may be denied if the [PHI] was obtained from someone other than a healthcare provider under a promise of confidentiality and the access requested would be reasonably likely to reveal the source of the information." The question is whether it can be inferred that this section can be applied to the AoD when a whistleblower needs protection from a parent or personal representative. If a provider chooses to honor this inference to withhold other PHI access, can an AoD listing also be omitted? If the medical record identifies who accompanied the patient, can the CE opt not to give it to a patient representative, parent, or guardian? This might not be an issue if the organization doesn't record abuse information in the medical record as noted earlier.
- 164.524(a)(3)(i), (ii), and (iii) may offer additional protection. PHI access can be denied the individual if access could endanger that person's life or the life of another individual (i). PHI access can be denied if it makes reference to another person and substantial harm to the other person is reasonably likely (ii). PHI access can be denied if the request is made by the personal representative and release is likely to cause substantial harm to the individual or another person (iii).
- 164.528 addresses AoD suspensions externally requested by a health oversight agency or law enforcement official. It does not extend to CEs wishing to exercise protective actions toward an alleged victim or allow flexibility in policy setting for withholding the AoD.
- 164.502(g)(1) establishes that a personal representative must be treated as the individual for purposes including PHI access unless certain conditions apply. 164.502(g)(5) is one exception and references a CE's right not to treat a person

as a personal representative when there's reasonable belief the individual may be endangered or subjected to violence, abuse, or neglect by that person or when it is not in the best interest of the individual to treat this individual as the personal representative. Withholding of AoD reports may be arguable under this section.

AHIMA contacted the Office for Civil Rights (OCR) for interpretation. While the response was nonspecific, insightful understanding can be derived. The official acknowledged "a good question" and in the absence of a definite answer, offered the standard response: approaches should be decided by individual CEs. The recommendation is for policies and procedures to be developed in conjunction with a facility's attorney. Since a CE's legal counsel would be expected to frame and defend a case if a CE is involved in a complaint investigation, the attorney should be involved in establishing the organization's approach. For example, for the above-referenced sections of the rule where inference is questioned as extending to the AoD, what does the attorney feel is a reasonable interpretation for this organization based on what he or she has seen in practice? The official stated it is important that attorneys document the rationale for the policy decision. During an investigation, OCR will look at any reasoned argument and respect good faith effort toward compliance through a reasonable approach.

Without solid direction, CEs are left to question their authority to choose to act in favor of a patient or one who accompanies the patient. AHIMA has directed a letter to OCR requesting a clarifying rule modification.

## Reference

"Standards for Privacy of Individually Identifiable Health Information; Final Rule." 45 CFR Parts 160 and 164. Federal Register 67, no. 157 (2002). Available at http://aspe.hhs.gov/admnsimp.

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