

## **DISCLOSURE OF PROTECTED HEALTH INFORMATION TO THE GOVERNMENT**

By Denise Chrysler  
Assistant Attorney General  
Community Health and Public Administration Division

### **I. General Rule:**

A covered entity may not use or disclose protected health information (“PHI”) except as permitted or required by HIPAA privacy regulations. 164.502(a). Described below are uses and disclosures of PHI to governmental agencies that are permitted by HIPAA privacy regulations, and conditions for and limitations on such disclosures.

Note: The Office of Civil Rights discusses disclosures to government in its responses to FAQs (dated 10-02-02) posted on its website.

### **II. Definitions related to disclosures of PHI to government.**

- a. Disclosure – The release, transfer, provision of, access to, or divulging in any other manner of information outside the entity holding the information. 164.501
- b. Health Oversight Agency – An agency or authority of federal, state, local or tribal government, including government’s agents and contractors, that is authorized by law to oversee the health care system (whether public or private) or government programs in which health information is necessary to determine eligibility or compliance, or to enforce civil rights laws for which health information is relevant. 164.501.
  - i. For examples of Health Oversight Agencies and descriptions of various health oversight functions, see 65 FR 82492.
- c. State Law – A constitution, statute, regulation, rule, common law, or other State action having the force and effect of law. 160.202.
- d. Law Enforcement Official – An officer or employee of any agency or authority of federal, state, local or tribal government, who is empowered by law to:
  - i. Investigate or conduct an official inquiry into a potential violation of law; or
  - ii. Prosecute or otherwise conduct a criminal, civil, or administrative proceeding arising from an alleged violation of law. 164.501.
- e. Public Health Authority – An agency or authority of federal, state, local or tribal government that is responsible for public health matters as part of its official mandate, including agents or contractors acting under a grant of authority from the Public Health Authority 164.501.
- f. Required by Law – A mandate contained in law that compels an entity to make a use or disclosure of PHI and that is enforceable in a court of law. 164.501. Examples include (but are not limited to):
  - i. Court orders and court-ordered warrants.
  - ii. Subpoenas or summons issued by a court, grand jury, a governmental or tribal inspector general, or an administrative body authorized to require the production of information.
  - iii. A civil or an authorized investigative demand.
  - iv. Medicare conditions of participation with respect to health care providers participating in the program.
  - v. Statutes or regulations that require the production of information, including statutes or regulations that require such information if payment is sought under a government program providing public benefits.

- g. Use – With respect to individually identifiable health information, the sharing, employment, application, utilization, examination, or analysis of such information within an entity that maintains such information. 164.501.

### **III. Federal preemption**

- a. General Rule: A HIPAA privacy standard, requirement, or implementation specification that is contrary to a provision of State law preempts the provision of state law. 160.203.
- b. Exceptions to general rule:
  - i. The Secretary grants a State an exception for a state law. 160.203(a), 160.204.
  - ii. State law provides greater privacy protection to the individual.
  - iii. State law provides for the reporting of disease or injury, child abuse, birth, or death, or for the conduct of public health.
  - iv. State law requires a health plan to report, or to provide access to, information for the purpose of management, audits, financial audits, program monitoring and evaluation, or the licensure or certification of facilities or individuals.

### **IV. Permitted uses / disclosures to government that do not require an authorization or an opportunity for the individual to agree or object 164.512.**

- a. Uses and disclosures required by law. 164.512(a).
  - i. Covered entity may use or disclose PHI to the extent that:
    - 1. Such use and disclosure is required by law,
    - 2. The use or disclosure complies with, and is limited to the relevant requirements of such law.
  - ii. For uses/disclosures required by law, covered entity must comply with requirements described in 164.512(c) [disclosures about victims of abuse, neglect or domestic violence], 164.512(e) [disclosures for judicial and administrative proceedings], or 164.512(f) [disclosures for law enforcement].
- b. Uses and disclosures for public health activities. 164.512(b). Covered entity may disclose PHI to:
  - 1. A public health authority that is authorized by law to collect or receive such information for the purpose of preventing or controlling disease, injury, or disability, including, but not limited to, the reporting of disease, injury, vital events such as birth or death, and the conduct of public health surveillance, public health investigations, and public health interventions; or at the direction of a public health authority, to an official of a foreign government agency that is acting in collaboration with a public health authority.
  - 2. A public health authority or other appropriate government authority authorized by law to receive reports of child abuse or neglect.
- c. Disclosures about adult victims of abuse, neglect or domestic violence. 164.512(c). A covered entity may disclose PHI about an individual whom the covered entity reasonably believes to be a victim of abuse, neglect, or domestic violence. Disclosure can be to any governmental authority authorized by law to receive such reports. Disclosure is allowed only for the following circumstances:
  - i. The disclosure is required by law, complies with law, and is limited to the relevant requirements of such law, or
  - ii. The individual agrees to the disclosure, or
  - iii. The disclosures is expressly authorized by statute or regulation and either (1) the covered entity, in the exercise of professional judgment, believes the disclosure is necessary to prevent serious harm to the individual or other potential victims, (2) if the individual is unable to agree because of incapacity, a law enforcement or other public official

authorized to receive the report represents that the PHI is not intended to be used against the individual, and that an immediate enforcement activity that depends on the disclosure would be materially and adversely affected by waiting until the individual is able to agree to the disclosure.

1. The covered entity must inform the individual (may be oral) of the disclosure unless (a) informing the individual would place the individual at risk of serious harm, or (b) the covered entity would be informing the personal representative, there is reason to believe that the personal representative is the perpetrator, and informing the person representative would not be in the individual's best interest.
- d. Uses and disclosures for health oversight activities. 164.512(d). A covered entity may disclose PHI to a health oversight agency for oversight activities authorized by law.
  - i. Oversight activities include:
    1. Audits.
    2. Civil, administrative, or criminal investigations.
    3. Inspections.
    4. Licensure or disciplinary actions.
    5. Civil, administrative, or criminal proceedings or actions.
    6. Other activities necessary for appropriate oversight of:
      - a. The health care system;
      - b. Government benefit programs for which health information is relevant to beneficiary eligibility;
      - c. Entities subject to government regulatory programs for which health information is necessary for determining compliance with program standards; or
      - d. Entities subject to civil rights laws for which health information is necessary for determining compliance.
  - ii. Exception to health oversight activities. A health oversight activity does not include an investigation or other activity in which the individual is the subject of the investigation or activity and such investigation or other activity does not arise out of and is not directly related to:
    1. The receipt of health care;
    2. A claim for public benefits related to health; or
    3. Qualification for, or receipt of, public benefits or services when a patient's health is integral to the claim for public benefits or services.
  - iii. "Health oversight" vs. "law enforcement". For discussion of overlap and distinction between "health oversight" (individual is not subject of investigation) and "law enforcement" (individual is subject of investigation), see 65 FR 82528-82529. See also, Executive Order 13181 of December 20, 2000, which limits law enforcement's use of PHI concerning an individual that is discovered during the course of health oversight activities for unrelated civil, administrative, or criminal investigations of a non-health oversight matter, except when the balance of relevant factors weighs clearly in favor of use.
- e. Disclosures for judicial and administrative proceedings. 164.512(e). Addresses when a covered entity is permitted to disclose PHI in response to requests made in the course of judicial and administrative proceedings.
- f. Disclosures for Law Enforcement Purposes. 164.512(f). A covered entity may disclose protected health information for a law enforcement purpose to a law enforcement official as follows:
  - i. If the following conditions are met, as applicable:

1. As required by law including laws that require the reporting of certain types of wounds or other physical injuries. (Disclosures regarding injuries from abuse of children or adults must be handled in accordance with specific sections, described above).
  2. In compliance with and as limited by the relevant requirements of court orders, warrants, subpoenas, administrative requests, etc.
- ii. Limited information may be disclosed in response to a law enforcement official's request for such information for the purpose of identifying or locating a suspect, fugitive, material witness, or missing person.
  - iii. Information may be disclosed in response to a law enforcement official's request for information about an individual who is or is suspected to be a victim of a crime if the individual agrees to the disclosure or in certain circumstances when the individual is not able to agree. (Disclosures regarding victims of abuse or neglect must be handled in accordance with specific sections, described above).
  - iv. PHI may be disclosed to a law enforcement official about an individual who has died for the purpose of alerting law enforcement of the death of the individual if the covered entity has a suspicion that such death may have resulted from criminal conduct.
  - v. PHI may be disclosed to a law enforcement official that the covered entity believes in good faith constitutes evidence of criminal conduct that occurred on the premises of the covered entity.
  - vi. PHI may be disclosed to a law enforcement official by a covered entity providing emergency care to an individual if such disclosure appears necessary to alert law enforcement to the commission, nature, location, or victims of a crime or the identity, description, or location, of the perpetrator of such crime. (Disclosures regarding victims of domestic violence must be handled in accordance with specific section, described above).
- g. Disclosures to coroners and medical examiners. 164.512(g).
    - i. A covered entity may disclose PHI to a coroner or medical examiner for the purpose of identifying a deceased person, determining a cause of death, or other duties authorized by law.
  - h. Uses and disclosures to avert a serious threat to health or safety. 164.512(j).
    - i. A covered entity may, consistent with applicable law and standards of ethical conduct, use or disclose protected health information, if the entity in good faith, believes the use or disclosure is necessary to prevent or lessen a serious and imminent threat to the health or safety of a person or the public, provided certain conditions and limitations are met.
  - i. Uses and disclosures for specialized government functions. 164.512(k).
    - i. Disclosures allowed for certain military and veterans activities.
    - ii. Disclosures to federal officials under National Security Act.
    - iii. Disclosures to federal officials to protect the President and others.
    - iv. Disclosures to the Department of State for medical suitability determinations.
    - v. Disclosures to correctional institutions and other law enforcement custodial situations.

**V. Permitted Uses / Disclosures for treatment, payment or health care operations (“TPO”).**  
164.506(a).

- a. Uses / Disclosures for TPO do not require an authorization or an opportunity for the individual to agree or object.
- b. Under implementation standards: A covered entity may disclose PHI to another covered entity (which may include governmental entities that are covered entities) for health care operations activities of the entity that receives the information, if each entity either has or had a relationship

with the individual who is the subject of the PHI being requested, the PHI pertains to such relationship, and the disclosure is for the purpose of health care fraud and abuse detection and or compliance. 164.50(c).

**VI. Permitted Uses / Disclosures that require an opportunity for the individual to agree or object.**

- a. Uses and disclosures for disaster relief. 164.510(b)(4).

**VII. Permitted Uses / Disclosures that require authorization.**

- a. Psychotherapy notes – A covered entity must obtain an authorization for any use or disclosure of psychotherapy notes. 164.508(a)(2).
  - i. Exception: An authorization is not required for use or disclosure when required by HHS to determine compliance in accordance with 164.502(a)(2)(ii); when mandated by law in accordance with 164.512(a); when needed for oversight of the health care provider who created the psychotherapy notes in accordance with 164.512(d); when needed by a coroner or medical examiner in accordance with 164.512(g)(1); or when needed to avert a serious threat to public health or safety in accordance with 164.512(j)(1)(i).

**VIII. Conditions of Disclosure.**

- a. Minimum necessary. General Rule: When using or disclosing PHI or when requesting PHI from another covered entity, a covered entity must make reasonable efforts to limit PHI to the minimum necessary to accomplish the intended purpose of the use, disclosure, or request. 164.502(b)(1).
  - i. Minimum necessary does not apply to uses or disclosures that are required by law, as described by section 164.512(a). 164.502(b)(2)(v).
  - ii. Implementation: A covered entity must implement policies and procedures for routine disclosures and criteria to determine the minimum necessary for disclosures that are not routine. 164.514(d)(3).
    - 1. A covered entity may rely, if such reliance is reasonable under the circumstances, on a requested disclosure as the minimum necessary for the stated purpose(s) when making disclosures to public officials that are permitted under 164.512, if the public official represents that the information requested is the minimum necessary for the stated purpose(s). 164.514(d)(3)(iii)(A).
- b. Verification requirements. Prior to disclosure, a covered entity must verify the identity of a person requesting PHI and the authority of such person to have access to protected health information, if not known to the covered entity. 164.514(h).
  - i. Implementation standards are described in 164.514(h) to determine if conditions for disclosure are met, and to verify the identity and the authority of public officials.
- c. Business Associate Agreements. Health oversight agencies, public health authorities, and law enforcement are not “business associates” of covered entities. Government is not performing services for or on behalf of covered entities. See discussion at 65 FR 82476.

**IX. Rights to request privacy protection for PHI.**

164.522.

- a. An individual has the right to request that a covered entity restrict certain uses and disclosures. However, a restriction agreed to by a covered entity is not effective to prevent use or disclosures permitted or required under 164.502(a)(2)(ii), 164.510(a), or 164.512.

**X. Accounting of Disclosures.**

164.528.

- a. An individual has a right to receive an accounting of disclosures of PHI made by a covered entity in the six years prior to the date on which the accounting is requested. The individual is entitled to accounting of disclosures to health oversight agencies, public health authorities, and law enforcement (see 67 FR 53245-53246) except disclosures:
  - i. For national security or intelligence purposes as provided in 164.512(k)(2).
  - ii. To correctional institutions or law enforcement officials as provided in 164.512(k)(5).
- b. Suspension of right: 164.528(a)(2). The covered entity must temporarily suspend an individual's right to receive an accounting of disclosures to a health oversight agency or law enforcement official, as provided in 164.512(d) or (f), respectively,
  - i. For the time specified by such agency or official, if such agency or official provides the covered entity with a written statement that such an accounting to the individual would be reasonably likely to impede the agency's activities and specifying the time for which such a suspension is required;
  - ii. If the agency or official statement is made orally, the covered entity must
    - 1. Document the statement, including the identity of the agency or official making the statement;
    - 2. Temporarily suspend the individual's right to an accounting of disclosures subject to the statement; and
    - 3. Limit the temporary suspension to no longer than 30 days from the date of the oral statement, unless a written statement is submitted during that time.

Disclaimer: The analysis in this outline is that of the author and is not intended to represent the official position of the Attorney General.