

MYTHS & MISCONCEPTIONS: HIPAA'S PRIVACY RULE AND PATIENT ACCESS

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Q. A patient has requested a copy of his record. When I explained to him that I did not think it would be in his best interest to access his medical record, his response was “I have the right to access my record under HIPAA’s Privacy Rule.” I am a covered provider under HIPAA, but I believe I am entitled to follow state law which allows me to deny patient access if the release would be detrimental to the patient.

A. HIPAA’s Privacy Rule grants patients the right to inspect and obtain a copy of their record. Disclosure of protected health information to patients is one of the two mandatory disclosures (the other mandatory disclosure is to the Department of Health and Human Services for enforcement of the Privacy Rule) under the Privacy Rule. *This mandatory patient access will preempt any state law that is contrary.*

Preemption of State Law: The federal Privacy Rule will preempt (or take precedence over) any contrary state law, unless the state law is “more stringent”. In terms of patient access, more stringent is defined to include granting greater rights of access to the patient. So, the Privacy Rule’s standards are to be followed, unless a state law grants patients greater rights of access.

Denying Access: Under the Privacy Rule, there are some exceptions to the patient’s right of access to the record for both reviewable and non-reviewable grounds. However, some states may not provide for any exceptions to patient access. In those states without exceptions to patient access, patients would have greater rights under state law and state law would have to be followed. The non-reviewable grounds for denial of patient access under the Privacy Rule include:

- Psychotherapy notes – defined by the Privacy Rule as notes that are kept separate from the rest of the record and are of no value to anyone else (see page 143 for more information),
- Certain protected health information of inmates,
- Protected health information in certain research activities, and
- Other grounds as listed in the Privacy Rule §164.524(a).

The reviewable grounds for denying patient access under the Privacy Rule are:

- A licensed health care professional has determined that access is likely to endanger the life or physical safety of the patient or another person,
- Protected health information makes reference to another person (who is not a healthcare provider) and a licensed healthcare provider has determined that the access requested is likely to cause substantial harm to such other person, or
- Request for access is made by the patient’s personal representative and a licensed healthcare provider has determined access is likely to cause substantial harm to the patient or another person.

From a risk management perspective, the reviewable grounds standards for denying patient access to the record are extremely high. There may be cases where the provider has strong concerns about patient access, and such concerns may approach the standards for denial, but physical harm may not be likely to result from accessing the record. Because the Privacy Rule is new and has not been interpreted by the courts, providers are advised to contact their risk manager or personal attorney when they believe patients would be harmed by access, but the high standard for denial is not met. See also “Clinical Aspects of Patient Access” below.

If Access is Denied: The patient's notification of denial must be accompanied by information on how to have the denial reviewed (if denied for reviewable grounds) and how to complain to the covered provider and HHS. It is important to keep in mind that to the extent possible, access must be given to the remaining protected health information, after excluding the denied information. Also keep in mind that the patient can authorize the release of the entire record to a third party, such as an attorney.

Review of the Denial of Access: The patient can appeal a decision to deny access only if the denial was based on a reviewable ground. If requested by the patient, the review must be performed by a licensed healthcare professional who did not participate in the original decision to deny access. The covered provider must provide written notice to the patient of the reviewer's decision.

Clinical Aspects of Patient Access: When a provider believes that it is not in the patient's best interest to access the record, but the concern does not meet the standard for denial, there are several risk management steps that can be considered. Specifically, the provider can discuss with the patient the clinical basis for recommending against allowing access. The provider can also consider offering to review the chart with the patient instead of releasing it. If the patient insists in accessing the information, the provider can suggest that a summary of the record be provided instead of the entire record. Of course, as discussed below, if the patient does not agree to a summary, or if after seeing the summary the patient still wants the entire record, a copy of the record would probably have to be released. In the event the entire record must be released, providers may want to consider reviewing the chart with the patient before releasing the copy of the record to the patient.

Summary Form: The Privacy Rule allows covered providers to provide information to the patient in the form of a summary as long as the patient is given advance notice and agrees to a summary rather than a copy of the entire record. If the patient does not agree to a summary, a copy of the record would probably have to be released.

Fees for Patient Copies: The Privacy Rule allows covered providers to charge a reasonable fee for copying records as long as patients have been notified in advance. The Privacy Rule prohibits covered providers from charging patients a retrieval fee; only actual copying charges are allowed. There is no per page fee in the Privacy Rule, but state laws often include the maximum fee that can be charged.

Time Frames: Under the Privacy Rule, covered providers must act on requests for access within 30 days (60 days for off-site information and this time period can be extended). However, many states have a much shorter (more stringent) period of time for the provider to provide patients with their records; the more stringent law, giving patients greater rights of access, would have to be followed.

Information Covered: Information created prior to the effective date of the Privacy Rule is included in the patient's right of access.