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Guidance – Privacy Implications in Washington for COVID-19

Draft Date: March 24, 2020

1. Disclosures of PHI Without a Patient Authorization Guidance.

Recent HHS guidance reminds providers that “the Privacy Rule recognizes the legitimate need for public health authorities and others responsible for ensuring public health and safety to have access to protected health information that is necessary to carry out their public health mission.” Accordingly, the Privacy Rule permits covered entities to disclose necessary protected health information (PHI) without individual authorization in certain specific circumstances.

Specific to the Coronavirus/COVID-19 health crisis, health care providers and covered entities may disclose PHI without an authorization to: (1) public health authorities for purposes of controlling the spread of the virus or to protect the public; (2) to family members, caregivers, or friends of a patient, or to law enforcement, if necessary to prevent a serious imminent threat posed by the patient to self or others; or (3) to other health care providers (if necessary for treatment or coordination of treatment). Washington law is consistent with federal law on this point.

Additional details regarding the extent of permissible disclosures is described below, as well as additional exceptions that might be useful during this crisis.

Related COVID-19 Guidance from HHS:

- <https://www.hhs.gov/hipaa/for-professionals/special-topics/emergency-preparedness/index.html>
- <https://www.hhs.gov/sites/default/files/february-2020-hipaa-and-novel-coronavirus.pdf>
- <https://www.hhs.gov/sites/default/files/hipaa-and-covid-19-limited-hipaa-waiver-bulletin-508.pdf>

Analysis and Summary: Under both HIPAA and Washington’s Uniform Health Care Information Act (UHCIA), health care providers may disclose PHI (or “health care information” under the UHCIA) to public health authorities if necessary, to protect the public health.

2. Disclosure related to Public Health Activities.

HIPAA: HIPAA permits covered entities to disclose necessary protected health information without individual authorization:

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- To a public health authority, such as the CDC or a state or local health department, that is authorized by law to collect or receive such information for the purpose of preventing or controlling disease, injury or disability.
- At the direction of a public health authority, to a foreign government agency that is acting in collaboration with the public health authority.
- To persons at risk of contracting or spreading a disease or condition if other law, such as state law, authorizes the covered entity to notify such persons as necessary to prevent or control the spread of the disease or otherwise to carry out public health interventions or investigations.¹

As always, even under these limited exceptions, the regulations govern the specific circumstances when they may apply, and proper procedures must be followed for any such disclosures.

More information on disclosures for public health and to first responders available here: <https://www.hhs.gov/sites/default/files/covid-19-hipaa-and-first-responders-508.pdf>.

Washington’s Uniform Health Care Information Act (UHCIA): Washington’s UHCIA has a similar provision for disclosure to federal, state or local health authorities to protect public health:

(2) A health care provider **shall disclose health care information**², except for information and records related to sexually transmitted diseases, unless otherwise authorized in RCW 70.02.220, about a patient without the patient's authorization if the disclosure is:

(a) To federal, state, or local public health authorities, to the extent the health care provider is required by law to report health care information; when needed to determine compliance with state or federal licensure, certification or registration rules or laws, or to investigate unprofessional conduct or ability to practice with reasonable skill and safety under chapter 18.130 RCW. Any health care information obtained under this subsection is exempt from public inspection and copying pursuant to chapter 42.56 RCW; or

(b) **When needed to protect the public health.**³

¹ 45 CFR 164.512

² Emphasis added

³ RCW 70.02.050 (excerpted in relevant part, emphasis added).

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3. Disclosures to Prevent a Serious and Imminent Threat to the Patient or Public.

HIPAA: “Health care providers may share patient information with anyone as necessary to prevent or lessen a serious and imminent threat to the health and safety of a person or the public – consistent with applicable law (such as **state statutes**, regulations, or **case law**) and the provider’s standards of ethical conduct.” See 45 CFR 164.512(j). Thus, providers may disclose a patient’s health information to anyone who is in a position to prevent or lessen the serious and imminent threat, including family, friends, caregivers, and law enforcement without a patient’s permission. HIPAA expressly defers to the professional judgment of health professionals in making determinations about the nature and severity of the threat to health and safety. See 45 CFR 164.512(j).”⁴

UHCIA: Washington’s UHCIA contains similar provisions for sharing of health care information to lessen a serious/imminent threat to the patient or public:

(1) A health care provider or health care facility **may disclose health care information** ... about a patient without the patient's authorization to the extent a recipient needs to know the information, if the disclosure is:

c) To any person if the health care provider or health care facility believes, in good faith, that 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**, and the information is disclosed only to a person or persons reasonably able to prevent or lessen the threat, including the target of the threat. There is no obligation under this chapter on the part of the provider or facility to so disclose;...⁵

4. Disclosure for Treatment.

“Under the Privacy Rule, covered entities may disclose, without a patient’s authorization, protected health information about the patient as necessary to treat the patient or to treat a different patient. Treatment includes the coordination or management of health care and related services by one or more health care providers and others, consultation between providers, and the referral of patients for treatment.” See 45 CFR §§ 164.502(a)(1)(ii), 164.506(c), and the definition of “treatment” at 164.501.”⁶ Washington law is consistent with this. See RCW 70.02.050(1)(a).

⁴ <https://www.hhs.gov/sites/default/files/february-2020-hipaa-and-novel-coronavirus.pdf>

⁵ RCW 70.02.050 (excerpted in relevant part).

⁶ <https://www.hhs.gov/sites/default/files/february-2020-hipaa-and-novel-coronavirus.pdf>.

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5. Disclosure of Patient Information to Friends or Family Members Involved in the Patient's Care Guidance.

Limited disclosure of patient information to family members/friends involved with the patient's care is permitted under HIPAA and Washington state law even if the patient does not, or cannot, provide authorization for same. The limited nature of the permitted disclosure is described below:

HIPAA: "A covered entity may share protected health information with a patient's family members, relatives, friends, or other persons identified by the patient as involved in the patient's care. A covered entity also may share information about a patient as necessary to identify, locate, and notify family members, guardians, or anyone else responsible for the patient's care, of the patient's location, general condition, or death. This may include, where necessary to notify family members and others, the police, the press, or the public at large." See 45 CFR 164.510(b).

- The covered entity should get verbal permission from individuals or otherwise be able to reasonably infer that the patient does not object, when possible; if the individual is incapacitated or not available, covered entities may share information for these purposes if, in their professional judgment, doing so is in the patient's best interest.
- For patients who are unconscious or incapacitated: A health care provider may share relevant information about the patient with family, friends, or others involved in the patient's care or payment for care, if the health care provider determines, based on professional judgment, that doing so is in the best interests of the patient. For example, a provider may determine that it is in the best interests of an elderly patient to share relevant information with the patient's adult child, but generally could not share unrelated information about the patient's medical history without permission.
- In addition, a covered entity may share protected health information with disaster relief organizations that, like the American Red Cross, are authorized by law or by their charters to assist in disaster relief efforts, for the purpose of coordinating the notification of family members or other persons involved in the patient's care, of the patient's location, general condition, or death. It is unnecessary to obtain a patient's permission to share the information in this situation if doing so would interfere with the organization's ability to respond to the emergency."⁷

UHCIA: Washington's UHCIA provides for similar disclosures to family members involved in the patient's care:

⁷ <https://www.hhs.gov/sites/default/files/february-2020-hipaa-and-novel-coronavirus.pdf>

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(1)(a) A health care provider or health care facility may use or disclose the health care information of a patient without obtaining an authorization from the patient or the patient's personal representative if the conditions in (b) of this subsection are met and:

(i) The disclosure is to a family member, including a patient's state registered domestic partner, other relative, a close personal friend, or other person identified by the patient, and the health care information is directly relevant to the person's involvement with the patient's health care or payment related to the patient's health care; or

(ii) The use or disclosure is for the purpose of notifying, or assisting in the notification of, including identifying or locating, a family member, a personal representative of the patient, or another person responsible for the care of the patient of the patient's location, general condition, or death.

(c) A health care provider or health care facility may make the uses and disclosures described in (a) of this subsection if:

(i) The patient is not present or obtaining the patient's authorization or providing the opportunity to agree or object to the use or disclosure is not practicable due to the patient's incapacity or an emergency circumstance, the health care provider or health care facility may in the exercise of professional judgment, determine whether the use or disclosure is in the best interests of the patient and, if so, disclose only the health care information that is directly relevant to the person's involvement with the patient's health care or payment related to the patient's health care

(3) Any use or disclosure of health care information under this section must be limited to the minimum necessary to accomplish the purpose of the use or disclosure.

(4) A health care provider or health care facility is not subject to any civil liability for making or not making a use or disclosure in accordance with this section.⁸

6. Disclosures to a Hospital Directory While Patient is Incapacitated Guidance.

⁸ RCW 70.02.205 (excerpted in relevant part).

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A covered entity may use the patient's protected health information for purposes of the hospital's directory, while the patient is too sick/incapacitated to know or object, in order to allow a patient's family to locate them in the hospital, with certain exceptions.

Analysis and Summary:

Per the relevant regulations:

(1) Permitted uses and disclosure. Except when an objection is expressed in accordance with paragraphs (a)(2) or (3) of this section, a covered health care provider may:

(i) Use the following protected health information to maintain a directory of individuals in its facility:

(A) The individual's name;

(B) The individual's location in the covered health care provider's facility;

(C) The individual's condition described in general terms that does not communicate specific medical information about the individual; and

(D) The individual's religious affiliation; and

(ii) Use or disclose for directory purposes such information:

(A) To members of the clergy; or

(B) Except for religious affiliation, to other persons who ask for the individual by name.

(2) Opportunity to object. A covered health care provider must inform an individual of the protected health information that it may include in a directory and the persons to whom it may disclose such information (including disclosures to clergy of information regarding religious affiliation) and provide the individual with the opportunity to restrict or prohibit some or all of the uses or disclosures permitted by paragraph (a)(1) of this section.

(3) Emergency circumstances.

(i) If the opportunity to object to uses or disclosures required by paragraph (a)(2) of this section cannot practicably be provided because of the individual's incapacity or an emergency treatment circumstance, a covered health care provider may use or disclose some or all of the protected health information permitted by paragraph (a)(1) of this section for the facility's directory, if such disclosure is:

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- (A) Consistent with a prior expressed preference of the individual, if any, that is known to the covered health care provider; and
- (B) In the individual's best interest as determined by the covered health care provider, in the exercise of professional judgment.

(ii) The covered health care provider must inform the individual and provide an opportunity to object to uses or disclosures for directory purposes as required by paragraph (a)(2) of this section when it becomes practicable to do so.⁹

7. Scope of Permitted Disclosures Under HIPAA and Washington Law Guidance.

Disclosures for purposes other than those related to treatment should be limited to the “minimum necessary” to accomplish the purpose of the disclosure.

Analysis and Summary: “For most disclosures, a covered entity must make reasonable efforts to limit the information disclosed to that which is the ‘minimum necessary’ to accomplish the purpose.” (Minimum necessary requirements do not apply to disclosures to health care providers for treatment purposes.) Covered entities may rely on representations from a public health authority or other public official that the requested information is the minimum necessary for the purpose, when that reliance is reasonable under the circumstances. For example, a covered entity may rely on representations from the CDC that the protected health information requested by the CDC about all patients exposed to or suspected or confirmed to have Novel Coronavirus (2019-nCoV) is the minimum necessary for the public health purpose. In addition, internally, covered entities should continue to apply their role-based access policies to limit access to protected health information to only those workforce members who need it to carry out their duties. See 45 CFR §§ 164.502(b), 164.514(d).¹⁰ Washington law is consistent on this point (though the standard is “need to know”). See RCW 70.02.050(1).

8. Waiver of HIPAA Sanctions/Penalties Guidance.

As of March 15, 2020, the HHS Secretary has waived certain HIPAA sanctions and penalties against covered hospitals during a Presidential-declared emergency (which is currently in effect). Additionally, OCR has announced that it will waive potential HIPAA penalties for good faith use of telehealth during the nationwide public health emergency due to COVID-19.¹¹

⁹ 45 C.F.R. 164.510(a)(3).

¹⁰ <https://www.hhs.gov/sites/default/files/february-2020-hipaa-and-novel-coronavirus.pdf>

¹¹ <https://www.hhs.gov/hipaa/for-professionals/special-topics/emergency-preparedness/index.html>

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Analysis and Summary: The Secretary’s emergency declaration states that he waives sanctions and penalties arising from noncompliance with the following provisions of HIPAA’s privacy regulations¹²:

- (a) the requirements to obtain a patient’s agreement to speak with family members or friends or to honor a patient’s request to opt out of the facility directory (as set forth in 45 C.F.R. § 164.510)
- (b) the requirement to distribute a notice of privacy practices (as set forth in 45 C.F.R. § 164.520); and
- (c) the patient’s right to request privacy restrictions or confidential communications (as set forth in 45 C.F.R. § 164.522);

<https://www.phe.gov/emergency/news/healthactions/section1135/Pages/covid19-13March20.aspx>

9. COVID-19 Scams.

It is important now, as always, to remain vigilant about continuing to implement reasonable safeguards to protect patient information against intentional or unintentional impermissible uses and disclosures. One important thing to be aware of is phishing emails targeting people that are claiming to have the most up-to-date information about COVID-19.

<https://www.consumer.ftc.gov/features/coronavirus-scams-what-ftc-doing>

<https://www.who.int/about/communications/cyber-security>

In order to avoid large scale cyber fraud from interfering with a health care entity’s information system or treatment of patients during this time, covered entities should remind employees that they should only rely on the main websites for global and national health authorities, like the CDC, WHO, Washington’s DOH, and Washington’s Governor’s office, for up to date information on management of the COVID-19 crisis. Additionally, they should be reminded to follow the covered entity’s policies for appropriately accessing the internet and email during this time.

10. Other Resources.

HHS and other reliable public health entities (e.g. the CDC and the World Health Organization) continue to publish new and evolving information on a frequent basis. As a good start, I would

¹² Only with respect to hospitals in the designated geographic area that have hospital disaster protocols in operation while the waiver is in effect.

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encourage you all to read the recent global HHS COVID-19 guidance HHS published; these materials are cited in the first section of this guidance.